# Migration, abduction and children's rights: the relevance of children’s rights and the European supranational system to child abduction cases with immigration components

Florescu, A.S.

E.M. MEIJERS INSTITUUT
INSTITUUT VOOR RECHTSWETENSCHAPPELIJK ONDERZOEK

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A. S. FLORESCU

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# Aknowledgements

A good friend once told me that writing a PhD is like a marathon. It can be completed in one stretch but stopping and resuming makes reaching the finishing line harder. Now that I am at the end of the marathon, and after stopping and resuming so many times I keep thinking of how right she has been.

My PhD journey begun at the Child Law Department of the Leiden University, it continued through Covid times and unemployment through to new professional challenges. The completion of this journey would not have been possible without all the people who cheered me along the way and who pushed me further even when I was almost ready to give up. Ton Liefaard and Marielle Brunning have always encouraged me to continue; they have gently reminded me that I am almost there, and they have offered invaluable advice and critical reflections to the numerous drafts I have sent. Their continuous support has kept me going and I am deeply grateful for their academic insight and personal engagement. Katrien Klep, my friend and former colleague at Leiden University was there through good and bad, she made me feel heard and understood and she took much of her precious time to read through my drafts and offer excellent suggestions.

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It is said that the choice of topic is influenced by personal experience. Being a Romanian immigrant who left the country of origin and lived in three other countries in the past 20 years has certainly left an imprint. I have experienced many cultural differences associated to bringing up children in a

country different than my own. In this journey, I was fortunate to have parents ready to leave their own comfort to spend extended periods of time abroad and help raise the kids while I was in libraries or abroad for research. I was also fortunate to have their model of relationship as a yardstick for my own. My best friends, some of whom left, some of whom stayed kept reminding me that there are more sides to any argument and that there is no topic on which we cannot debate. Andra, Bordi, Olive and Mona, thank you for being unique and for keeping our bond alive despite the distance.

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Simona Florescu,
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# 1 Introduction

## 1.1 Children in the aftermath of parental separation

The past 50 years have seen an increase in the number of persons who live outside their country of origin.[1] According to the International Organisation for Migration, in 2020 there were almost 281 million international migrants, more than three times the estimated number in 1970 (84 million).[2] Thirty-six million of these migrants were children.[3] The most significant change in migration is an increase in temporary migrants, i.e. those individuals who reside in a foreign country for 12 months or more for study or work.[4] As researchers have emphasised, migration patterns have shifted from once-in-a-lifetime moves towards multiple migrations over the life course.[5]

Children cross international borders for different reasons and in various contexts. They move alone or with their parents, they settle in one country, or they leave it on their own, with one or with both parents.

Cross-border moves affect children and their parents' citizenship statuses. National immigration regimes lay down various forms of legality or illegality. For example, among legal migrants, states distinguish between temporary residents who have or do not have the right to work or are entitled to various forms of social benefits; permanent residents or those who have acquired citizenship. Moreover, statuses can vary between children and their parents. A child may be a citizen of a state whereas their parents are not. A child may share the immigration status of a parent but not of the other parent. It is also possible for each family member to have

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1 The current United Nations Recommendations on Statistics of International Migration defines an "international migrant" as any person who has changed his or her country of usual residence, distinguishing between "short-term migrants" (those who have changed their countries of usual residence for at least three months, but less than one year) and "long-term migrants" (those who have done so for at least one year). However, not all countries use this definition in practice. See, IOM *World Migration Report 2022,* available at << https://publications.iom.int/books/world-migration-report-2022>>, last accessed on 4 November 2023; See also, United Nations Recommendations on Statistics of International Migration, available at << https://unstats.un.org/unsd/publication/seriesm/seriesm_58rev1e.pdf>>. This dissertation shall hereinafter use the term 'migrant' as defined in the United Nations Recommendations on Statistics of International Migration.

2 IOM *World Migration Report 2022,* p. 23.

3 << https://data.unicef.org/topic/child-migration-and-displacement/migration/>>, last accessed on 4 November 2023.

4 McCann et. al, p. 362.

5 McCann et. al, p. 362.

a different position in immigration law. For example, if a child is born in a country allowing for birthright citizenship, that child will be a citizen of that country. One parent may be an illegal migrant and the other parent a permanent resident. National immigration laws lay down the rights of each person within the family unit, including their entitlements to live, study, work, and receive social benefits in that country. Mixed-status families are those families where family members share different statuses and entitlements for the purposes of immigration law.

However, relationships do not always work out. Parental separation exposes children of immigrant parents to additional challenges compared to those whose parents have never left their countries of origin.

In law, parental separation of children from mixed-status families does not only require a family law response but it can engage the immigration laws in multiple ways. For example, a child may have migrated with both of their parents. They have moved as one parent was offered a job opportunity in the new country and the other spouse agreed to join with the child. Under the immigration regime of that state, one parent has the right to live and work there whereas the other parent is not able to work legally, nor has that parent a right to state support. Separation results in the loss of income, impossibility to obtain legal employment and a risk of expulsion on the ground that the legal basis for admission, i.e. a spousal visa, has ceased to exist. In family law, courts need to decide what weight to attribute, if any, to the immigration status of the parent when deciding on the post separation parenting agreement. For the immigration authorities, one parent must regularise their status and obtain a work permit to secure an income or otherwise leave the country. The child's status could also be subject to regularisation.

Parental separation of children from mixed-status families can occur in many other factual constellations. Separation can be connected to violence against the child and the parent. A family can become a mixed-status family once a parent has crossed the borders with the child and has applied for asylum. The commonality of these cases is that they require a legal response from (at least) two different branches of law: family and immigration law which operate under different logics and follow different principles.

Immigration law is closely linked to the principle of state sovereignty which ascribes that states have the exclusive power to decide on the entry and stay of aliens in their territory.[6] Immigration rules contribute to the creation of power asymmetries within the families that intersect with and exacerbate the vulnerability of some family members over the others.[7] In 2017 Hacker remarked that we live in an era of bordered globalisation.[8] She argued that in the XXI$^{st}$ century, states have shown an increased interest

6 Lee 1999, p. 86; ECtHR 28 May 1985, nos. 9214/80 9473/81 9474/81 (Abdulaziz, Cabales and Balkandali v. The United Kingdom), para 67.

7 Cook 2023, p. 835; see also the discussion in Section 5.5 of this dissertation.

8 Hacker 2017.

in placing physical and legal borders.[9] She understood borders broadly, as encompassing "objectified forms of social differences manifested in unequal access to and unequal distribution of resources (material and nonmaterial) and social opportunities."[10] In short, immigration laws are concerned with borders and restricting entitlements to non-citizens.

In family law, any child whose parents have separated must remain in the country of habitual residence until the courts in that country have decided on the allocation of custody. The act of the child's leaving the jurisdiction with one parent without the consent of the other parent falls under the scope of application of the Convention on the Civil Aspects of International Child Abduction (the "(Child Abduction) Convention" or the "Hague Convention"), regardless of any immigration considerations of the parent(s) or child. The Convention was drafted in 1980 with a different child in mind: a child who had been living all their life in one country where the legal system distinguishes clearly between custody and access rights. The Convention's drafters saw the removal of the child as a selfish act of one parent who takes the child away from the other parent to secure a more favourable custody order elsewhere.[11] For them, the child's best interests were inextricably linked with the right not to be removed or retained in a foreign country.[12]

Today, the Child Abduction Convention operates in a much different sociological and legal landscape. It is not the parent frustrated with the award of custody rights that abducts the child. All five statistical reviews of the Child Abduction Convention conducted in 1999, 2003, 2008, 2015 and 2021 show that children are mostly removed by their mothers who are their primary or joint primary caretakers and who in most cases 'return home'.[13] Many of these parents remove children to escape domestic violence.[14] Moreover, key family law concepts on which the Convention is based have changed or acquired a different meaning. For example, the term custody, as used in the Child Abduction Convention, is now largely obsolete and has been replaced with the broader notion of parental responsibilities.[15] It is now widely accepted that 'custody' under the Child Abduction Convention exists whenever a parent or entity has the right to veto the child's relocation to another country.[16] The dynamics of parental separation have equally

9 Hacker 2017, p. 28.

10 Hacker 2017, p. 29, referring to the definition used by Lamont/Molnár 2002.

11 Pérez-Vera 1980, Explanatory Report: Hague Conference on Private International Law. *Acts and Documents of the Fourteenth Session (Child Abduction), 3*, 426, para 15.

12 Para 24 of the Explanatory Report.

13 <https://www.hcch.net/en/instruments/conventions/publications1/?dtid=32&cid=24>, last accessed on 4 November 2023.

14 For a discussion and further references, see Section 5.3 of this dissertation.

15 For a discussion and further references, see Section 4.3.2.2 of this dissertation.

16 This shift has started with the US Supreme Court judgement in Abbott v. Abbott, 130 S. Ct. 1983 (2010). This approach has been followed in many of the State Parties to the Child Abduction Convention. For a discussion, see Section 4.3.2.2 of this dissertation.

changed and parents are expected to remain closely involved in their children's lives, irrespective of their relationship with the other parent.[17]

Judges deciding on child abduction applications encounter many different scenarios, ranging from children who have lived a very short time in the country of habitual residence, to children whose parents are facing various levels of precarity in the country where they should return or children whose parents raise violence allegations, children who have left war zones or other forms of persecution, children whose parents are not able to return with them due to criminal prosecutions or immigration entry bans. These situations coexist with those where children have been selfishly taken away by a parent to frustrate the relationship between the child and the other parent, and with many others in between.[18]

The Convention proposes a straightforward solution to all these different factual scenarios: the return of the child to the country/parent they had been taken away from. Under the Convention, return is in the child's best interests. Judges may refuse to order the return in a limited set of circumstances, such as exposure of the child to a grave risk of harm or if return were prohibited by the fundamental principles related to human rights. However, the extent to which the Convention allows for an inquiry into the individual circumstances of the child when deciding on return has been the subject of much academic debate.[19] Does a return of a child without their primary carer amount to a grave risk of harm to the child? Can a child go back if the parent has put forth arguable allegations of domestic violence? How does the best interests of the particular child relate to the policy objectives of the Convention to secure the return of children in general? To what extent should judges consider the circumstances of the child's return in their assessment of grave risk of harm to the child or the human rights exception? Debates continue on how children's rights should be weighed in the decision-making process, considering that in principle it is for the courts of habitual residence to decide on the substance of the custody disputes, and hence on the rights of children.[20] On the one hand, courts are encouraged to order the return of the child under the assumption that it is best for that child to have the custody and associated disputes adjudicated there. On the other hand, courts ordering the return have been criticised for not paying enough attention to the circumstances of the child's return.

In child abduction cases, decision-makers are bound to take into account all other international law instruments ratified by their country. With the exception of the United States of America, all 103 States Parties to the Child Abduction Convention[21] are also parties to the 1989 United Nations Con-

17 See also the discussion in Section 4.3.2.2.

18 These remarks are based on the reading of national case law as well as available scholarly works. These are discussed in more detail in Chapters 4 and 5 of this dissertation.

19 This is discussed in Chapter 4 of this dissertation.

20 See Chapter 4 of this dissertation.

21 As of 15 June 2024.

vention on the Rights of the Child (the "CRC").[22] It has been suggested that the CRC and the Child Abduction Convention are complementary in that, through the work of the Hague Conference, it helps turn the values and principles of CRC into reality.[23] Nevertheless, how the CRC should inform the interpretation of the Child Abduction Convention in practice remains both undertheorized and subject to contention.[24] At the same time the most common defences to the return of the child – the exposure of a parent to domestic violence and the parent child separation – have been primarily argued from a feminist perspective, rather than from a child's rights perspective.[25] This is even though the parent child relationship is equally relevant under the CRC which ascribes a key role to the child's caregivers in the conceptualization of children's rights.[26]

Further, in Europe, both the European Union (the "EU") and the Council of Europe (the "CoE") have an important role to play in this field. National judges are bound to follow the laws of the European Union as well as the case law of the European Court of Human Rights (the "ECtHR" or the "Strasbourg Court") and the Court of Justice of the European Union (the "CJEU" or the "Luxembourg Court"). Both Courts have developed an extensive body of case law in this field. Their case law has equally contributed to setting out minimum standards of protection across the EU and CoE Member States.

Consequently, despite the simplicity of the mechanism envisaged by the Child Abduction Convention, the decision-making under this Convention is complex. From an international law point of view, it juxtaposes several legal systems. As argued herein, it also requires an understanding of the broader context affecting the individuals subject to the decision.

This dissertation analyses the impact of immigration considerations within child abduction proceedings worldwide; it proposes a child rights-based approach to domestic courts within the European Union dealing with child abduction cases in general and those with immigration components in particular. Immigration laws, seen broadly, are at the core of individuals crossing borders. This dissertation argues that child abduction should be understood in the context of immigration, rather than an isolated incident disconnected from it.

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22 UN Commission on Human Rights (46th sess.: 1990 : Geneva), *Convention on the Rights of the Child.*, E/CN.4/RES/1990/74, UN Commission on Human Rights, 7 March 1990 entered into force on 2 September 1990.

23 Van Loon 2016, p. 33.

24 This is discussed in Chapter 4 of this dissertation.

25 These are discussed in Sections 5.2, 5.3 and 5.4 of this dissertation. For example, in the case of domestic violence, domestic courts tend to consider that as long as there is no proof of direct violence on the child, domestic violence allegations raised by one parent do not affect the child. Also, there is a body of feminist scholarship (indicated in Section 5.3) criticizing the approach to the issue as contrary to the rights of women.

26 For a discussion, see Section 2.3.2. of this dissertation.

## 1.2 Aims and research questions

Against this background, this dissertation has three main aims.

First, it investigates how international children's rights law can inform judicial decision-making in child abduction cases. Here, it proposes a child's rights-based approach to child abduction cases, in general. In this first step, the key children's rights which play a role in the event of parental separation are analysed from the perspective of CRC. Second, a general analysis of the Child Abduction Convention is offered. Subsequently, the two steps are merged to determine the contours of a child rights approach to parental child abduction. Immigration is not included in this assessment. Nor are other considerations, such as the issue of primary carers or domestic violence. Existing works in the field have assessed the Child Abduction Convention and sought to integrate children's rights into this instrument.[27] The opposite approach has been taken in this dissertation. Children's rights are first assessed in depth and this analysis forms the lens for determining how a child rights-based approach applies to the Child Abduction Convention.

Second, this dissertation looks at how immigration has permeated child abduction proceedings, and it applies the child's rights framework identified in the first step to abduction cases with immigration considerations. In the field of parental child abduction, immigration considerations have received little dedicated attention.[28] Instead much of the academic literature has focused on the issue of primary carers and domestic violence. In practice, immigration considerations are *distinct*, but frequently overlap with domestic violence and questions raised by primary carer abduction.

The choice to focus on immigration is motivated by the fact that immigration considerations can fundamentally challenge (some of) the original assumptions of the drafters: that return restores the status quo *ex ante* where the child is in direct and frequent contact with both parents. Immigration considerations also raise questions as to the capacity of the system in the country of habitual residence to protect the child.

The decision-making framework offered at the end of this dissertation recognises that immigration is not a stand-alone factor, and that the weight to be ascribed to it differs depending on whether other issues are incident in a particular situation, such as domestic violence allegations and/or the taking parent is the primary carer of the child.

Third, this dissertation investigates the value of a regional system, such as the European one for (i) integrating children's rights into child abduc-

27 Schuz 2013; Sthoeger 2010; Baker and Groff 2016.

28 This has been the case despite the fact that immigration considerations have been mentioned frequently in literature concerning child abduction; in reports sent to the Hague Conference as well as in the HCCH Guide to Good Practice. Section 5.6.1 of this dissertation further elaborates on the prevalence of the issue and on the sources used herein to identify and determine how immigration considerations have been argued within child abduction proceedings.

tion cases in general and (ii) child abduction and immigration in particular. Institutionally, the European supranational system encompasses the CoE and the EU, two distinct organisations, with no formal links. Within each of these two organisations, it has been said that the ECtHR and the CJEU form the supranational constitutional architecture of Europe.[29] The CJEU and ECtHR are relevant to child abduction in three important ways. First, they are competent to hand down binding judgments which in turn must be followed by domestic courts within the EU and the Council of Europe. Second, their competence extends to both human rights in child abduction and human rights more broadly. Hence, they can articulate a child rights oriented framework to child abduction cases. Third, given their competence in other areas of law, the CJEU and the ECtHR are capable to trigger legislative changes ensuring that minimum standards of protection are in place if the child's country of habitual residence is a Member State to the EU or a State Party to the CoE. In other words, their case law can bring about a human rights oriented approach to immigration.

Ultimately this dissertation seeks to lay down a decision-making framework informed by international children's rights and European human rights law to child abduction cases with immigration components that come before the European Union's domestic courts. It seeks to answer one main research question as follows:

> *How could domestic courts within the European Union adopt a child rights-based approach to child abduction cases in general and in those cases with immigration components in particular?*

This research question is divided into two sub-questions as follows:

> *(1) How can a child rights-based approach inform decision-making in child abduction cases in general and specifically parental child abductions with immigration components?*
>
> *(2) What is the role of the European supranational courts in ensuring that the national courts adopt a child rights-based approach in child abduction cases in general and those with immigration components in particular?*

Parts I and II answer the first sub-question whereas Part III answers the second sub-question. The conclusions set out the decision-making framework which answers the main research question. The conclusions also reflect on the role of children's rights in child abduction cases, on the interplay between child abduction and immigration and finally on the role of the European supranational system in this field.

29 Krisch 2008.

## 1.3 Research methods

The research approach undertaken is doctrinal: the dissertation studies the main sources of international law applicable in this field, the Child Abduction Convention, the CRC, the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "ECHR"),[30] as well as the EU normative framework. These instruments are analysed and interpreted on the basis of case law, guidance documents issued by international bodies, academic literature, studies and reports. The context to which the relevant instruments apply is described through academic literature and case law emanating from jurisdictions in the Global North.

The interpretation is grounded on the *method of systemic integration* and the *interactions methodology.* The following paragraphs explain these methods and the rationale behind these choices.

The *method of systemic integration* follows from the 1969 Vienna Convention on the Law of Treaties (VLCT)[31] and it provides the unifying framework for the fragmentation of international law. Specifically, Article 31(1)(c) VLCT lays down that "any relevant rules of international law applicable in the relations between the parties" shall be taken into account in the interpretation of treaties. This Article forms the legal basis for the method of systemic integration which is used in this dissertation.[32] According to the International Law Commission (the "ILC"), the "systemic integration represents the process […] whereby international obligations are interpreted by reference to their normative environment ("system")."[33] Further, it is clarified that international law functions within a system and it is the task of legal reasoning to establish the relationship between various decisions, rules and principles.[34] Within the method of systemic integration, international law has introduced a strong presumption against normative conflict and in favour of a harmonious interpretation.[35] This dissertation equally relies on the principle of harmonious interpretation within the method of systemic integration of international treaties. The principle of harmonious interpretation has also been largely endorsed by the Strasbourg Court which has referred to the works of the ILC.[36] According to the well settled case law of the Strasbourg Court:

> "[…] the Convention [n.a. European Convention of Human Rights] has to be interpreted in the light of the rules set out in the Vienna Convention on the Law of Treaties of 23 May 1969, and that Article 31§3 (c) of that treaty indicates that

30 ETS 5, 4 November 1950.
31 Done at Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, Treaty Series, vol. 1155, p. 331.
32 United Nations. International Law Commission. Study Group/Koskenniemi 2007, para 413.
33 United Nations. International Law Commission. Study Group/Koskenniemi 2007, para 413.
34 United Nations. International Law Commission. Study Group/Koskenniemi 2007, para 33.
35 United Nations. International Law Commission. Study Group/Koskenniemi 2007, para 37.
36 Sicilianos 2017, p. 798.

> account is to be taken of "any relevant rules of international law applicable in the relations between the parties". The Convention, […] cannot be interpreted in a vacuum. The Court must be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account."[37]

In its interpretation of the ECHR, the Strasbourg Court has relied heavily on child specific treaties such as the Hague Convention and the CRC.[38] This means that the ECtHR is receptive to interpret the ECHR in light of both the CRC and the Child Abduction Convention. Human rights integration has the advantage that it increases legal certainty both for states and for individuals.[39]

Further, this dissertation draws on the '*interactions methodology*', an approach focused on assessing a branch of human rights law (the 'focal branch'), in order to analyse its present and possible future interactions with other branches and with general human rights law.[40] As Desmet explains, the interactions methodology starts from the observation that different branches of human rights law develop in isolation. She suggests that "effective human rights protection would be served by reflecting more explicitly and carefully upon the benefits and drawbacks of increased interaction between various subfields of human rights law."[41] This methodology has been applied specifically to children's rights law as a focal branch.[42] The first step in the methodology is to analyse the distinctive principles of the focal branch.[43] In the second step it is analysed how general human rights law and/or other branches of human rights can draw on the distinctive elements of the focal branch; third, the interactions between the focal branch and general human rights law are investigated in a specific thematic area.[44]

This dissertation considers the 'interactions methodology' as a specific form of systemic integration. Children's rights law is the focal branch. A three-step approach is subsequently undertaken. First, the distinctive principles of children's rights law are identified and analysed (Chapters 2 and 3). Second, the interactions between children's rights law and child abduction are investigated both in general and with specific relevance to situations when immigration considerations have been brought before child abduction courts (Chapters 4 and 5). Third, the interaction between children's rights law and European human rights law in the field of child

37 Among many other cases: ECtHR 21 November 2001, no. 35763/97, (*Al-Adsani v. the United Kingdom [GC])*, para 55.
38 Forowicz 2010, p. 145.
39 Brems 2018, p. 168; Brems 2014.
40 Desmet 2018, p. 18.
41 Desmet 2018, p. 18.
42 Brems/Desmet & Vandenhole (Eds.) 2017.
43 Desmet 2018, p. 19.
44 Desmet 2018, p. 19.

abduction is assessed (Chapters 7, 8, 9 and 10). European human rights law encompasses both the laws and case law emanating from the European Union and the case law of the ECtHR.

Throughout this study, children's rights law is placed in the wider context of existing debates; the immigration considerations analysed herein form part and parcel of these debates. However, rather than looking at how family laws could influence immigration decisions, the opposite stance is taken: that of assessing the way family courts could take into account immigration considerations – a distinct set of rules which cannot be modified through individual decision-making and do not form the object -*stricto sensu*- of that decision.

## 1.4 Selection of sources and focus of the research

In devising a child rights-based framework (Chapters 2 and 3) account is taken of the CRC, the CRC Committee's General Comments, the Views of the CRC Committee adopted pursuant to Optional Protocol to the Convention on the Rights of the Child on a Communication Procedure (the "OPIC"), [45] as well as academic literature from children's rights scholars.

Research on international child abduction is based on the works of the Hague Conference on Private International Law (the "Hague Conference" or "HCCH"), the organisation which has facilitated the adoption of the Convention, academic sources and national case law. The Hague Conference has published best practice guides, judges' newsletters, questionnaires or responses covering the practice of Member States. Further, national case law plays an important role in the interpretation and application of the Child Abduction Convention. Key concepts under the Convention, such as custody rights or grave risk of harm, have been distilled from national judicial interpretations.[46] Therefore, given the importance of national judicial decision-making, this dissertation relies on court judgments as examples of situations which have arisen before domestic courts. When it comes to national case law under the Child Abduction Convention, the main source has been the Hague Conference's database, INCADAT.[47]

Further, this dissertation relies on examples of laws and academic sources indicating developments in family law and immigration in certain countries. The selection of jurisdictions was based on the countries with the largest number of outgoing child abduction cases.

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45 General Assembly resolution A/RES/66/138.

46 For example in Abbott v. Abbott, 560 U.S. 1 (2010) the United States Supreme Court has held that a *ne exeat* right -i.e. the right to consent to the child's leaving the country- granted to a parent under domestic law amounted to a 'right of custody under the Child Abduction Convention. Currently, arguably influenced by the interpretation of the United States Supreme Court, it is widely accepted that the right to veto a relocation amounts to rights of custody under the Child Abduction Convention.

47 Available at <<www.incadat.com>>.

According to the latest statistics concerning child abduction cases decided in 2021, of the 2180 outgoing child abduction applications, the United States, with a total number of 313 applications and the United Kingdom with a total number of 188 applications had dealt with the most child abduction cases. They represent approximately 14 and respectively 12 percent of the child abduction applications closed that year. Further, according to the Regional Report, 861 applications, representing a 39% of all child abduction applications were received by states bound by 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 (the "Brussels II *bis* Regulation").[48] Thus, together, (i) the United States, (ii) the United Kingdom[49] and (iii) the Brussels II *bis* states account for 65% of the total outgoing child abduction application. When the Council of Europe Member States are included, the number is 77% of all outgoing applications.

In this dissertation, developments in countries such as Canada, Australia, New Zealand or Israel are equally mentioned as they represent an important source of inspiration for the Hague Conference. For example, the latest Guide to Guide Practice concerning Article 13(1)(b) includes extensive case law references from these jurisdictions.[50]

The statistical data of 2021 reproduced above are consistent with the previous studies carried out in relation to child abduction applications decided in 1999, 2003, 2008, and 2015, meaning that overall, since 1999 judges in these jurisdictions have decided on most child abduction applications.[51]

Therefore, considering the data mentioned above, this dissertation assumes that the practice in countries deciding on most child abduction cases is most likely to influence the interpretation and application of the Convention for all its 103 states parties. Of course, it is important to note that the practice of a court in one jurisdiction does not bind courts in other jurisdictions in the formal sense. Nevertheless, as Weiner pointed out, there

48 OJ L 338, 23.12.2003, p. 1–29; it should be noted that of the EU Member States, only Denmark does not participate in this instrument.

49 Under Articles 126 and 127 of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community2019/C 384 I/01, OJ C 384I, 12.11.2019, p. 1–177, Union law shall be applicable to the United Kingdom until 31 December 2020. As per this agreement, the Brussels II *bis* Regulation was revoked in the United Kingdom on that date. See also <https://www.legislation.gov.uk/uksi/2019/519/regulation/3>. Consequently in 2021, the reference date of the Regional Report, The UK was no longer bound by this instrument.

50 Available at: << https://assets.hcch.net/docs/225b44d3-5c6b-4a14-8f5b-57cb370c497f.pdf>>, last accessed on 12 November 2023.

51 <https://www.hcch.net/en/instruments/conventions/publications1/?dtid=32&cid=24>.

is a high potential for cross-fertilization across national courts in the field of child abduction.[52]

In addition, while the information above covers data on incoming child abduction applications (i.e. applications decided by the courts of a respective country), it should be noted that states with a high incoming number of applications are equally states with a large outgoing number of applications. According to the Lowe statistical report of 2021 the following states dealt with the highest number of both incoming and outgoing child abduction applications: the United States of America (USA) 517 applications, followed by England and Wales with 479 applications, Germany with 397 applications, France with 285 applications, Mexico with 234 applications, Colombia with 217 applications, Poland with 199 applications, Italy with 176 applications, and Spain with 175 applications.[53]

Further, there is a correlation between countries dealing with a large number of child abduction applications and migration. For example, according to the latest migration report, the United States, Germany, United Kingdom, Canada, Australia, Spain, Italy, and France were among the top 20 destination countries for migration worldwide.[54] Some of them (United Kingdom, Germany) were also among the top 20 countries of origin, whereas Poland -also included among the countries with the most activity in the child abduction field-, is also one of the top 20 countries of origin of migrants.[55]

These figures demonstrate that the Child Abduction Convention operates primarily within certain countries and that these countries are equally states with a large number of migrants. Therefore, this dissertation relies primarily on sources from these jurisdictions whenever it addresses sociological phenomena, such as the change in the family structures, the shift from custody to parental responsibilities or the historical perspective on children's rights.

One limitation in the use of sources should equally be noted here. According to the latest statistical survey 421 return applications, representing 19% of the total number of child abduction applications, were received by 18 Latin American and Caribbean states (the "LATAM states").[56] LATAM states thus also account for an important share of the total child abduction applications. However, for reasons of language restrictions and limited

52 Weiner 2002, pp.756-758.

53 Lowe/Stephens 2023, Global Report, Annex no 1, p. 36.

54 IOM, *World Migration Report 2022*, p. 25.

55 IOM, *World Migration Report 2022*, p. 25.

56 As per the report, the LATAM states are: Argentina, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago, Uruguay, and Venezuela: Lowe/ Stephens, Regional Report – Statistical study of applications made in 2021 under the 1980 Child Abduction Convention, Prel. Doc. No 19B of October 2023, 10-17 OCTOBER 2023, para 66, accessible at << https://assets.hcch.net/docs/fcb00f53-ba49-4f62-ae79-0f0724b59093.pdf>>, last accessed on 12 November 2023.

accessibility of sources, this dissertation does not rely on scholarly writings or case law emanating from countries in this region.

Lastly, it is important to clarify that this dissertation draws on historical, legal, and sociological research stemming from the jurisdictions mentioned above primarily to contextualise child abduction. The national case law is given as an example to illustrate how domestic courts have considered children's rights, immigration or other aspects discussed in this study. It is not suggested that this is the only way domestic courts have dealt with the issues addressed herein; other possible approaches might very well have been adopted. Similarly, whenever immigration restrictions are mentioned, it is not claimed that the same immigration restrictions exist in all countries. This is for each national court to assess on a case by case basis.

This dissertation calls for an increased attention to the global system within which child abductions operate as it is argued that domestic courts should exercise their discretion when applying the Child Abduction Convention in accordance with children's rights. In order to make this argument, examples of how domestic courts have exercised their discretion so far are addressed, as well as the family and immigration law dynamics against which such discretionary decision-making takes place. In specific decision-making processes, it will be for the individual judge to make an assessment depending on the circumstances of the case by addressing the given immigration and children's rights considerations.

Ultimately, the normative recommendations of this dissertation are addressed to the domestic courts of the European Union and are based on a comprehensive assessment of the case law of the two supranational courts (Chapters 7, 8, 9 and 10). The case law of these two Courts until 14 June 2024 has been analysed in its entirety as has been published in the online databases of the ECtHR and the CJEU, respectively. Chapters 7 and 8 further explain the search terms and the results obtained for each Court. The ECtHR and CJEU have been chosen as these two Courts enjoy the highest authority among international tribunals worldwide and have the capacity to give binding instructions to national judges. Also, these two supranational courts have competence to address children's rights not only in relation to child abduction but in relation to substantive family law and immigration, which are all of relevance to the present dissertation. The case law research has been supplemented with a literature review of publications on child abduction within the European Union.

## 1.5 Limitations

This dissertation makes recommendations for the domestic courts within the European Union on the basis of (i) a child rights-based approach and (ii) the case law of the two European supranational Courts which is binding on all domestic courts. The determination of the type of immigration considerations was based on (i) the overview of all the case law published on the

website of the INCADAT database available on the website of the HCCH, (ii) the identification of the phenomenon by individual states in questionnaires submitted by the HCCH, (iii) the classification of the issue by the HCCH in its Article 13 Guide to Good Practice, and (iv) the references in academic literature.[57] Admittedly, this approach could not result in an exhaustive overview of *all* the types of immigration issues which may have come before domestic courts or a comprehensive overview of the approach taken by child abduction courts in a particular country or countries. A systematic analysis of the child abduction case law of a country or several countries was not ultimately pursued for several reasons. First, the overview of the materials mentioned in Section 5.6.1 showed that the issue of immigration has consistently been brought before domestic courts and that it has had a limited impact on child abduction cases. A systematic analysis may have resulted in adding other types of cases while at the same time omitting cases which have arisen in other jurisdictions. Further, a systematic overview of national child abduction courts' approach to immigration would have likely yielded limited results. This is because child abduction cases worldwide are not many and courts publish case-law selectively.[58] Moreover, it was hypothesised that the limited impact that immigration has had on family proceedings is likely to have dissuaded applicants to bring such issues to the attention of the courts.

Second, key principles developed under EU law, such as primacy and supremacy make clear that European domestic courts must set aside their own laws and interpretations in favour of EU law[59]. Equally, Article 46(1) of the ECtHR provides that "The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties". Both the CJEU and the ECtHR have functions akin to constitutional courts, as has been discussed extensively in scholarship.[60] Domestic courts are the primary addressees of the case-law of both the CJEU and the ECtHR; therefore, this dissertation proceeded from the assumption that the CJEU and ECtHR jurisprudence must be followed by domestic courts, irrespective of their existing case-law.

In addition, it should be stated that this dissertation does not compare the approach taken by child abduction courts to certain immigration issues with the approach taken by immigration courts to the same issues. Instead, immigration is looked at as an element of fact or a piece of evidence for the child abduction courts. The research inquires how child abduction courts

57 Section 5.6. of this dissertation.

58 In the latest statistical analysis, Lowe and Stephens mentioned that of the total 2180 application analysed, 38% (804 applications) had been decided in court. (Lowe/Stephens Global report 2023, para 65). Of these applications return on the basis of Article 13(1)(b) Hague Convention was refused in 29% of the cases (Lowe/Stephens Global report 2023, para 81). On the publication of case law, see Kruger/Mol 2018, 423, indicating the approach in The Netherlands and England and Wales.

59 See also Section 7.2 of this dissertation.

60 See also Section 7.2.2 and 8.2 of this dissertation.

should take into account the immigration considerations in the decision-making. A child-rights perspective is thus offered only in relation to child abduction proceedings, and not more broadly to immigration considerations, such as the principle of non-refoulement.

Empirical methodologies and case-studies would also have been suitable to answer the research questions, and they have been considered, however they have not ultimately been pursued due to time and logistical considerations.

## 1.6 Structure and outline of the chapters

The dissertation is structured in three parts, as outlined in the following two diagrams:

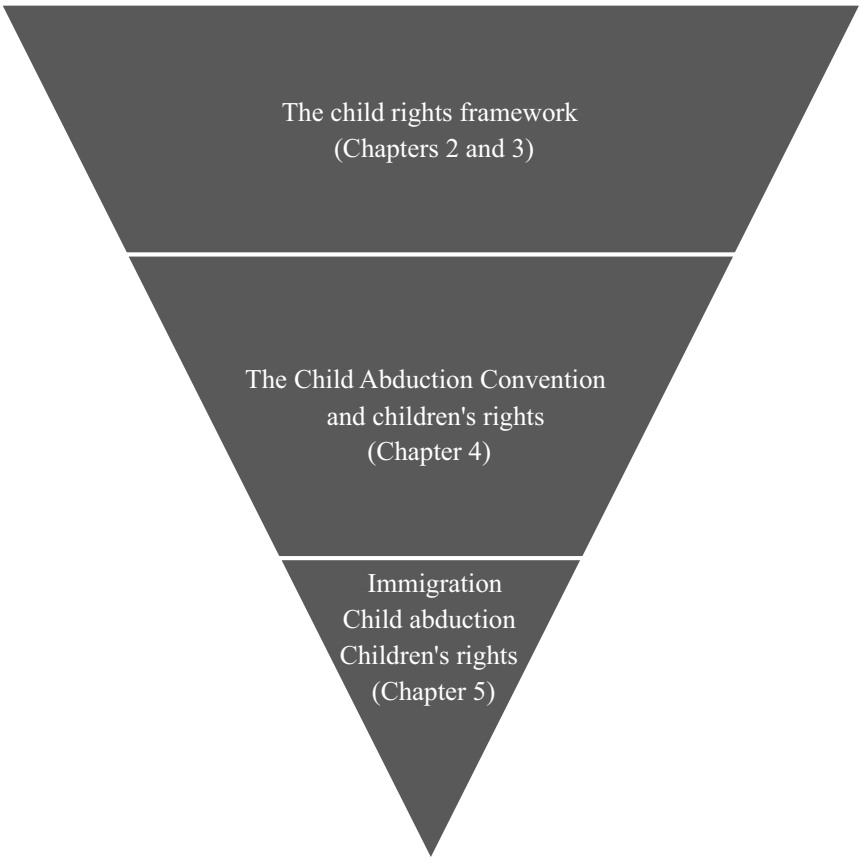


*Figure no 1: Outline Part I and Part II of the dissertation*

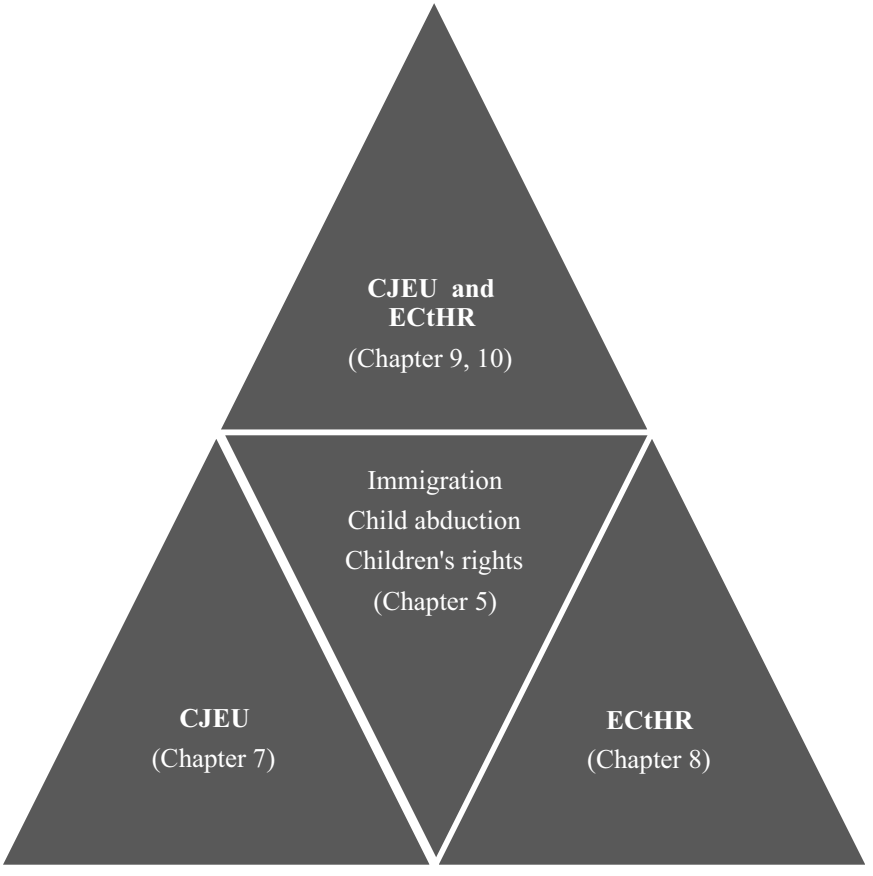


*Figure no 2: Outline Part III of the dissertation*

The first part lays down the foundation of the children's rights framework at an international level. Chapter 2 addresses the emergence of children's rights on the international arena, the specificities of the CRC as the only treaty dealing with the rights of third parties, specifically caregivers. It further addresses the notion and the substance of a rights-based approach to children's rights which is being used as 'focal branch' in this study. It is clarified here that a rights-based approach to children's rights considers the interdependency of individuals, with dedicated attention to relationships and their preconditions. Two important express principles are relevant to children's rights: respect for caregivers and the evolving capacities of the child.

Chapter 3 zooms into three rights of the child which are mostly discussed in post separation parenting disputes: the best interests of the child, the child's right to have contact with both parents and the right of the child to be heard. This chapter analyses how each of these rights has emerged at national level as well as the discussions during the *travaux préparatoires* to the CRC. In this chapter it is shown that already at the drafting stage

immigration considerations gave rise to tensions among states. Further, this Chapter discusses in relation to each of the three rights the current interpretation of the CRC Committee as well as of some of the reputable children's rights scholars. Further, it is widely known that these rights are central to national family laws. For this reason, the last section of Chapter 3 discusses some of the debates in family law around the intersection between the three rights and in particular how the theoretical discussion between autonomy and protection has been given effect in national family laws.[61]

Part II of this dissertation is dedicated to child abduction. Chapter 4 places child abduction in its socio-historical context, followed by a discussion on the return mechanism as is now currently understood. Particular attention is paid to the exceptions to return as it is widely accepted that such exceptions give rise to an individualised assessment of the rights of children. The last section of this chapter addresses specifically how children's rights have been taken into account in child abduction proceedings, against the background of other considerations which play a role herein. Chapter 5 introduces the topic of immigration considerations in child abduction proceedings. Immigration considerations are analysed from two perspectives: one substantive and one specific to child abduction. Substantively, academic literature has discussed immigration considerations in the field of family law from the perspective of power imbalances and domestic violence. This literature is analysed herein. Further, as domestic violence has given rise to some of the most extensive debates in relation to child abduction, substantive considerations around domestic violence are equally presented. It is important to note that most of the scholarly works in these areas have emanated from feminist scholarship. This study is focused on children's rights -domestic violence is thus equally analysed from the perspective of this field of law. This chapter draws extensively on literature on intersectionality: children should be seen in the diversity of their identities: as children, as children of immigrant parents and as children exposed to domestic violence. After addressing the substantive considerations mentioned above, this chapter analyses how immigration and domestic violence have been addressed in child abduction proceedings. Chapter 6 outlines the preliminary conclusions to Part I and II of this dissertation.

In Part III, the focus is on child abduction and immigration as interpreted by the European supranational Courts. Chapters 7 and 8 respectively, include a comprehensive overview of these Courts' child abduction case law. Each chapter also addresses general but key issues for each of these Courts, such as their competence in family matters, the relevance of children's rights and the CRC as well as the relevance of their judgments for the national legal orders. Chapter 9 covers the relationship between the two Courts in general and their interaction in the field of child abduction in par-

61 The selection of family laws and the reasons in support thereof have been discussed in Section 1.6 above.

ticular. Their convergence or as the case may be divergence has important consequences for domestic decision-making across the European Union.

The last chapter of this dissertation discusses the relevance of immigration considerations within the European Union from the perspective of the European supranational Courts. As it has been highlighted throughout this dissertation, context is important for child abduction. It was also argued that the approach to immigration in a national setting should be assessed as part of the minimum level of protection in a given state. The competence of the European supranational Courts extends to human rights in migration cases. This offers an optimum space for harmonisation of practices in immigration law across the European Union. In addition, the two Courts function as constitutional courts in Europe. This entails that they can give binding rulings to family courts across their jurisdiction. Family courts deciding on child abduction cases should follow the European supranational Courts case law even where their decisions are not related to child abduction cases *stricto sensu*. This jurisdiction is thus also important for child abduction cases with refugee components which require child abduction courts to integrate asylum law in their decision.

Chapter 10 analyses the case law of the European Courts in these two separate immigration areas. The first part analyses the weight the two Courts attach to the right of the child to have contact with both parents in immigration proceedings. The second part of the analysis focuses on the asylum aspects which have been presented to domestic courts and which have received conflicting responses.

The conclusions reiterate the main research questions and provide answers on the basis of the research undertaken herein.

## 1.7 Contribution of the thesis and future questions

The main contribution of this dissertation is that it places child abduction in context. This dissertation argues that the international human rights of children offer courts deciding on child abduction cases a lens through which they can resolve complicated cases where different and often competing narratives intersect. This dissertation takes a different position to previous contributions in the field: children's rights are used as the framework which guides the interpretation of the Child Abduction Convention, rather than these rights being employed to justify the aims and necessity of this Convention. This is not contrary to the mechanism of the Convention; however, it does require a more robust understanding of the meaning of a child rights-based approach.

The context envisaged here is that where the same factual constellation, i.e. the separation of a child's parents, has received different responses in law. On the one hand, family laws require children and parents to remain in geographical proximity to one another. On the other hand, immigration laws distinguish between categories of individuals, tying rights and benefits

to certain statuses. Laws have compartmentalised the human experience, and it is argued here that this compartmentalisation has negative consequences for children from mixed-status families caught in the middle of their parents' separation.

The intersection between family and immigration laws within child abduction proceedings has received little academic attention so far.[62] In child abduction literature, the focus has been on the one hand on strengthening the mechanism for return and on the other hand on children's voices or on the hardship experienced by children's parents on return.[63] Academic studies have analysed the impact of immigration on immigrant parents or children – the focus has been on children and parents who wish to remain in the country of immigration and the barriers, legal or sociological, imposed by the systems in receiving countries on their possibilities to remain.[64] To date, research has not considered that these barriers may in fact contribute to the phenomenon of child abduction and how these barriers have permeated the child abduction cases. This dissertation focuses on the latter aspect, i.e. the manifestation of the barriers before the child abduction courts. Empirical research could further assess the causal link between child abduction and the concept of 'bordered globalisation'.

In a sense, the lack of focus on the interaction between child abduction and immigration is surprising, because the Child Abduction Convention functions in a cross-border context, and immigration law is the discipline most closely associated with people crossing borders. The lack of any international monitoring mechanism of decision-making post abduction is perhaps one explanation for the paucity of research. Some studies have analysed these aspects in the past, however their empirical relevance is limited as they have only dealt with a small number of cases or have looked at isolated jurisdictions.[65] More comprehensive empirical research is necessary to assess how receiving jurisdictions deal with child abduction cases post return and the ensuing power imbalances created by the confluence of different fields of law for families.

The Child Abduction Convention remains an important international instrument. However, the change in migration patterns and the increase in temporary migration require the international community to consider other instruments which are better equipped to cater to children who cross borders with their parents on multiple occasions and who are integrated in more than one country. The 1996 Child Protection Convention discussed here may offer an alternative, however scholarly attention has focused on the Child Abduction Convention and improving its operation, rather than

62 See Section 5.6 of this dissertation.
63 See Sections 4.3 to 4.5 of this dissertation.
64 See Section 5.5 of this dissertation.
65 See Reunite 2003: this study which has analysed the outcomes in 22 cases involving 33 children.; See also Bozin 2018 for research carried out in Australia.

on devising adequate mechanisms for ensuring that children maintain contact with both parents across borders.[66]

The conclusions of this dissertation are addressed to decision makers within the European Union. However, the reflections offered here are broader and they could inform child abduction decision makers in general, whenever they decide on individual children's rights in child abduction cases.

## 1.8 Choice of terminology

Not all abductions are the same. Some child abductions take place for forum shopping and in order to deprive the parent and the child of a meaningful relationship with one another.[67] These are the 'typical abductions' envisaged at the time of the drafting of the Convention.[68]

Other abductions however are motivated by different reasons. The desire of a parent to return home, lack of income, loneliness, another partner or the flight for protection from an abusive parent.

The Child Abduction Convention uses the term 'abduction' in its title only; and the Explanatory Protocol also clarifies that it was an explicit choice of the drafters, given the resonance of the term abduction for the public mind.[69] As the same Report also mentions, child abduction is a common term in criminal cases, and even though in time parental child abduction has been criminalised in many jurisdictions, the terminology is used to describe abductions motivated by protective reasons, such as domestic violence or objective impossibilities to return. The appropriateness of the term due to its stigmatising effect has been questioned recently together with the related concepts such as 'abducting parent' or 'left-behind parent'.[70]

In absence of different accepted terminology, in this dissertation the term 'taking parent' is preferred to that of 'abducting parent'.

In addition, as has been mentioned before, even though the Child Abduction Convention's terminology is gender neutral, it has been demonstrated that most taking parents are the child(ren)'s mothers. Also, while domestic violence may affect other genders, it should be emphasised that domestic violence has become part of international law as a result of

66 The 1996 Child Protection Convention has been superseded by the Brussels II ter Regulation when it comes to inter-Union cases. This Convention remains applicable to Member States in so far as the child should return to a third state. See also , Section 4.4 below.

67 This was one of the justifications for the Convention, put forth at the time of drafting this instrument. Pérez-Vera, E. (1982). Explanatory report on the 1980 Hague child abduction convention. Netherlands: HCCH Publications, para 14; Lowe 2023, p. 388, with further references, Silberman 2003, p. 44.

68 Schuz 2002, p. 397, referring to the traditional concepts of parental rights and welfare underpinning the drafting of the Convention.

69 Pérez-Vera Explanatory Report, para 53.

70 Niemi/Poikela 2022, p. 196.

feminist scholarship's advocacy.[71] Similarly, the intersection between violence and immigration has been noted primarily in feminist scholarship. Therefore, for accuracy whenever referring to this scholarship, this dissertation shall also use gendered language. Given the existing data, it is also expected that women shall be the ones mostly affected by the intersection between immigration and abduction. However, outside references to existing studies, this dissertation is worded in gender neutral terminology – the framework proposed herein is meant to give effect to the rights of children regardless of the gender of their parents.

71 This is discussed in Chapter 5.

# Part I
# The Children's Rights Framework

# 2 Building Blocks in Children's Rights

## 2.1 Introduction

This chapter discusses the emergence of children's rights, it presents an overview of the conceptualization of children's rights under international law and it draws the contours of a rights-based approach to the rights of children.

The field of children's rights is a relatively new area of research.[1] The United Nations Convention on the Rights of the Child (CRC)[2] is the international legal instrument which contains the most comprehensive set of rights exclusively for children. It has barely reached adulthood having been adopted in 1989, just over 30 years ago. The CRC represents the culmination of the attention to children's rights which entered the international arena at the beginning of the twentieth century, when several binding and non-binding instruments dedicated to them saw the light of day.[3]

Questions on whether children should have rights, and if so which rights or how such rights are to be exercised are still subject to debate. Among the debates, a prominent place is held by the position of children within families and the role of states in relation to children and their families. These debates are not new, they have long predated the CRC, or for that matter any international instrument. Children have formed the object of regulation from antiquity, Middle Ages and modern times. Laws in turn have been informed by different notions of what childhood means. There are marked differences between Roman law – which saw children as objects under the quasi-absolute authority of their fathers – and the CRC which is said to have signalled a paradigm shift in the thinking of children as subjects of rights. These differences notwithstanding, some themes are recurrent in the scholarship on children's rights and go to the core of children's rights debates to this day, more than 30 years after the adoption of the CRC. One of them is the relationship between children and their parents

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1 Quennerstedt 2013, p. 234.

2 UN Commission on Human Rights (46th sess.: 1990: Geneva), *Convention on the Rights of the Child.*, E/CN.4/RES/1990/74, UN Commission on Human Rights, 7 March 1990 entered into force on 2 September 1990.

3 For example, the International Labour Organisation Conventions, as follows C138 – Minimum Age Convention, 1973 (No. 138); R146 – Minimum Age Recommendation, 1973 (No. 146); C182 – Worst Forms of Child Labour Convention, 1999 (No. 182); R190 – Worst Forms of Child Labour Recommendation, 1999 (No. 190).

and how granting rights to children may (negatively) impact the rights of parents. In 1987, commenting on the drafting process of the CRC, Bennett wrote "children's rights carry a "tripartite" aspect not present in the rights of adults".[4] As an example of such a "tripartite" relationship he mentioned a child's versus a parent's right to choose the place of residence.[5] The nature of parent-child relationship gives rise to many questions, not existing in traditional human rights discourse. How could or should the state intervene in the relationship between the parent and the child? Is the right holder the child or the parent? How could the autonomy of the child be balanced with the state's or parents' interests in the child's well-being? The difficulty of engaging with children's rights due to the rights of the parents or the family was not a creation of international law but rather came to be discussed in international law from existing debates at the national level. International law and the first instruments concerning children are the product of domestic advocacy and their conceptualization of children is intimately linked with domestic discussions around children and their rights.[6]

Childhood itself as a concept has been debated among historians, psychologists or sociologists to name but a few. Whether or not childhood has existed has prompted discussions in the legal arena on the proper balance, if any, between protection and agency for children.

Against this background, this chapter offers an insight into the triangular relationship parents-children-state as envisaged within the CRC. It further sets out the parameters of the concept of a child-rights approach, thus answering the first sub-question of this dissertation.

This dissertation uses the language of law; however, as laws, both national and international have been informed by societal conceptions, it is believed that a brief historical incursion into the concept of childhood will assist in a better understanding of the way the CRC has framed the triangular relationship mentioned above. For this reason, Section 2.2 focuses on the emergence of the concept of childhood and traces some historical debates on images of childhood. Within Section 2.2, the topic of children as subjects of international law is also addressed. Section 2.3 delves into how the CRC addresses the triangular relationship between children, parents and the state, considering the standards set out by the Convention and amid existing academic debates. On the basis of the CRC, Section 2.4 lays down the foundations of a child rights approach with a focus on judicial decision-making.

4 Bennett 1987, p. 32.
5 Bennett 1987, p. 32.
6 Marshall 1999, pp 106-108.

## 2.2 Children and parents throughout history

### 2.2.1 Images of childhood

The history of childhood is intimately linked to the development of ideas about families and the role of parents.[7] Some researchers have pointed out that the concept of childhood has substantially changed throughout time.[8] In his influential and divisive book *Centuries of Childhood: A Social History of Family Life,* Ariès made the claim that in mediaeval society, childhood, as a distinct phase of human existence, did not exist.[9] Child mortality was high in those times and parents could not be too emotionally attached to their children whose chances of survival during infancy were limited.[10] In Ariès' view, childhood as a distinct phase in human existence emerged in close connection with the affection that parents could give to their children.[11] During the Middle Ages, children spent little time with their parents, most of them leaving home at some point between the ages of seven to fourteen.[12] Children were thus seen more like commodities rather than human beings.[13] In the same vein, Lloyd DeMause points out that "the history of childhood is a nightmare from which we have only begun to awaken".[14] DeMause contends that the farther one goes in history the higher the possibility for children to be abused, killed, beaten, or abandoned.[15] In his view it is the evolution of the parent-child relation which constitutes an independent source of historical change.[16] Tucker, in her research of 16th century England has also concluded that children were perceived as untrustworthy and at 'the bottom of the social scale' and that 'childhood was a state to be endured rather than to be enjoyed'.[17] Ariès points to the seventeenth century as the era when the concept of childhood began to emerge in close

7 This part draws on historical and psychological research conducted mainly in European countries and the United States. These countries have also been primarily involved in the drafting of the Convention on the Rights of the Child, therefore arguably their vision of 'childhood' and existing national debates have permeated the final text of the Convention on the Rights of the Child. Also, as explained in the Introduction to this dissertation, most child abduction cases are decided by jurisdictions in the Global North.

8 Among them Ariès 1976, Shorter 1975, DeMause 1995, Hoyles 1979, Bremner 1976, Weisberg, 1978.

9 Ariès 1976, p. 311.

10 Ariès 1976, p. 17.

11 Ariès 1976, p. 259; Eekelaar 1986, p. 161. Eekelaar also explains that Aries did not necessarily claim that there was no affection between parents and children in pre-modern times, but rather that there was indifference from parents to children. Even if his work has been later on criticised, Aries' History of childhood is one of the landmark works in the field.

12 Stone 1977, p. 40.

13 Stone 1977, p. 641.

14 Veerman 1992, p. 6.

15 Veerman 1992, p. 6.

16 Jenks 1982, p. 49 referring to DeMause 1974.

17 Weisberg 1978, p. 43 referring to Tucker 1976, p. 231.

connection with the emergence of the 'nuclear family' as known today.[18] Previously, the interests of the group took priority over the interests of the individual, children being therefore entirely ignored.[19] The claim was not that children were not loved by their parents, but rather that they were considered the property of their parents and 'mini-adults'.[20] Hunt also argued that the French society of the early seventeenth century depicted the child as inferior to the adults and the process of raising children was devalued.[21]

Little by little, the family began to evolve as a separate unit with a need for privacy, and especially the upper- and middle-class societies' started devoting increasing attention to the proper upbringing of their children.[22] These changes also mark the appearance of the private family space (to which children belong) and the public space reserved for adults (mostly men). Stone argues that in the period between 1660 to 1880, the societal structure changed with more emphasis on the family who became child oriented, affectionate and recognizing the uniqueness of each child.[23] Shorter considered that changes in three areas led to the emergence of the modern family: (i) the change in courtship practices; (ii) the change in mother-child relationships with the child becoming the most important being for a mother and (iii) the delineation of the nuclear family from the larger community.[24] It was also considered that these evolutions, i.e. the increase in caring for children, only changed in the eighteenth century for low income families.[25]

These arguments were based on a linear concept of history where things evolved from bad to better.[26] The theses of the aforementioned researchers revolve around the core concept of *change*, where history is looked at as a gradual pattern of unfolding events.[27] These narratives have strongly been contested by other historians who argued that the focus on change was exaggerated and misleading in that human history is characterised more by continuity than by change.[28] For Gillis and Pollock the differences between the distant past and the present are less pronounced than previously claimed.[29] Pollock's main claim was that parents loved children in the same way and to the same extent in the sixteenth century as well, however children's lives were made harder by other ills, among which medicine,

18 Ariès 1976, p. 226.
19 Stone 1977, p. 118.
20 Pinchbeck, Hewitt 1969, p. 288-305.
21 L Pollock 1985 referring to Hunt 1972. The same claim (not specifically connected to the French Society, but rather to the "Western World") can be found in Weisberg 1978, p. 44.
22 Ariès 1976, pp. 306-307.
23 Stone 1977, p. 405.
24 Vann 1976, p. 107.
25 Vann 1976, p. 106.
26 Veerman 1992, p. 9.
27 Veerman 1992, p. 9.
28 Pollock, 1983, pp. 142-144.
29 Pollock, 1983, pp. 142-144.

social circumstances and the economic condition.[30] Gillis considered that the reasoning behind the focus on change was motivated by the progressive movements of the 1960s and 1970s, rather than by actual historical truth.[31]

Veerman contends that both change and continuity coexist and that it is important not to overstress change to the detriment of continuity in that not every change is an improvement from a past situation.[32] Regardless whether the focus is change or continuity, it could be argued that the debate was more about the delineation of childhood from adulthood and the social and legal consequences thereof, rather than about the idea of childhood itself.[33] For some, the idea of confounding childhood with adulthood, and not having clearly defined boundaries meant greater autonomy for children, more decision-making power, a liberation movement for children from adults.[34] These scholars focused on the child's right to self-determination, or children's autonomy rights. For others, childhood was a golden period which deserved protection in and of itself. Le Shan for example wrote: "It is my belief that we are trying to eliminate childhood and *that* is what is so terrible about being a child today."[35] These scholars emphasised that children's needs of protection derived from their vulnerability. Both points of view utilised the concept of childhood and the relationship between parents and children to emphasise either agency or welfare. In both cases the family was seen as either the promoter or the inhibitor of a particular image of childhood.

As law is a reflection of societal phenomena, it is perhaps not coincidental that the earliest legal recognitions of children's rights intended to limit parental powers. [36] Already in Roman law, the power of the father to discipline children (*patria potestas*) was limited by requirements of pietas – i.e. the expectation that parents would take care of their children.[37] In 1641, the first legal code of New England (Massachusetts – *Body of Liberty*) included provisions restricting parental authority to discipline children and to choose their friends.[38] The same code gave children the liberty to complain to the authorities and to obtain redress.[39] However, it was not until the nineteenth century that measurable changes in the treatment of children could be seen.[40] These changes were originally prompted by substantial advances in health care which resulted in decreased mortality at birth as well as in better

30 Gillis 1985, p. 143.
31 Gillis 1985, pp. 142-144.
32 Veerman 1992, p. 9.
33 Archard 2014, pp. 27-36.
34 Farson 1978, referred to in Byrne 2016, p. 119.
35 Veerman 1992, p. 8
36 Freeman 1997, p. 48.
37 Vuolanto 2016, p. 492.
38 Freeman 1997, p.48
39 Freeman 1997, p. 48.
40 Cohen 1982, p. 370.

life prognosis as vaccinations were discovered and sanitation improved.[41] Gradually, public school education became compulsory, special juvenile courts were set up and protection measures were instituted for mentally ill or poor children.[42] Fass explains that these developments were uneven between Western societies: some countries such as the United States, Sweden, Germany and France outpaced other Western European countries and South and Eastern Europe.[43] Even so, as the middle class expanded, their concerns were centred on ending poverty for children of all classes and children's needs and rights were articulated in universal terms.[44] The language was that of vulnerability, advocacy for children focusing on their welfare, and the means necessary to end the evils that the children found themselves in. As Fass explains, "manifest deprivation became less tolerated by middle-class do-gooders who aspired to have all children, not just the privileged, benefit from the advances taking place. And those who looked to national aims believed that progress required that all nations' children be brought up to a basic level".[45]

### 2.2.2 Children as subjects of international law

It was against this background that the first international instruments emerged. Child labour and exploitation was a significant concern of the beginning of the XXth century, and this was reflected in the 1919 International Labour Organisation's conventions prohibiting children from working in hazardous conditions.[46]

More generally, international advocacy for children's rights which led to the first non-binding documents is closely intertwined with the establishment of the League of Nations in the aftermath of the First World War. The League of Nations became a venue to transpose into an international document the concerns in relation to children which existed up until that point at a national level.[47] This was also legally enabled by the Covenant to the League of Nations which mentioned children in its Article 23. According to the first paragraph of Article 23 "[…] Members of the League […] will endeavour to secure and maintain fair and humane conditions of labour for men, women, and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and for that purpose will establish and maintain the necessary international organisations."[48]

41 Fass 2011, pp17-29.
42 Price Cohen 1982, p. 370.
43 Fass 2011, p. 19.
44 Fass 2011, p. 19.
45 Fass 2011, p. 19
46 Fass 2011, p. 17.
47 Moody 2015, p. 18.
48 League of Nations. The Covenant of the League of Nations, Including Amendments in Force, February 1,1938.

Other than child labour, concerns over children were closely related to the aftermath of the First World War which left many orphans, without the protection they would otherwise have in times of peace.[49] Thereafter, the discussions extended to more general concerns over child protection.[50] Marshall documents that there was much political resistance to extend the mandate of the League to children in distress.[51] Eglantyne Jebb, the founder of Save the Children, is credited with successfully lobbying for including children on the agenda of the League of Nations which culminated with the adoption in 1924 of the Geneva Declaration of the Rights of the Child (the "(1924 Geneva) Declaration").[52] Part of her success was connected to using film and photo-engraving to depict the sufferings of children so as to create momentum in support of the Declaration.[53]

The Declaration included five principles which all emphasised existing concerns in the aftermath of war. The focus was on the need to protect children from famine, exploitation and disease. None of the principles of the Declaration addresses the relationship between children and parents. The preamble arguably includes an incipient reference to what was to become 'the best interests' standard by providing that "mankind owes to the Child the best that it has to give".

It was its simplicity which made the Declaration successful. [54] An excerpt from a report drafted by Save the Children in 1923 helps clarify the aim of the Declaration at the time:

> "The Geneva Declaration is a programme that calls on individual and collective good will and on legislators throughout the world. It sets out the rights of the child, that is the duties of the family and of society towards children, in general terms, without entering into detail, which it leaves to each country to determine in accordance with its level of civilization, its national characteristics and also the current situation of its financial and technical resources."[55]

In the period that followed, the 1924 Geneva Declaration had enjoyed considerable success being accepted among various fora, from welfare organisations to the media to heads of states and leaders of religious communities.[56] In the aftermath of the Geneva Declaration, several general or regional international instruments concerning children had been adopted. Their focus was specifically on the needs of children, and they addressed

49 Marshall 1999, p. 106.
50 Marshall 1999, p. 108.
51 Marshall 1999, p. 107.
52 Geneva Declaration of the Rights of the Child of 1924, *adopted* Sept. 26, 1924, League of Nations O.J. Spec. Supp. 21, at 43 (1924).
53 Marshall 1999, p. 132.
54 Marshall 1999, p. 131.
55 Moody 2015, p. 18.
56 Moody 2015, p. 21.

concerns such as human trafficking, sexual exploitation or labour.[57] However, it was the climate after the end of the Second World War that paved the ground for renewed discussions on a general international instrument concerning children. The League of Nations had now been replaced by the United Nations and the Social Commission of the Economic and Social Council (ECOSOC) received a mandate in 1946 to examine the necessity of recasting the 1924 Geneva Declaration. [58] The discussions that led to the adoption of a new Declaration in 1959 were prompted by the International Union for Child Welfare – the successor of Save the Children.[59] As opposed to the 1924 Geneva Declaration, this time the negotiations within the United Nations focused on the relationship between children and their parents, and on the duties and responsibilities of the State and of the parents.[60] The negotiations were carried out along the different ideological lines of the East and West: Warsaw Pact countries were advocating for the idea that the State bore the primary responsibility for children whereas the Western Delegations considered that the primary responsibility for the child lay with the parents.[61] Also, the idea of drafting a binding document did not get sufficient traction, with opposition coming both from the United States which rejected covenants calling for an international supervisory mechanism, and from the Eastern bloc which would agree to binding instruments but reject an international oversight of implementation.[62]

Moody posits that the resulting document, the 1959 United Nations Declaration on the Rights of the Child (the "(1959 Geneva) Declaration") was essentially drawn up behind closed doors with little input from international organisations.[63] Following its adoption, even though the dissemination efforts were similar to its predecessor the 1959 Declaration has never enjoyed the same success.[64] The reasons vary, ranging from the lack of binding status to the fact that the principles are intertwined with implementing clauses.[65]

In terms of content, the 1959 Geneva Declaration expanded significantly the scope of the 1924 Geneva Declaration. This time several references to the relationship between children and parents permeated the text. Already in the preamble, parents are named as duty bearers, tasked with recognizing,

57 Bennett 1987, p. 20.
58 Moody 2015, p. 21.
59 Veerman 1992, p. 159. In 1946 Save the Children International merged with another organisation to form the International Union for Child Welfare. The International Save the Children Union of today is the result of the merging in 1977 of several Save the Children organisations which formed the International Save the Children Alliance.
60 Veerman 1992, p. 163
61 Veerman 1992, p. 164.
62 Veerman 1992, p. 166.
63 Moody 2015, p. 21.
64 Moody 2015, p. 24.
65 Moody 2015, p. 24.

and observing the rights of children. Several of the 10 principles make direct references to the child's parents/caregivers. For example, under paragraph 2 of Principle 7 the responsibility for a child's education and guidance lies primarily with the child's parents. Placing responsibility on a person, other than a state in an international instrument was remarkable for the times.[66] Principle 6 deals more in detail with the triangle state-child-parent. It provides:

> "The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Society and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support. Payment of State and other assistance towards the maintenance of children of large families is desirable."

According to Veerman, discussions leading to the adoption of this principle were extensive and they showcased differences among states in values and norms.[67] Among the areas of concern, Veerman notes precisely the issue of protecting the family unit against outside intervention.[68] The topics subject to debate were for example the age from which the consequences of separating a child from his mother were particularly serious as well as the financial assistance required from states for helping families in need. That separation from the mother had harmful effects on a child's development was not contested in itself, but rather the issues of age or socioeconomic aspects, as mentioned above.[69] Principle 6 of the 1959 Geneva Declaration is of particular importance as it formed the negotiation basis for what was to become Articles 9, 10 and 11 of the CRC. These Articles include the core substantive and procedural children's rights in cases of parental separation and cross-border movements.

According to Freeman, all of the rights included in the 1959 Geneva Declaration are welfare rights, in that they recognize that children cannot provide for themselves and need the care and guidance of adults.[70] Bennett saw the declaration as a dangerous precedent for what was to become the Convention on the Rights of the Child.[71] His critique rests on three aspects, namely that, other in its title, it failed to recognize *rights* of children, that it overemphasised socio-economic rights to the detriment of civil and political

66 Veerman 1992, p. 173.
67 Veerman 1992, p. 173.
68 Veerman 1992, p. 173.
69 Veerman 1992, p. 173.
70 Freeman 1983, p. 40. In the same vein Bennet-Woodhouse 2002, p. 108.
71 Bennett 1987, p. 18.

rights, and finally that it treated the interests of children as independent and unconnected to the rights and interests of parents and family control and unity.[72]

The decades following the 1959 Geneva Declaration were prolific in the adoption of many binding treaties safeguarding the human rights of minorities.[73] Concerns over children and families were reflected by the inclusion of several articles in the 1966 International Covenant of Civil and Political Rights (the "ICCPR")[74] and the International Covenant on Economic, Social and Cultural Rights (the "ICESCR").[75] Article 24 of the ICCPR is the only provision dealing expressly with children. It provides protection to children against discrimination, the right to a name, birth registration and the right to a nationality. The first paragraph deals expressly with the right of the child to protection on the part of his family society and the State. In its General Comment No 17, dated 7 April 1989, the Human Rights Committee addressed specifically Article 24. It emphasised that the primary responsibility for raising children lies with the family (to be understood broadly) and particularly on the parents. Already before the Convention on the Rights of the Child the Human Rights Committee emphasised that "If the marriage is dissolved, steps should be taken, keeping in view the paramount interest of the children, to give them necessary protection and, so far as is possible, to guarantee personal relations with both parents".[76] The ICESCR also includes several references to children and families from the perspective of socio-economic rights. Article 10 recognizes the family as the fundamental unit of society entitled to the widest protection and assistance from the state. The same Article includes several other references to children focusing on measures of protection and assistance to which they are entitled. Children are also featured in Articles 12 and 13 respectively which concern obligations on the state to ensure the healthy development of the child and the rights of parents to choose schools and educational forms for their children.

Soon after the adoption of these core human rights instruments, which include provisions concerning children but seem to follow the focus on needs of the previous instruments, the Children's Liberation Movement emerged. This movement advocated for granting children equal rights to adults so as to be autonomous and to be able to fully participate in society.[77] In post-industrial societies the debates around children increasingly used the language of rights, replacing the previous paternalistic language of

72 Bennett 1987, p. 19.
73 Moody 2015, p. 25.
74 Adopted on 16 December 1966 by General Assembly Resolution 2200A (XXI), entry into force 23 March 1976.
75 Adopted on 16 December 1966 by General Assembly Resolution 2200A (XXI), entry into force 3 January 1976.
76 ICCPR General Comment No. 17: Article 24 (Rights of the child) 7 April 1989, para 6.
77 Hanson 2012.

'children's needs'.[78] This language however was not matched in the work of UNICEF and other INGOs whose concern continued to be that of meeting the most basic needs of children in the non-industrialized world.[79] Two diametrically opposing stances on children seem to have emerged: one aiming for the 'full liberation' of the child from adults, focused on the child's rights and one seeking to protect the child, focused on the child's 'needs'.

This was the context in which the first discussions on the adoption of a binding instrument concerning children were put forth to the UN Commission on Human Rights by Poland, in 1978. The Polish proposal was to cast the 1959 Geneva Declaration into a binding instrument.[80] This proposal was criticised for its indeterminate language, failure to specify concrete rights and duty holders, or absence of a definition of the child.[81] Pressing issues for the time, which according to the Commission on Human Rights, should have been included in the future convention were matters such as apartheid, abortion or family reunification.[82] The Commission on Human Rights appointed an Open-Ended Working Group on the Question of a Convention on the Rights of the Child so as to revise and reformulate the text of the Polish proposal.[83] In the coming 10 years which led to the adoption of the CRC, the Working Group, which was open to UN Member States, met for one week a year to discuss the draft convention.[84] One explanation for the 10-year span of the negotiations lies in the fact that the Working Group operated by consensus, in that no article was adopted unless all of the Working Group Members agreed to it.[85] According to Nigel Cantwell of Defence for Children International, the Convention on the Rights of the Child "was meant to reflect the minimum present-day standards of what things children have rights to; nevertheless, one cannot say that there is a universal approval for the provision therein. […] The Convention thus reflects a negotiated consensus rather than a real consensus."[86]

The paragraphs above have highlighted the evolution of children's rights, both at national and at international level, along historical lines. It has been argued that children's rights could only have emerged if childhood was recognized as different from adulthood in human existence. For some historians and developmental psychologists, childhood as a different stage in human existence could be traced back to the beginning of the seventeenth century. In this view, childhood only developed as parents changed their attitudes towards children. Other researchers argued that such linear evolu-

78 Moody 2015, p. 25.
79 Moody 2015, p. 25
80 Detrick 1999, pp. 14-15.
81 Price Cohen 1982, p. 373.
82 Price Cohen 1982, p. 373.
83 Veerman 1992, p. 182.
84 S. Detrick 1999, p 17.
85 Veerman 1992, p. 183.
86 Veerman 1992, p. 183; Quennerstedt, Robinson, l'Anson 2018, pp. 53-54.

tion in the history of childhood is not supported by evidence. Despite their divergent points, there is agreement that childhood is a social construct. The different conceptions of childhood have resulted in various views over children, whether they should have rights and what having rights actually means. The conceptions of children's rights are intimately connected to different societies' views of families, and this is shown in law as the earliest recognitions of children's rights were enacted as limitations of parental powers. As Price Coen writes: "The proposition that children are individuals who have rights of their own, in addition to their rights as family members, is relatively new; a creature of the last few hundred years." It was chiefly children's need for protection which justified some of the early laws on children's rights. The same conception of children's rights is reflected at the international level where the atrocities of wars and images of despair and hunger paved the way for the first non-binding instruments concerning children. As the scars of war subsided and in tandem with the proliferation of international human rights instruments, advocacy for children's rights shifted from protection to liberation. Liberation, as a movement, aligned the rights of children to those of all the other human beings, claiming that children should have rights in the same way as adults have. These two opposing stances, one focusing on protection, and the other on autonomy coexisted at the time the CRC was drafted. The parents and the state are central to both arguments as they can be seen both as inhibitors and enhancers of children's rights. It is thus the triangle parent-child-state which makes children's rights unique.

## 2.3 Children, parents and the state within the CRC

### 2.3.1 Standard setting within the CRC

Before delving into the question of how the CRC envisages the triangular relationship between the child, parents and the state, some remarks on the drafting process are necessary to clarify the type of standards set by the Convention as well as their breadth.

As outlined above, the Convention was adopted by consensus which meant that each of its Articles was unanimously approved by the States Parties. One of the underlying reasons for such a working method was to secure widespread agreement and subsequent ratification of the future Convention.[87] Indeed, within a year from its adoption, 130 states had accepted the CRC.[88] To date, the CRC is, without doubt, the most widely ratified international instrument. One consequence of the consensus approach may be

87 Dietrick 1999, p. 17.

88 Hafen/Hafen 1996, p. 449. The authors explain that by 'accepted' both signatures and ratifications were included.

the open-endedness of the Convention's provisions. Bennett has criticised (the draft) Convention at the time, for politicisation of children's rights, by which he meant that the Convention included a set of ideals which were cast as rights resulting in an attempt to implement policy in international law.[89] Other commentators share this view, arguing that in a strictly legal sense, the CRC is an inherently unenforceable document, including a set of ideals and abstract principles. Tobin, whose view was also shared by Cantwell, considered that the Convention reflects "a normative commitment to a conception of childhood".[90]

Contrary to what has been argued above, the claim in this dissertation is that the CRC does contain a set of minimum standards, with the potential to become enforceable.[91] States, though courts, legislators and other actors may choose from a wide range of implementing measures, provided that they comply with the minimum core set out in the Convention. This interpretation is also supported by Article 41 of the CRC according to which

> "Nothing in the present Convention shall affect any provisions which are more conducive to the realisation of the rights of the child and which may be contained in: (a) The law of a State party; or (b) International law in force for that State. "

Further, as a counterweight to the claim that the CRC is inherently unenforceable, it should be pointed out that on 19 December 2011 the UN General Assembly adopted the Optional Protocol to the Convention on the Rights of the Child on a Communication Procedure (the "OPIC").[92] The OPIC entered into force on 14 April 2014, and it is open for ratification to all countries of the world. Under the OPCCRC the CRC Committee has the authority to adjudicate on individual complaints brought by children or on behalf of children.[93] Even though the CRC Committee may only render 'Views', which could be considered to have less resonance than the legally binding judgments, these Views do resemble judgments and they have the capacity to add more flesh to the bone to the Convention. Nevertheless, as stated above, it is worth reiterating that, under Article 41 of the CRC, such standard setting represents a minimum guarantee rather than an optimal protection of children's rights. Seen through this lens – that of a document setting out minimum standards for the rights of children and which is capable of being enforced at national level – the CRC is more than merely symbolic affirmation of ideals in the field of children's rights.

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89 Bennett 1987, p. 37.

90 Tobin 2013, p. 419.

91 And indeed, in some jurisdictions courts have relied directly on the CRC to support their reasoning, In this sense, see: Liefaard, Doek, 2016.

92 Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/66/138 of 19 December 2011.

93 Article 5 CRC. For more information on the mechanism set under OPCRC see among others Hanson 2015.

As shown above, prior to the CRC the existing international instruments solely ascribed protection rights to children. Children as subjects of law were also included in several articles of binding international conventions but their express inclusion was clearly linked to family and protection rights. In short, prior to the CRC children only had the right to protection.[94] Law reflected what was to be considered a paternalistic attitude, positioning the youngest members of society solely as becomings, that is individuals whose future is to be secured but whose present existence is largely ignored. That was in stark opposition to traditional human rights where the focus was precisely on individual autonomy and self-determination. The basic human rights framework rests on a sharp distinction between private and public responsibilities with the parents being assigned the responsibility for childcare and the public power which is not supposed to intervene in the private sphere.[95] Within this basic framework, focusing on children's needs and their right to protection is relatively uncontested. It is more difficult however to see children as beings in their own rights, not just becomings. The questions behind the conceptualization of children's rights at the time of drafting were raised by Minow: "What exactly is a right that can be exercised by a five-year-old, or a two-year-old-and does it rest on different premises than rights for adults? How are rights for children to be enforced: do they require adult supervision, and if so, by which adults? Won't many adults politically oppose suggestions that children-perhaps their own children-should have legal liberties and powers that constrain the liberty and authority of adults?"[96]

For Freeman, the CRC successfully merged both attitudes towards children by recognizing the best interests of the child (traditionally associated with the child's need of protection) as a core concept and the child's right to participate (advocated by those who put children on an equal footing with adults).[97] Price Cohen wrote in 1993 that the original rights of the child to care and protection enshrined in the 1959 Declaration were supplemented by individual personality rights (where she included the 'adult-style' civil rights such as "speech, religion, association, assembly and the right to privacy").[98]

The rights laid down in the CRC have been widely classified in 3 categories, the so-called 3 Ps: provision of basic needs, protection against neglect and abuse and participation rights.[99] As will be further detailed below, it is generally accepted that the CRC is an attempt to resolve the dilemma of protection versus participation through a developmental approach, under which the balance between protection and autonomy would shift progressively toward the latter as the child grew in age and maturity.[100]

94 In this sense, see also Price Cohen 1993.
95 Minow 1986, p. 7.
96 Minow 1986, p. 7.
97 Freeman 1997, p. 639.
98 Price Cohen 1993, p. 7.
99 Quennerstedt 2010.
100 Smolin 2003, p. 975; Rap/Schmidt/Liefaard, 2020, p. 4.

### 2.3.2 The approach under the CRC to the relationship children – parents – state

A textual analysis of the Convention shows that children are inextricably linked to their caregivers. 39 Articles of the CRC lay down rights for children; of these no less than 30 Articles mention the child's family, parents, guardians or caregivers.[101] The Preamble makes such references in two recitals. It is thus clear that the child is seen first and foremost within the context of the family and only exceptionally outside it.

The child's parents have the most prominent role in ensuring the realisation of children's socio-economic rights as well as their civil and political rights. Indeed, the Preamble sets out the family as "the fundamental group of society and the natural environment for the growth and well-being of […] children". It is also recognized that the child should grow up in a family environment "for the full and harmonious development of his or her personality". An overview of the substantive provisions of the Convention indicates that the role of the state is to support the child's caregivers in discharging their duties. For example, Article 3(2) lays down that States are to ensure the protection of the child's wellbeing taking into account the rights and duties of their parents, legal guardians or other individuals legally responsible for the child. Article 18 provides that the primary responsibility for the upbringing and development of the child lies with the parents, or as the case may be, legal guardians. States, in turn, should render appropriate assistance to parents and legal guardians for facilitating the proper exercise of their duties. Under the Convention, the child has, among others, the right to know and be cared for by his or her parents (Article 7), to preserve his or her family relations without unlawful interference (Article 8), to maintain contact and personal relations with both parents on a regular basis and not to be separated from parents against their will (Article 9), to family reunification and contact across borders (Article 10), to not be subjected to unlawful or arbitrary interference with his or her family (Article 17). Parents are also primarily in charge of securing the socio-economic rights of the child, such as the right to development (Article 27) or the right to social security (Article 26).

Doek sees the CRC as "the only [international instrument] in which the rights of parents are clearly recognized and respected and which attaches special importance to the role of the family in the life of the child".[102]

At the same time, – while the CRC evidently highlights the importance of parents and family for children -, it is important to stress that the status of the child as a rights holder places some limitations on the exercise of paren-

101 The CRC is divided into two parts, the first part including the definition of the child (Article 1) followed by 39 Articles laying down various rights. Article 41 – which is the last Article of the substantive part – does not concern a right, but the relationship of the rights within the CRC with other provisions of national and international law. Hence, there are 39 provisions laying down various substantive rights for children.

102 Doek 2006, p. 203.

tal rights. Arguably, the two most important limitations are those included in Articles 5 and 12 of the CRC. Under Article 5 CRC parents are to provide the child with appropriate direction and guidance in accordance with the child's evolving capacities. A similar reference to evolving capacities is included in Article 14 CRC on freedom of thought, conscience and religion. This Article affirms that parents are to provide direction to the child in the exercise of his or her right to freedom of thought, conscience and religion in a manner consistent with the evolving capacities of the child.

The notion of *evolving capacities* is core to the understanding of the CRC as it places the relationship between parents and children on a gradient scale, ensuring a balancing role between the protection rights and autonomy of the child.[103] This was evident already at the drafting stage of the Convention when some delegations feared that introducing a notion of (evolving) capacities of the child could undermine the rights of the parents and the sanctity of the family.[104] On the other hand, other delegations argued that 'the family' should not be given arbitrary control over the child, but rather that a balance should be sought between protection from the state to the family and protection of the child within the family.[105] The latter approach is the one ultimately taken by the Convention.

Furthermore, it is considered that the way the concept of 'evolving capacities' was introduced in the Convention at the drafting stage markedly differs from how the Committee has interpreted it throughout time.[106] Initially thus, 'evolving capacities' was seen less as a right of the child to exercise rights in accordance with evolving capacities and more as a right to receive appropriate guidance from parents.[107] Later General Comments of the CRC Committee shifted this approach to one where parents no longer have absolute powers in deciding how to provide guidance to children but rather where "parental guidance and direction must be provided in a manner that reflects a child's unique needs […] and such guidance needs to be adjusted continually to enable the child to exercise progressive levels of agency and responsibility in the exercise of her rights".[108]

The 'evolving capacities' are at the centre of the triangular relationship between parent-child-state; the state has the duty to ensure that the "more the child himself and herself knows […] the more the parent[s] […] have to transform direction and guidance into reminders and advice and later to an exchange on an equal footing".[109] Here the link between the evolving capacities of the child and the child's right to be heard becomes evident, in that the child's voice shall weigh heavier the more evolved his capacities

103 Lansdown 2005.
104 Varadan 2019, p. 315.
105 Working Group Report 1987, para 106.
106 Varadan 2019, p. 308.
107 Varadan 2019, p. 308.
108 Varadan 2019, p. 320.
109 General Comment no 12 (2009): The right of the child to be heard, CRC/C/CG/12, 20 July 2009 (GC 12), para 84.

are assessed to be. Also, within the framework of the Convention, Article 12 on the child's right to be heard is generally credited with bringing about the paradigmatic shift between children as objects of protection to children as rights holders.[110] This notwithstanding, the breadth of Article 12 is rather modest in that it only requires States to ensure the right to express views freely and to have those views given due weight in accordance with the age and maturity of the child. Even though it is ultimately up to adults to decide whether children possess the necessary 'age and maturity", the insertion of participation rights for children represented a shift from the need-based rights for children to acknowledging children's agency. Liebel argued that "stressing the agency aspect of human rights in relation to children also has a power-balancing function, which counteracts the structural ruthlessness against children in contemporary societies, while strengthening their social status and bargaining power."[111]

The provisions of the CRC thus demonstrate that the Convention places considerable emphasis on the role of parents in contributing to the fulfilment of the rights of children. Todres argued that many of these provisions could have been drafted without references to parents, legal guardians or families, but instead, the CRC does recognize the valuable role that parents and families have in the development of children.[112] The limitation on parental rights, which exists in the Convention, most notably through concepts such as evolving capacities and right to be heard – as discussed above – but also through prohibition of violence against children even at the hands of their caregivers as laid down under Article 19, is a recognition that the Convention does not allow parents to act with impunity toward their children.[113] Bennett Woodhouse has also argued that giving rights to children does not take away rights from parents.[114] The focus of the CRC, in line with other international human rights instruments, was the individual right to be free from state oppression.[115] To her, the CRC should rather be seen as empowering parents to protect children against government abuses.[116]

This aspect -the relationship between the rights of children, those of parents and role of the state- has triggered substantial criticisms to the concept of children's rights as enshrined in the Convention. One of the main claims is that the vagueness of the provisions of the CRC, coupled with the insertion of the best interests standard leaves an open door for unwarranted intrusion of the state in family matters.[117] For example, in the United States – also the country from which most criticism to the CRC has arisen- the

110 Mayall 2013, p. 35.
111 Liebel 2018, p. 621.
112 Todres 2006, p. 21.
113 Todres 2006, p. 27.
114 Bennet Woodhouse 2006, p. 39
115 Bennet Woodhouse 2006, p. 39.
116 Bennet Woodhouse 2006, p. 40.
117 Guggenheim 2005.

best interests standard has been used as a proxy for fast termination of parental rights and placing children with adoptive families.[118] Guggenheim considered that the best interests as a decision-making factor "is a formula for unleashing state power, without any meaningful reassurance of advancing children's interests".[119] His concern was that children's rights, instead of advancing rights for children, have the opposite effect of delineating the power of state officials.[120] It has also been suggested that "the Convention's autonomy flavour could nudge unsophisticated adults to give undue weight to a child's desires. Parenthood has taught […] us that children, even at very young ages, have no difficulty in forming their own views, but children having little idea of their own long term interests may well express views that are inconsistent with reality of their own interests."[121] It has also been suggested that the excessive autonomy given to children through (primarily) Articles 5 and 12 takes the decision-making power away from the parents to an objective person, such as a judge and this role results in the state substituting itself to the role of a parent.[122] Moreover, the Convention is not so much about what children or their parents wish but rather about the standards that the UN deems necessary for children[123]. Authors endorsing this position claim that the better standard, which the CRC is seeking to replace, is that of parental fitness, which means that unless a parent is demonstrably unfit, state authorities are not competent to assess the best interests of the child.[124]

Further, it should be stressed that commentators criticising the alleged interference of the CRC with the rights of the parents, share the view that all children have the right to care and protection. Moreover, this right to protection is highly valued. Haffen posits that children should be protected against their own immaturity and that essentially parents and not the state are the best to provide such protection.[125] He is also wary that the CRC has created a new and lower threshold for state intervention in families.[126]

A closer look at the criticism of children's rights appears to stem from a narrow view of rights rooted in the will theory which posits that the main purpose of a right is to curb state interference. Even the main proponent of the will theory, Hart, admits that children have rights but that they need adults to represent them.[127]

118 Guggenheim 2005, p. 61
119 Guggenheim 2005, p. 41.
120 Guggenheim 2005, pp. 246-247.
121 Hafen 1996, p. 465.
122 Hafen 1996, p. 465.
123 Farris 2010.
124 Hafen 1996, p. 466, McGee 2018, p. 709.
125 Hafen 1996, p. 453.
126 Hafen 1996, p. 464.
127 Liebel 2018, p. 614.

When viewed in this way the difference in positions between proponents and opponents of children's rights in the context of the family is less stark than a cursory reading of their position seems to indicate. Both warn against excessive state intervention into family life. For all commentators, dependency of children on adults is a key factor leading to either denying their status of rights holders or advancing the idea that children have or should have rights. There is agreement that children are indeed dependent on their caregivers. Dependency results in children having a special position and this special position makes recognition and enforceability of their human rights more difficult compared to other human rights. Babies are born entirely dependent on adults and need an adult's care for survival. (Parental) care is essential for their survival and development. Dependency and care do not fit well with traditional rights' discourses focus on autonomy and equal rights. Paternalistic attitudes towards children's rights focus on children's dependency on adults and on them being future persons (becomings).[128] This interpretation of children's rights focuses on their need for special treatment and rights which are necessary to secure children's future well-being.[129]

Clearly, there is a tension between traditional claims of equal justice under the law and children's essential dependency and such tension has pushed advocates for children's rights to construct more varied descriptions of equality.[130] Accepting that children have a special relation within their families and at the same time human rights inherent to all human beings leads to the inescapable conclusion that rights for children require certain modifications to traditional notions of human rights.

Tobin has claimed that the CRC "offers what could be termed a *collaborative* or *cooperative* conception of the relationship between state and family as regards children's upbringing".[131] For him the CRC should be seen as offering a relational -as opposed to individualistic- conception of rights where the more autonomous the child, the less role should parents have in the realisation of children's rights.[132] Proponents of children's rights have seen the Convention as marking a shift between what adults think children need to what children actually need, while recognizing that these needs are sometimes inescapable from those of their caregivers.[133]

The paragraphs above provided a textual analysis to the CRC so as to determine how this instrument construes the parent-child relationship and

128 Hanson 2012, p. 73.
129 Hanson 2012, p. 73.
130 Bennett Woodhouse 2009.
131 Tobin 2013, p. 426.
132 Tobin 2013, p. 426.
133 Bennett Woodhouse 2009, p. 836.

the role of the state in this area. It has been shown that an overwhelming number of provisions reflects a concern of the Convention not only with the child, but with the child's family as well. At the same time, it has been shown that the critical voices to the Conventions focused on the allegedly wide scope left by its text to unwarranted interventions in family lives. However, it has also been shown that the CRC only lays down minimum standards subject to further refinement by states. This contribution is based on a reading of the Convention that supports the idea that the child is inextricably linked to his or her caregivers and that the rights of the child are to be construed in light of this link with two major limitations to parental rights, as laid down under Articles 5 and 12 of the Convention. The following sections shall delve deeper into the question of what constitutes a child rights approach, as this approach will guide the analysis throughout this entire dissertation.

## 2.4 A rights-based approach to children's rights

### 2.4.1 Choice of terminology: child-centred or rights-based?

The field of children's rights could lead to some terminological confusions due to many factors, including that the preoccupation with children exists in sciences other than the legal discipline. Also, even within the legal discipline expressions such as *child law*, *children's rights* or *children's rights law* have different meanings.[134] *Child law* includes all law concerning children and childhood; *children rights* refers to the fundamental human rights of children but not necessarily as a legal category; and *children's rights law* is the narrower category including only the fundamental human rights of children.[135] This dissertation focuses on the last substantive concept: *children's rights law*. In turn, children's rights law primarily focuses on the human rights of children which have been included in national constitutions, international treaties and the CRC.[136]

The concept of *rights-based* approach should similarly be distinguished from the related but sometimes different notions of *child centred* or *child friendly*. The main point of departure is that the *rights* discourse, albeit increasingly used in other disciplines, is rooted in law. The language of law is used to discuss social questions, such as definitions of families, or what parents owe their children, and these questions go to the root of defining a scheme of rights and responsibilities.[137] Tobin has also noted a trend within many legal systems to situate issues concerning children in terms of their rights.[138] Rights-based approaches are also central to judicial decision-

134 Vandenhole 2015, p. 27.
135 Vandenhole 2015, p. 27.
136 Vandenhole 2015, p. 27.
137 Bennett Woodhouse 2000, p. 2.
138 Tobin 2009, p. 597.

making.[139] At the same time, focusing on a rights discourse for children can at times appear controversial. The sceptics to the use of rights in connection to children readily agree that child centred legislation is necessary and to be encouraged: in the context of legislation children centred being interpreted to mean legislation enacted in consideration of how children will fare by it.[140]

In this dissertation a rights-based approach is followed. The choice of *rights-based* as opposed to *child centred* is also motivated by its use within the CRC Committee's General Comments. So far, the Committee has issued a number of 23 General Comments, two Joint General Comments and one Joint General Recommendation.[141] Recommendations or references to rights-based strategies can be found in 14 General Comments. Conversely, other than two scattered mentions in earlier General Comments, the CRC Committee does not use the term *child centred*.

### 2.4.2 Substance of a rights-based approach

With reference to research, Lundy and McEvoy have noted that the term 'rights-based' is used broadly to describe work influenced by the international human rights standards.[142] In the same vein, Tobin has highlighted that there is no single definition of a rights-based approach.[143]

In the field of children's rights law, additional focus on rights-based approaches may appear at a first glance tautological as children's rights law is necessarily based on international human rights instruments concerning children. The principles of a rights-based approach may be drawn from all international human rights instruments; the CRC however represents the primary but not exclusive source from which the principles of a human rights-based approach for children can be derived.[144]

Perhaps this is also the reason why no precise definition of this concept is provided in any of the General Comments of the CRC Committee. The Committee considers for example that a rights-based national strategy is primarily rooted in the Convention.[145] In other contexts, the CRC Committee underlined that a rights-based strategy is one where the children's best interests are always the starting point for service planning and provision.[146] A human rights perspective for the CRC Committee includes due respect

139 Tobin 2016, p. 66.
140 Guggenheim 2006, p. 63.
141 As General comments No 18 and 19 do not exist, the total number of such documents, irrespective of their numbering is 23.
142 Lundy/McEvoy 2012, p. 76.
143 Tobin 2016, p.64 referring, among others to Sarelin 2007.
144 Tobin 2016, pp. 67-68.
145 General Comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child, CRC/GC/2003/5 27 November 2003, para 28.
146 General Comment No. 7 (2005): Implementing Child Rights in Early Childhood, CRC/C/GC/7/Rev.120 September 2006, para 22.

for children's participatory rights.[147] In the juvenile justice contexts, rights-based approaches mean that awareness campaigns should focus on dealing with children alleged of violating the penal law in accordance with the spirit and the letter of CRC.[148] A rights-based approach to child labour includes a focus on education, a basis on the CRC and other relevant international standards.[149] On the relationship between children and caregivers, the CRC Committee highlights that "A child rights-based approach to […] caregiving and protection requires a paradigm shift towards respecting and promoting the human dignity and the physical and psychological integrity of children as rights-bearing individuals rather than perceiving them primarily as victims".[150] For adolescents as well, a rights-based approach includes the recognition and respect for their dignity and agency.[151]

The references above indicate that the Committee's mentioning of a rights-based approach is intended to shift the focus from protection rights to participatory rights for children. The same view has been shared by commentators who see participation as a key feature of a rights-based approach.[152] In the context of children, it should be noted that participation is modified but does represent a rejection of the previous approaches to focus solely on their welfare.

Notwithstanding the extensive references of the CRC Committee, adopting a rights-based approach to children's rights remains in itself subject to contestation. Similarly to the case of the relationship between children and parents, the divergence is spurred, among others, by the fact that children are dependent on their caregivers, lack the capacity for autonomous decision-making and thus they cannot possess rights in the 'adult sense of the word".[153] The language of rights implies choices by the rights holders and children are not born autonomous.[154] Rights are rooted in the liberal theory and they presuppose an independent individual as the basic organising principle of polity and citizenship.[155] In family law in particular, rights theories assume equal freedom and opportunity for each individual in soci-

147 GC No 7, para 40; Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child (2019) on harmful practices, CEDAW/C/GC/31/REV.1 – CRC/C/GC/18/Rev.1, para 60.

148 General comment No. 10 (2007): Children's Rights in Juvenile Justice CRC/C/GC/10 25 April 2007, para 96.

149 General comment NO. 11 (2009) Indigenous children and their rights under the Convention, CRC/C/GC/11,12 February 2009, paras 71-72.

150 General comment No. 13 (2011) The right of the child to freedom from all forms of violence, CRC/C/GC/13, 18 April 2011, para 3.

151 General comment No. 20 (2016) on the implementation of the rights of the child during adolescence, CRC/C/GC/20, 6 December 2016, para 4.

152 See among others Tobin 2016; Lundy/McEvoy 2012.

153 Bennet Woodhouse 2001, p. 377.

154 Bennet Woodhouse 2001, p. 378.

155 De Graeve 2015, p. 156.

ety.[156] It has been further contended that a rights discourse is ill-equipped to accommodate the relationship between children and their caregivers which is characterised by the ethics of care, emphasising responsibilities over rights.[157]

As a response to these challenges several commentators have drawn on feminist relational theories and ethics of care to develop a more nuanced approach to rights for children.[158] Most children's rights theorists accept that children are indeed different but they argue that such difference should not result in them being denied rights but rather in adapting the 'rights discourse' in a way that it fits children.[159] The struggle is that of stretching "a more nuanced […] discourse and a more child-centred perspective on rights."[160] Rights discourses for children need to take into account the interdependency of individuals, families and communities.[161] That being said, the argument is not that the position of children does not fit within rights theories. Rather, these theories should be enriched with strong attention to relationships and their preconditions.[162] Tobin has identified several features of a rights-based approach to children's rights, derived from the more general concept of a rights-based approach to human rights.[163] In his attempt to provide stronger conceptual foundations for such an approach, he has identified (i) core principles; (ii) express principles and (iii) implied principles. Among the core principles to such an approach is the requirement to integrate rights into the issue subject to analysis.[164] As with general human rights, the express principles include accountability, non-discrimination and participation; which apply in a modified form to children's rights.[165] As specific express principles to children's rights Tobin mentions 'due deference' – i.e. respect for parents and guardians in the exercise of their responsibilities – and evolving capacities of the child. Last, there are three implied principles: (i) dignity, (ii) interdependence and indivisibility and (iii) cultural sensitivity.

These principles in essence attempt to reconcile the debates mentioned above by laying down criteria for a rights-based approach to children that takes into account their special position of dependency without at the same time discarding the concept of rights altogether. These principles could be said to represent the backbone of a rights-based approach to children's rights. The section below shall delve deeper into the same question from the perspective of the judiciary.

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156 Minow/Shanley 1996, p. 5, with further references.
157 Arneil 2002, p. 90.
158 Among others Minow 1986, Woodhouse 2009; Rosenbury 2015.
159 Woodhouse 2001, p. 1 referring to Freeman 1992, Federle 1995.
160 Bennet Woodhouse 2001, p. 1.
161 Bennet Woodhouse 2001, p. 3, Minow/Shanley 1996, p. 12.
162 Minow 1996, p. 20.
163 Tobin 2016.
164 Tobin 2016, p. 66.
165 Tobin 2016, p. 66.

### 2.4.3 A rights-based approach to judicial decision-making

At the heart of this dissertation lies judicial decision-making. One of the questions posed is 'How can a child rights-based approach inform primary carer abductions with immigration components?' As a precondition to answering this question it is considered necessary to set out the theoretical parameters of a rights-based approach in family matters.

As shown above, in general terms such an approach implies that the decision-making process shall be guided by the rights set out in the CRC. However, despite the wide ratification of the CRC, commentators have noted that it is rare for courts to refer to the rights of children even in judgments that concern them.[166] Commentators considered that one of the reasons for such few references was the lack of separate representation for children; indeed it was found that when children acted independently in litigation, judges did include children's rights in their reasoning.[167] Other reasons could be that the legal provisions are phrased in adult terms and the concerns of adults tend to overshadow those of children.[168] Further, an over-focus on the child's welfare could be seen as an impairment for a discussion on rights[169].

The paragraphs above have argued that the main features of a rights-based approach are the focus on the human rights of children as enshrined in the CRC, with an adequate balance between protection rights and participation rights for children. It is not proposed to assimilate children to adults, but rather to ensure that rights are modified in such a way that they could be exercised effectively by children. Further, the implementation of such an approach may be different in practice depending on the implementation actor. Rights-based approaches may have different meanings if the question is how to apply such an approach to research, legislation or budgeting, to name but a few. When it comes to the judiciary, any process seeking to mainstream children's rights should consider that the function of the judiciary is remedial and not anticipatory (such as the case may be with legislation, or other programmes).[170]

In his assessment on whether judges conduct a rights-based analysis, Tobin has identified six types of approaches: (i) the invisible rights approach, (ii) the incidental rights approach; (iii) the selective rights approach; (iv) the rhetorical rights approach; (v) the superficial rights approach and the (vi) substantive rights approach.[171] Tobin has argued in favour of the substantive rights approach as the manner of properly taking into account children's rights in the decision-making process. His general claim is that "from a practical perspective, the recognition of children as rights-bearers requires that judges actively identify children's claims to

166 Fortin 2006, p. 300.
167 Fortin 2006, p. 301.
168 Fortin 2006.
169 Choudhry/Fenwick 2005, pp.491-492.
170 Tobin 2016, p. 66.
171 Tobin 2009.

independent rights and not simply overlook, subsume, marginalise them within the rights or interests of their parents".[172] A similar view is held by other scholars, who found that in balancing various rights, judges rarely expressly articulate the rights of children.[173]

This dissertation shall also use Tobin's substantive rights approach as a frame of reference for cross border family disputes over children. Tobin's view of a rights-based model implies a process where judges consider (i) the wishes of the child; (ii) the relevance of other rights under the CRC; (iii) the particular circumstances of the child; and (d) any available empirical evidence which may be of relevance.[174] Brief references to the rights of children are not sufficient to meet such an approach.[175] Nor are truncated references to some rights of children, or rhetorical affirmations pertaining to – for example- society's interest in protecting minors.[176] Last but not least, judges should undertake the actual scope and nature of the rights in question and balance them against any competing considerations.[177]

For Tobin, a rights-based approach to judicial decision-making includes four aspects: (i) the conceptualization stage; (ii) the procedures used; (iii) the meaning given to the rights in question and (iv) the reasoning, i.e. how the rights at stake were balanced in the context of the specific case. Under the conceptualization stage it is important to identify the children's rights at stake.[178] The procedures used refers to all the means taken in the process of litigation to ensure children's effective participation and appropriate protection: such as appointing a guardian *ad litem* or administration of evidence in a child friendly way, etc. The meaning given to the rights in question requires adaptation of the litigation process in a way that is particularly fit for children taking into account their specific position: thus the right to be free from inhuman and degrading treatment may have a different meaning for children than it has for adults. Last but not least, the substantive reasoning of courts relates to how they balance competing rights.[179] Importantly, balancing does not entail that the rights of children trump all other rights in question, but rather that all of the competing rights should be identified and given appropriate consideration.[180] Tobin accepts that there may be circumstances where other rights or interests will have priority over those of children, and such an outcome could very well fulfil the conditions of a rights-based approach provided that the aforementioned five conditions are met. Such a balancing, with identifying the rights of children along with the other rights or interests in a particular case, performs the important

172 Tobin 2009, p. 586.
173 Fortin 2006, p. 302; in this sense see also, Liefaard/Doek 2016. With specific reference to child abduction see Mol/Kruger 2018.
174 Tobin 2009, p. 592.
175 Fortin 2006, p. 301.
176 Tobin 2006, pp 598-600.
177 Tobin 2006, p 601.
178 Tobin 2006, pp 604-605.
179 Tobin 2009, p. 612.
180 Tobin 2009, p. 615.

function of ensuring that the rights of children are not overlooked in the decision-making process.[181]

In a similar vein, more recently, Krutzinna has proposed a framework for assessing the child's best interests in judicial decision-making, taking into account that judges have a considerable amount of discretion in assessing the best interests of the child.[182] Her proposal focuses on three steps: categorization -where the needs of the 'categorical child are identified-, followed by individualization -meaning the hearing the views and preferences of the specific child- and ending with balancing which represents the determination of the appropriate course of action and decision-making which is in the best interests of the specific child.[183] Similarly to the rights-based approach proposed by Tobin, Krutzinna stresses the importance of transparent decision-making which explains and justifies a decision, and avoids misrepresentation of children's rights.[184]

## 2.5 Conclusions

The aim of this chapter was to place children's rights in the context of history and law and to lay the foundation of a rights-based approach to children's rights. The purpose was to show that the image of childhood has influenced both social perceptions and legal regulations concerning children. At international level, the CRC was predated and influenced by societal views of what childhood means and how children were seen within their families. The CRC's paradigm shift from children as objects of protection to children as rights holders can be better understood as an attempt to reconcile traditional views over children with new discourses on human rights. Such reconciliation has some paradoxical elements in that the child now has both protection rights and agency-based rights, and the family is the primary setting where 'the paradox' manifests itself. That leaves decision-makers with the delicate task of balancing rights so as to ensure that children can exercise their rights in a way that does not diminish their autonomy while ensuring they receive appropriate protection. This chapter has argued that a rights-based approach can duly reconcile these factors and it has laid out the parameters of such an approach.

A rights-based approach to children's rights considers the interdependency of individuals, with dedicated attention to relationships and their preconditions. It requires judges to follow certain steps when deciding cases concerning children and to explain at each step how they have considered and balanced the rights at hand. Such an approach has several advantages, including that it offers transparency and avoids the misrepresentation of children's rights.

181 Tobin 2009, p. 617.
182 Krutzinna 2022.
183 Krutzinna 2022, pp. 133-134.
184 Krutzinna 2022, p. 140.

# 3 Children's Rights in The Aftermath of Parental Separation

## 3.1 Introduction

This Chapter builds on the previous one by conceptualising the rights of children in the aftermath of their parents' separation. It thus adds flesh to the bones of a child rights-based approach developed in the preceding Chapter. It brings insight into the approach under the CRC of three rights of children which are essential to any parental separation case: the best interests of the child, the right to have contact with both parents and the right to be heard.

As discussed in Chapter 2, both Tobin and the CRC Committee have stressed that in matters concerning children, all of the rights enshrined in the CRC should guide the analysis.[1] Clearly, depending on the specific context of a case, some rights may become more relevant than others. Moreover, flexibility is essential to achieving true child-oriented decision-making. In other words, a too rigid approach which impacts on the judge's flexibility to balance the rights in a given case may ultimately result in undermining the position of the child rather than enhancing it. This notwithstanding, this dissertation identifies three rights of children as *core* to cross-border separation cases. This is because judicial decision-making in all parental separation cases should take into account as a minimum, all of these three rights: (i) the child's best interests (hereinafter also abbreviated as "BIC"), (ii) the right to have contact with both parents; and (iii) the right to be heard. As will be discussed below, the child's best interests originates precisely in family law proceedings. The right to have contact with both parents has been first laid down in the CRC and since then, arguably supported by the CRC, has brought about a paradigm shift in the way children are positioned within their families. Last but not least, the right to be heard is essential to all cases involving children and it is the main venue through which children become agents and not merely objects of protection. Thus, it is difficult to conceive a rights-based approach in cross-border separation cases without an evaluation of (at least) these three rights.

One potentially relevant article of the CRC, which has ultimately not been included in the present analysis, is Article 11. As per this Article States Parties shall take measures to combat the illicit transfer and, non-return of children abroad and they shall promote the conclusion of international agreements or accession to existing agreements. As Tobin et al specify, to

1 See also Section 2.3.2.

date the CRC Committee has rarely relied on Article 11 CRC.[2] The same commentary confirms that the illicit transfer and non-return of children refers to parental child abduction in the same way as the Hague Abduction Convention.[3] Article 11 CRC is less relevant for the present dissertation as all Member States of the European Union have acceded to the Child Abduction Convention, rendering the second paragraph moot. Further, the obligation to take measures to combat the illicit transfer of children essentially overlaps with the scope of the Child Abduction Convention.[4] Also, as Tobin's et al commentary demonstrates, the assessment under this Article is an interpretation of the Child Abduction Convention which has been carried out in Chapter 4 of this dissertation.

The analysis below will be guided by the CRC, with a focus on the relevant General Comments of the CRC Committee and academic literature directly related to these General Comments. Each of the Sections 3.2, 3.3. and 3.4. address first the drafting works of the CRC followed by an analysis of the contemporary relevance of the best interests of the child, the right to have contact with both parents, and the right to be heard. Section 3.5 covers the relationship between these three rights. Balancing is one of the steps of a rights-based approach. Finally, Section 3.6 introduces the concept of parental alienation as a point of contention between women's rights advocates and father's rights advocates. This concept plays an important role in post separation parenting disputes, and it is closely linked to the child's right to have contact with both parents. In individual decision-making, judges need to distinguish between competing rights or policy interests, and parental alienation forms in many cases the backdrop against which the decision is being taken. Thus, for the purposes of a rights-based approach to children's rights parental alienation allegations should be distinguished from and balanced against other relevant rights to the decision.

## 3.2 The best interests of the child

The principle of the best interests of the child is now one of the four guiding principles of the CRC. The BIC was first laid out at international level in the 1959 Declaration which explicitly refers to it in two of its ten (10) principles. This principle predates the 1959 Declaration; its origins are in domestic custody decisions and legislation emanating from both common and civil law jurisdictions.[5]

2 Tobin et al 2019, p. 376.

3 Tobin et al 2019, pp. 374-375.

4 Tobin et al 2019, pp. 374-375. Chapter 4 of this dissertation is dedicated to analysing the Child Abduction Convention.

5 The United States: Zainaldin 1978, pp. 1052 -1053, Carbone 1995, p. 728; for the evolution of English custody laws, see among others, Wright 2002; Eekelaar 1986, pp. 167-168; for Canada, see Cliche, 1997, p. 54; France: Rubellin-Devichi 1994, p. 261; for Australia, see James 2006; for Switzerland, see: Zermatten 2003, p. 3; the Netherlands: de Boer 1984, p. 8.

The discussions surrounding the best interests of the child at both national and international levels reflect the paradoxes of rights of children which were described in the context of the family in the preceding chapter. Originally it was used to protect children from the power of the father (*patria potestas*); thus as a welfare consideration reflecting children's needs, rather than their agency.[6] More recently however, the CRC Committee and academic commentators have argued for a new conceptualisation of the best interests as a right, distinct from a purely welfare-oriented approach. The fact remains that it is both the most used concept in this area of law and the most criticised at the same time.

### 3.2.1 Best interests during the drafting process of the CRC

The current text of Article 3(1) CRC originates in Article II of the Polish draft, proposed in 1978. The original proposal read as follows:

> "The child shall enjoy special protection and shall be given opportunities and facilities, by law and by means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration."[7]

During the first and second readings in the Working Group, Article II became Article 3. In 1979, paragraph 1 of Article 3 was revised as follows: "In all actions concerning children, whether undertaken by their parents, guardians, social or State institutions, and in particular by courts of law and administrative authorities, the best interests of the child shall be the paramount consideration."[8]

It is to be noted that in both Polish proposals, the best interest was to be seen as the *paramount* consideration. This was changed into a *primary* consideration, in 1981, at the proposal of the United States.[9] The reason was that some delegations felt that making best interests a paramount consideration was too broad and that sometimes other parties may have equal or superior interests.[10] Already at the drafting stage a discussion emerged on the vagueness of the concept and the risk that States could give this concept purely nationalist content and interpretation in cases of children of dual origins.[11] Concerns over the fact that best interests should not be interpreted

6 Vuolanto 2016, p. 494.
7 Report of the Commission on Human Rights (thirty-fourth session, document E/CN.4/1292), p. 124.
8 Commission on Human Rights, document E/CN.4/1349.
9 Commission on Human Rights, document E/CN.4/L1575, paras 19-38.
10 *Travaux préparatoires*, p. 339, paras 23-24.
11 This comment was made by the International Federation of Human Rights, International Federation of Women in Legal Careers, Pax Romana, document no E/CN.4/1984/WG.1/WP.6.

as imposing limitations on countries' immigration laws were also expressed by the United Kingdom and Germany.[12]

However, other than these considerations, it does not appear that the introduction of 'best interests' as a concept in the text of the CRC was ever subject to debates as such. The reason is most likely that -as shown in the historical overview undertaken in Section 2.1 above- by the time the text of the CRC was being discussed the best interests of the child existed in the legislation and practice of most countries.[13] The main focus of the discussions was whether the best interests of the child was *the* primary or *a* primary consideration. Ultimately, the Working Group adopted the latter version in view of the consensus achieved.[14]

### 3.2.2 Current relevance

It has rightly been observed that the 'best interests of the child' is one of the most amorphous legal concepts of all times.[15] Certainly, much of its vagueness could be traced back to the historical origins and to the fact that it was and continues to be used as both an empowering legal tool for children and one which factually relegates them to passive objects of protection[16]. While both criticisms and endorsements have their legal merit, it is not the aim of this dissertation to undertake a detailed evaluation of either position. Such an endeavour would largely be doomed to failure, especially considering the amount of academic and professional writing which has already been dedicated to the best interests of the child. Also, various fields of law may use different interpretations thereof and it may have different meanings in different cultural contexts.

For the purposes of the present chapter it is considered important to lay down the core features of the best interests as a 'rights concept' on the basis of the CRC Committee General Comment no 14.[17] Further, attention will be paid to some recent works which have as a starting point the aforementioned General Comment. The reason for this approach is that the CRC Committee through its General Comment has arguably attempted to depart from the 'welfarist' or paternalistic view over the best interests of the child and to position this concept in the context of a rights-based approach to children.[18]

12 Commission on Human Rights, document E/CN.4/1984/71, paras 9 and 11.
13 Several commentators have remarked this as well, see for eg, Alston 1994, p. 11.
14 Legislative history CRC 2007, para 125.
15 Smyth 2015, p. 71.
16 This tension is also recognized by the CRC Committee in General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC/C/GC/14, 29 May 2013., para 83 (GC No. 14). The CRC Committee recommends that the age and maturity of the child guide the balancing act.
17 General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC/C/GC/14, 29 May 2013 (GC No. 14).
18 Kilkelly 2016, p. 55.

As has been discussed in the preceding chapter, it is the CRC which has enshrined the best interests of the child as a free-standing legal provision.[19] The Convention does not include a hierarchy of rights, and other than a brief discussion during the drafting process on the *general nature* of some provisions, there is no indication that the drafters saw the best interests as a core principle of the Convention.[20] The BIC has become one of the four general principles of the CRC in 1991, when it was listed as such by the CRC Committee in its guidelines for State Parties initial reports. [21] It has been documented that the elevation of the four provisions to the status of general principles did not receive much discussion at the time; such qualification nevertheless has generated in time a large impact on the way the CRC has been approached.[22] The first General Comment to refer to the best interests as one of the general principles of the Convention is General Comment No 5 of 2003, on general measures of implementation.[23]

Further, it should be noted that there are several references within the text of the Convention to the best interests, however the *principle* of the best interests of the child is enshrined in Article 3(1) of the CRC. A closer look at the other provisions indicate that the 'best interests' is used in other contexts as a tool to allow for discretion on the part of the state authorities to deviate from a specific right.[24]

The principle enshrined in Article 3(1) CRC is subject to a detailed analysis by the CRC Committee in its General Comment No 14. Commentators have pointed out that through this General Comment the Committee has attempted to flash out a true rights-based approach to BIC.[25] Importantly, the Committee underlines that BIC is a threefold concept: a substantive right, a fundamental legal principle and a rule of procedure. As a substantive right, BIC "creates an intrinsic obligation for States, is directly applicable (self-executing) and can be invoked before a court."[26] While ambitious, the proclamation by the Committee of BIC as a self-standing right has been considered problematic, especially against the more general perception that the BIC is an umbrella provision to the Convention.[27] Kilkelly however argues, on the basis of the interpretative rules of the Vienna Convention on the Law of Treaties, that reading Article 3(1) in the context of the CRC as a whole supports the idea that the BIC is to be seen as a substantive right.[28] Indeed, several commentators have highlighted that the BIC has been instrumental for national courts and that many domestic

19 Kilkelly 2016.
20 Hanson/Lundy 2017, p. 288.
21 Hanson/Lundy 2017, p. 287.
22 Hanson/Lundy 2017, pp. 288 – 292.
23 General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child, CRC/GC/2003/5,27 November 2003, (GC No 5) para 65.
24 See for example Article 9(1) and 9(3); Article 37(c), Article 40(2)(iii) of the CRC.
25 Cantwell 2017, p.68; Kilkelly, 2016, p. 55.
26 GC no 14, para 6.
27 Kilkelly 2016, pp 56-58.
28 Kilkelly 2016, pp. 55-57.

courts are directly applying it, so that it has acquired self-executing force.[29] Nevertheless, other than the possibility of using the best interests directly in court, there are hardly any contexts where the best interests can be seen as a stand-alone provision. For example, Pobjoy has argued for the interpretation of the best interests as a separate ground for granting refugee status, yet such an approach does not appear to have (yet) gained much traction in domestic courts.[30]

It has been considered that central to the concept of a *right* is the recognition that the interest protected by the right is understood by the right holder as expressing an element of his or her wellbeing.[31] Tobin and Eekelaar argue that under this conceptualization of a right, the principle requires an evaluation of a child's well-being to be undertaken as far as possible from each child's views.[32]

While the proposition of the best interests principle as a stand-alone right may be subject to debate, it is herein argued that the two other propositions of the CRC Committee, those of incorporating the best interests principle as an *interpretative legal principle* or, more importantly as a *rule of procedure* are more capable of furthering the rights of children. According to the CRC Committee, the best interests of the child as a rule of procedure in particular requires that procedural guarantees are offered and that decisions show that the right has been explicitly taken into account.[33] Further,

> "States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests, what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases."[34]

Such an approach would help diminish the negative perceptions of the best interests principle as infused with subjective perceptions and focus on a process whereby the consequences of actions and decisions are more consistently taken into account and assessed by reference to their impact on children.[35] It is within the context of the BIC as a procedural rule that the determination of the child's best interests requires decision makers to hear children and both commentators and the CRC Committee agree that articles 12 and 3 should be used together to advance the rights of children.[36] Moreover, in General Comment no 14 the CRC Committee recommends that decision-makers draw up a non-exhaustive and non-hierarchical list of elements which should assist in drawing up the child's best interests.[37] Such elements include:

29 Liefaard/Doek 2015, Couzens 2019.
30 Pobjoy 2017, pp. 196-203.
31 Eekelaar/Tobin 2019, p. 91.
32 Eekelaar/Tobin 2019, p. 91.
33 GC No. 14, para 6(3).
34 GC No. 14, para 6(3).
35 Eekelaar/Tobin 2019.
36 Kilkelly 2016, p. 59.
37 GC No. 14, para 50.

> "age, sex, level of maturity, experience, belonging to a minority group, having a physical, sensory or intellectual disability, as well as the social and cultural context in which the child or children find themselves, such as the presence or absence of parents, whether the child lives with them, quality of the relationships between the child and his or her family or caregivers, the environment in relation to safety, the existence of quality alternative means available to the family, extended family or caregivers, etc."[38]

On a closer inspection it has been submitted that the criteria included by the CRC Committee represent in fact the rights enshrined in the CRC.[39] The same is indicated by the Committee which expressly highlights that the balancing act should take place against the background and with the aim of ensuring the child's full and effective enjoyment of the rights set out in the CRC and its protocols.[40]

However, while the Committee highlights that guidance is important it also stresses the value of flexibility in such matters.[41] It has been submitted that such an approach, while commendable may not result in achieving the much-desired clarity in the interpretation of BIC in concrete cases, yet as has been discussed throughout this dissertation, judicial discretion is one key element present in the field of children's rights.[42]

Further, concerning the procedural safeguards, the CRC Committee recommends that states put in place formal processes, with strict procedural safeguards which are transparent and objective.[43]

One additional aspect touched upon in the General Comment is that of legal reasoning. This aspect is important as it reinforces the idea of how courts could take a rights-based approach to cases concerning children which was discussed previously in Chapter 2. The Committee also agrees that the reasoning of courts is essential and that motivations should state explicitly:

> "all the factual circumstances regarding the child, what elements have been found relevant in the best-interests assessment, the content of the elements in the individual case, and how they have been weighed to determine the child's best interests. If the decision differs from the views of the child, the reason for that should be clearly stated. If, exceptionally, the solution chosen is not in the best interests of the child, the grounds for this must be set out in order to show that the child's best interests were a primary consideration despite the result. It is not sufficient to state in general terms that other considerations override the best interests of the child; all considerations must be explicitly specified in relation to the case at hand, and the reason why they carry greater weight in the particular case must be explained."[44]

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38 GC No. 14, para 48.
39 Kilkelly 2016, p. 60.
40 GC No. 14, para 82.
41 GC No. 14, para 50.
42 Eekelaar/Tobin 2019, pp. 93-94.
43 GC No. 14, para 87.
44 GC No. 14, para 97.

All the aspects above are very significant for the purposes of the present dissertation as they indicate that the relevance of best interests lies less in the actual content of this right but more in the process used to achieve the result. This dissertation argues that it is principally through such a process, and through well-reasoned court decisions that children's rights could disentangle from other policy considerations which may play a role.

The final remark on the current use of the BIC concerns the wording which was ultimately adopted in the text of Article 3(1) CRC and which posits the best interests as *a* primary consideration, rather than *the* primary consideration. As has been stressed throughout this text, and is equally highlighted by the CRC Committee, such a distinction is an important one in practice in that the child's interests are not the only consideration for decision makers but nevertheless they have high priority and not just one of several considerations.[45] The idea of having children's interests as a primary consideration is rooted in their dependency and the ensuing risk that if their interests are not highlighted, they tend to be overlooked.[46]

## 3.3 The right of the child to have contact with both parents

The right of the child to have contact with both parents is intimately linked with the best interests principle. Article 9(3) of the CRC provides that "States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests." A similar provision is included in Article 10(2) of the CRC which provides that "a child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents." Other than the provisions of these two articles, the CRC makes numerous references to the child-parent (caretaker) relationship and to the way such a relationship is to be defined in relation to the state. For example, Article 5 the right to give guidance in accordance with the child's evolving capacities, Article 7(1) CRC provides for the child's right to know and be cared for by his parents. Article 8(1) CRC refers to the right of the child to preserve his or her family relations without undue state interference. Article 16(1) CRC mentions the right not to be subject to unlawful or arbitrary interferences with the family whereas Article 18 CRC mandates that States Parties use their best efforts to ensure that both parents have common responsibilities in the upbringing and development of the child. All these provisions refer to various aspects of the parent-child relationship and they are all relevant in cases concerning

45 GC No. 14, para 39.
46 GC No. 14, para 37.

parental separation. For cross-border relations, the provisions of Article 11 CRC are equally relevant.[47]

As has been discussed herein, there is agreement amongst commentators that the provisions of the CRC are to be interpreted holistically[48]. The same view is shared by the CRC Committee and this general position has been analysed in more detail in Chapter 1 of this dissertation. Notwithstanding the above, a closer look at the provisions of the Convention indicates that Articles 9 and 10 are the most specific ones detailing the rights of children to have contact with both parents in the event of parental separation. For this reason, and to avoid repetition, these two articles are analysed in more detail in the following paragraphs.

### 3.3.1 The right to have contact with both parents during the drafting process of the CRC

The origin of both provisions is Article VI of the first Polish draft of 1978 which read as follows:

> "The child, for the full and harmonious development of his personality, needs love and understanding. He shall, whenever possible, grow up in the care and under the responsibility of his parents and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Society and the public authorities shall have the duty to extend particular care to children without a family and to those without means of support. Payment of state and other assistance towards the maintenance of children of large families is desirable."[49]

Almost immediately, several delegations objected to the use of the word 'mother' and proposed to replace it by 'parents' focusing on the important role of both the mother and the father in the upbringing of the child. In the discussions on this Article -which spanned from 1978 to its adoption

47 The comments to Article 11 CRC are less relevant at this stage. This is because essentially Article 11 of the CRC makes reference to the provisions of other multilateral treaties. Further, as Lowe and Tobin pointed out, outside of a few references in the Concluding Observations the CRC Committee has been reluctant in making concrete recommendations to states in relation to Article 11 CRC. However, in these few remarks it can be observed that the CRC Committee seemed to understand that there is no tension between the Hague Convention and the CRC, and that ratification of the Hague Convention is a necessary step in the promotion of the rights of children. Even so, as mentioned above, some tensions exist and they relate in part to the issue of how the child's best interests should be approached. See Lowe/Tobin 2019, pp. 370-397.

48 Last but not least, when discussing Article 9 CRC, Tobin and Cashmore suggest that this Article should be understood through the lens of the other articles as well, where the child is not to be seen as isolated from his family, but rather within that context and where states are to take positive steps to prevent separation and ensure continuation of personal relationships Tobin/Cashmore 2019, p. 341.

49 Legislative History of the CRC 2007, E/CN.4/1292, pp 124-125.

in 1989 -, the trend towards awarding joint parental responsibility to both parents rather than to seeing mothers as the principal caretakers was constantly reiterated. Several delegations, including for example New Zealand and Australia pointed out that in their countries in cases of disputes, both parents were entitled to custody and courts were to treat the welfare of the child as the first and paramount consideration.[50]

One other aspect which also emerged soon after the first Polish proposal was that related to securing the rights of children from *international families*. The French delegation proposed the addition of the following sentence:

"Children who belong to an international family that has split up shall, so far as possible, preserve their ties with both parents even if they are of different social origin, nationality or religion".[51] In the same vein, the Society for Comparative Legislation proposed that a duty be inserted for states to provide particular care to children belonging to a divided international family.[52] Following drafts of this Article, initiated by the United States, included the right of the child to be reunited with parents if they *lawfully* reside in another state and to have the child's preferred place of residence taken into account as a *primary consideration* on questions of residence.[53]

From this moment on, the discussions were split into the issue of the child's right to have contact with both parents in a *national setting* and that of the same right in an *international setting*. The 1981 proposal of the United States framed the right to have contact with both parents in light of legal residence: the wording proposed indicated that the child's right to family reunification only existed to the extent the parents lawfully resided in one State Party and the child resided in another State Party.[54] The discussions then delved into the issue of child abduction where several delegations had pointed to the frequency and the increasing scale of the problem.[55] The issue of children of separated parents of different nationalities was expressly raised by the French delegation at several points during the drafting process.[56] At the same time the delegations were aware of the Child Abduction Convention and the European Convention of Luxembourg which had already been drafted and wished to avoid repetition.

As it is apparent from the above, the right of children to have contact with parents in the context of international families received significant attention during the drafting process. An analysis of these drafts indicates that particularly contentious issues were precisely immigration-related considerations such as the legality of the parents' stay in a particular state. While no

50 Legislative History of the CRC 2007, E/CN.4/1324/Add.5.
51 Legislative History of the CRC 2007, E/CN.4/1324/Add.1.
52 Legislative History of the Convention on the Rights of the Child, United Nations, New York and Geneva, 2007, HR/PUB/07/1. E/CN.4/1324.
53 HR/(XXXVII)/WG.1/WP.12.
54 Legislative History of the CRC 2007, Report of the Working Group to the Commission on Human Rights (E/CN.4/L.1575), para 65.
55 Legislative History of the CRC 2007, For eg Minority Rights Group, France, the United States.
56 Legislative History of the CRC 2007, p. 398.

major disagreement existed on the right to have contact with both parents as such, several states expressly pointed out the fact that they wished to retain authority on the issue of immigration. Particularly strong objections in this regard were expressed by Japan and the Federal Republic of Germany who wished to introduce a new paragraph as follows: "Nothing in this Convention shall affect in any way the legal provisions of States Parties concerning the immigration and residence of foreign nationals".[57] This proposal was however met with strong objections from Portugal on the ground that it interfered with the right to liberty of movement as enshrined in other (binding) international documents.[58] Upon further discussion, Article 6 was broken down into two Articles, Article 6 and Article 6 *bis* (which in the CRC became Articles 9 and 10 respectively). It was proposed to restrict Article 6 to domestic situations and to specifically mention that Article 6 *bis* did not affect the right of states to regulate their respective immigration laws in accordance with their international obligations. Again, Portugal, supported by Sweden and Italy, emphasised that they understood 'international obligations' to apply to both treaties as well as principles recognized by the international community.[59]

Furthermore, the discussions on Article 6 *bis* (now Article 10 of the CRC), also connected the right of the child to choose his residence, the right to freedom of movement, issues of residence rights, and immigration law. Some delegations proposed to eliminate all restrictions to international movement of children and parents.[60] Others limited the right to family reunification to situations of lawful residence.[61] The reference to the 'lawfulness' of residence was eventually eliminated at the suggestion of the United Kingdom.[62]

Ultimately, when Article 10 was adopted, both Japan and the Federal Republic of Germany made declarations in the sense mentioned above. It is to be noted that Germany withdrew this declaration on 15 July 2010.[63] Japan, for its part, does maintain two reservations to both Article 9(1) and Article 10(1). Concerning Article 9(1), Japan expressly declared that it does not understand this Article to apply to deportation decisions taken following domestic immigration laws.

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57 Legislative History of the CRC 2007, E/CN.4/1989/WG.1.WP.20, p. 405.

58 Legislative History of the CRC 2007, para 194, page 406. The documents referred to where Article 12 of the ICCPR and several recommendations of the CoE. Article 12 of the ICCPR reads as follows: 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. 2. Everyone shall be free to leave any country, including his own. 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant. 4. No one shall be arbitrarily deprived of the right to enter his own country."

59 Legislative History of the CRC 2007, paras 204-207, p. 407.

60 Legislative History of the CRC 2007, paras 11,12, p. 411.

61 Notably the United States, Legislative History of the CRC 2007, p. 412.

62 Legislative History of the CRC 2007, para 41, p. 414.

63 as per << https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en#34>> ,10 June 2019.

It should be also pointed out that the discussions on Article 11, were carried out while the 1980 Child Abduction Convention had already been adopted. Thus, it was ultimately decided to defer to this Convention for the actual regulation of the issue.[64] It is interesting to note though, that from the discussions it appeared that the factual scenario envisaged at the time was that of a couple where the two partners held *different nationalities*. The regulation of parental authority/ responsibility at national level did not play an important role in the discussions. Only one delegation mentioned that at the time when a couple was separated parental authority was retained by the parent with whom the child *lived*.[65]

The paragraphs above show that already at the drafting stage of the CRC, the gendered role of parenthood and immigration were important points of discussion for States Parties. The distinction between the roles of mothers and fathers in child rearing was eliminated from the very beginning making way for a provision where both parents share an equal role in raising their children. This is in line with the developments at national law which were taking place in some countries at the time as described in Section 3.1. above.

On the immigration points, more disagreements emerged. As mentioned, while delegations agreed that children should have the right to maintain contact with both parents, they were less willing to accept such a right when they perceived that it may encroach upon their powers to regulate immigration. Despite these tensions, it is telling that ultimately references to nationality and/or legal residence were eliminated from the final drafts of the Convention. This may be perceived as an indication of states' willingness to facilitate the right to family unity, which was perceived as fundamental already at the drafting stage of the CRC.[66]

Further, at the moment only two countries, namely Japan and Switzerland have made reservations to Articles 9 and 10 of the CRC on account of their immigration laws (more precisely in relation to the fact that they do not understand these Articles to affect their immigration laws).[67]

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64 Legislative History of the CRC 2007, p. 435-437.

65 Legislative History of the CRC 2007, Yugoslavia (doc E/ CN.4/1983/32/Add.2.), p.433.

66 See also the note of the representative of the United States to the effect that family unity and family reunification are basic rights and should be included in the draft convention. Legislative History of the CRC 2007, para 10 p. 418.

67 The Swiss reservation to Article 10(1) reads as follows: Swiss legislation, which does not guarantee family reunification to certain categories of aliens, is unaffected.; The reservations of Japan read as follows: " 1. The Government of Japan declares that paragraph 1 of article 9 of the Convention on the Rights of the Child be interpreted not to apply to a case where a child is separated from his or her parents as a result of deportation in accordance with its immigration law. 2. The Government of Japan declares further that the obligation to deal with applications to enter or leave a State Party for the purpose of family reunification `in a positive, humane and expeditious manner' provided for in paragraph 1 of article 10 of the Convention on the Rights of the Child be interpreted not to affect the outcome of such applications.", available at: <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en#34>, last accessed on 15 July 2024.

### 3.3.2 Current relevance

It is to be noted that commentaries to the aforementioned Articles of the CRC are scarce.[68] In particular in relation to Article 9, the CRC Committee routinely refers to the issue of non-separation of children from their parents, however, rarely does the Committee directly refer to Article 9 in the Concluding Observations[69]. Here, all relevant Articles (namely, Article 9, 10, 11 and 18) are grouped together under the heading Family Environment and Alternative Care.[70]

One other aspect worth highlighting is that, in line with the discussions during the drafting of the CRC, commentators point to the fact that Article 9 CRC is designed to ensure the child's right not to be separated from both parents in a national setting whereas Articles 10 and 11 are dedicated to the international setting.[71]

Under Article 9(3), the CRC favours *direct* and *regular* contact with both *parents* under the assumption that this type of contact is in the best interests of the child.[72] Doek stresses that the implicit assumption of the CRC is that contact with both parents is in the best interests of children, and the child's best interests is the sole ground for denying contact. The CRC Committee is of the opinion that the opposition to contact by one parent cannot be considered an exceptional circumstance justifying interruption of contact.[73] The CRC Committee has underlined in several Concluding Observations that states should ensure that the child has a right to maintain contact with both parents even after divorce.[74] Also, more recently in the General Comment no 14 concerning the best interests of the child, the CRC Committee has dedicated a section to the importance of the family environment and maintenance of relationships within such an environment.[75] In paragraph 70 of this General Comment the Committee highlights:

> "Preservation of the family environment encompasses the preservation of the ties of the child in a wider sense. These ties apply to the extended family, such as grandparents, uncles/aunts as well as friends, school and the wider environment and are particularly relevant in cases where parents are separated and live in different places."

With specific reference to Article 9(3) CRC the Committee mentions:

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68 For example: Detrick 1999, Doek 2006, Tobin/Cashmore 2019, pp. 307-343.
69 Tobin/Cashmore 2019.
70 Tobin/Cashmore 2019, p. 310.
71 Tobin/Cashmore 2019, p. 310; Doek 2006; Detrick 1999, 181.
72 Doek 2006, p. 19.
73 Doek 2006, p. 13.
74 Khazova 2019, pp. 176-177, referring to CRC/C/ALB/CO/2–4 Albania 2012a.
75 GC No. 14, section c, paras 58 to 70.

> "The *quality of the relationships* and the need to retain them must be taken into consideration in decisions on the frequency and length of visits and other contact when a child is placed outside the family."[76]

Furthermore, the reference to 'direct' contact has been interpreted to include contact via means of electronic communication such as e-mailing, Skype, etc.[77]

One other important aspect to note is that the holder of the right to contact is the *child* and not the parents.[78] This is in contrast with earlier approaches where contact rights were attributed to the parents.[79] Discussions on the distinction between the child as the right holder of the right of contact/access as opposed to the parent had emerged already as of the late 1980s.[80] The significance of having the child at the forefront is that decisions concerning whether to permit access will be taken from the perspective of the child, rather than that of the parents.[81]

The right of the child to have contact with both parents as mentioned under Article 9(3) is directly linked to cases of parental voluntary separation (divorce) and derived from the text of this Article, authorities are to take positive steps to ensure contact between the child and both (separated) parents.[82] This right has equally been affirmed on the international arena already from 1989, through the Human Rights' Committee General Comment no 17.[83]

On the meaning of the terms *'regular'* contact, it was emphasised that absent indications to the contrary there is a presumption in favour of more rather than less contact between the child and the non-residential parent.[84]

Under Article 9, the exclusive basis on which separation between the child and his parents can be justified is the child's best interests.[85] The CRC Com-

76 GC No. 14, para. 65.
77 Tobin 2019, p. 333.
78 Tobin 2019, p. 330.
79 Tobin 2019, p. 330.
80 Kodilinye 1992, p. 41.
81 It should be noted that such an approach is far from a clear cut. For example in her article Kodilinye criticises as not in the best interests of the child approaches where courts granted natural fathers the right to contact their children on the basis of the blood time. See: Kodilinye 1992. This is to be contrasted with more recent views where courts (particularly in the countries of the Global North) are far more likely to permit such contact, motivated precisely on the basis of the best interest of the child (see for eg *Mandet v. France*, ECtHR 14 January 2016, appl. No. 30955/12, ECLI:CE:ECHR:2016:0114JUD003095512.; See also Ismaïli 2019, discussing the approach of Dutch Courts to contact.
82 Tobin 2019, p. 332.
83 ICCPR General Comment No. 17: Article 24 (Rights of the Child), 7 April 1989.
84 Tobin 2019, p. 334.
85 Pobjoy/Tobin 2019, p. 350.

mittee has considered that joint parental responsibility is generally in the best interests of the child; however it is important that domestic authorities retain discretion in deciding these cases on a case by case basis as any automatic allocation of parental responsibilities would defeat this purpose.[86]

Based on the discussions during the preparatory works of the CRC, it has been considered that it is Article 10 CRC which gives expression to the child's right to have contact with both parents in an international setting.[87]

Article 10 is divided into two paragraphs, with paragraph 1 covering the right to family reunification and paragraph 2 providing for similar rights to Article 9(3) but in an international setting.

Article 10(1) grants the child or to his parents the right to apply for family reunification and to have the application decided in a positive, humane and expeditious manner.[88] That means that either the parent has the right to *apply* to join the child or the other way around, the child has the right to *apply* to join the parent located in a different country.[89] Further, under Article 10(1) states are under the obligation to deal with applications for family reunification.[90] Compared to other international instruments, Article 10(1) affords the right to file an application for family reunification, thus any blanket prohibition on family reunification is contrary to Article 10(1) CRC.[91] It has been suggested that in principle, the rejection of applications for family reunification are only justifiable to the extent that reunification would be contrary to the best interests of the child.[92] In the same vein, pursuant to the Joint General Comment of the CRC Committee and the Committee on Migrant Workers, states have been urged to adopt measures for parents to reunify with their children and / or to regularise their status on the basis of their children's best interests.[93] Clearly, the aforementioned provisions focus on procedures rather than outcomes.[94] In other words, the right to family reunification is considered to be respected provided that either the child is entitled to apply to join the parent or the parent is entitled to apply to join the child. In their turn, authorities have to assess the merits of these applications.

Moreover, it has been pointed out that states are under an obligation to facilitate reunification between a child and his parents.[95] Where reunifica-

86 GC No. 14, para. 67.
87 Pobjoy/Tobin 2019, p. 345.
88 Pobjoy/Tobin 2019, p. 344.
89 Pobjoy/Tobin 2019, p. 350.
90 Pobjoy/Tobin 2019, p. 350.
91 Pobjoy/Tobin 2019, p. 351.
92 Abram 1995, p. 423.
93 Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, CRC/C/GC/22 – CMW/C/GC/3, 16 November 2017.
94 In this sense see also Pobjoy/Tobin 2019, p. 348.
95 Pobjoy/Tobin 2019, p. 351.

tion is refused, reasons for such refusal ought to be provided, including the possibilities to appeal[96].

Article 10(2) deals with the right of the child to maintain direct contact and personal relations with both parents, where the parents reside in different countries. As with Article 9(3), it has been submitted that under Article 10(2) states are obliged to take measures to promote contact between children and parents.[97]

Further, even if Article 10(2) provides in a similar way to Article 9(3) for the right of the child to maintain direct contact and personal relations with both parents, it has been considered that given the geographical distance between the child and the parent(s) in this case, 'direct' contact cannot be interpreted to mean physical contact, but only contact through means of communication.[98] As opposed to the child's right to maintain contact with both parents in a national setting, which can be restricted solely on account of the child's best interests, the same right in an international setting provides that restrictions of the right can only occur in exceptional circumstances. Such exceptional circumstances are slightly broader than the child's best interests, allowing for cases concerning the socio-economic context as well.[99]

Overall, more tensions are to be perceived in the way the child's right to have contact with both parents has been granted in this context. This is because, in situations with an international dimension, as stated already at the drafting stage, states wished to retain their right to control the entry and stay of aliens. It has been considered that Article 10 stops short of granting children the right to reunification, yet there is a push for states to deal with these applications in a positive, humane, and expeditious manner.[100]

One important aspect to note concerns the point in time which should be considered when distinguishing between Articles 9(3) CRC and 10(2) CRC. Commentators differentiate between these two paragraphs on the basis of the drafting works to the CRC, but there is no indication as to the timeline. Article 9(3) CRC proclaims the right of the child to have contact with both parents whereas Article 10(2) CRC affirms the same rights for the "child whose parents reside in different States". A textual analysis of these provisions indicates that Article 10(2) is only incident when the parents already reside in different countries whereas it is Article 9(3) who is applicable to children and parents, irrespective of their nationality and legal or illegal residence status who reside in one country at a given time. In other words, if there is a question about the expulsion of a parent and/or of a child from a particular state at a moment in time, the child's right to have contact with both parents should be analysed from the angle of Article 9(3) and not in light of Article 10(2) as at the time the parents do not reside in

96 Joint GC no. 4, para 36.
97 Whalen 2022, p. 141.
98 Whalen 2022, p. 141.
99 Pobjoy/Tobin 2019, p. 359.
100 Schmahl (Ed.) 2021, pp. 173-174.

different states, and it is only this latter situation which is envisaged under Article 10(2) CRC. If a situation concerns parents and children who already reside in different countries (and not because they have been forced to do so through state action, such as for example expulsion), the right to have contact with both parents should be analysed from the angle of Article 10(2). This is also supported by paragraph (1) of Article 10 of the Convention which covers the issue of family reunification. This distinction is important in practice as commentators, on the basis of the *travaux préparatoires* and the actual text of the provisions, do accept that the provisions of Article 9(3) CRC confer more extensive rights to children than those concerning Article 10(2) CRC. In any event, for the time being no authoritative interpretation, case law or other directions exist on the distinction between Articles 9(3) and 10(2). Such interpretation would be very much welcomed in light of the different impact on the lives of children that these provisions are having.

In absence of such guidance, a closer look at the Committee's Views given in the context of the OPIC procedure seems to indicate that not much distinction between the two provisions is currently being made. To date,[101] the Committee had only one occasion[102] to issue a View on the merits of a complaint that covered both Articles 9(3) and 10(2) of the CRC. *C.R. v. Paraguay*, concerned a cross-border situation where a father complained that Paraguay had breached Articles 3(1), 9(3) and 10(2) in respect of his daughter in that he had not been able to have contact with her over a prolonged period of time. He had obtained final domestic judgments against his former partner granting him the right to either see the daughter in person or have Skype contact with her; however the judgments remained largely unenforced and no coercive measures had been imposed against his former partner so as to remove the obstacles to contact.

The Committee analysed these complaints together under Articles 3(1), 9(3) and 10(2) of the CRC. Importantly, it did not distinguish between the scope of Articles 9 and 10. In its reasoning, the Committee read in positive and procedural obligations on the part of the state: (i) to take active measures to secure rapid enforcement of judgments and (ii) to proceed expeditiously. This View has been so far subject to one commentary which, while commending the position of the CRC Committee highlighted as problematic the use of terminology alluding to the non-scientific concept of 'parental alienation' and the failure by the Committee to ascertain the views of the child.[103]

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101 The cutoff date for the purposes of the present dissertation is 15 June 2024.

102 Two other complaints which covered the same issue were declared inadmissible by the Committee. *K.A.B. v. Germany*, Communication No. 35/2017, View of 11 July 2018 was discontinued; *L.H.L. and A.H.L. v. Spain,* communication No. 13/2017, View of 15 May 2019 was declared inadmissible as manifestly ill-founded as the assessment of the domestic decisions was not found to be clearly arbitrary or a denial of justice.

103 Yaksic, Case note 2018/2, Communication 30/2017 *N.R. v. Paraguay*, Right to maintain personal relations and direct contact with the father, available at <<https://www.childrensrightsobservatory.org>>.

By way of conclusion, it could be ascertained that the right of the child to have contact with both parents was a topic being discussed already before the drafting stage of the CRC in the context of emerging changes in some national custody laws from sole custody to joint custody which had occurred amid debates on the respective roles of mothers and fathers in raising and educating children. There is no dedicated General Comment on this right, but its importance is highlighted in the Committee's specific provisions to the right to maintain relationships with both parents in the General Comment concerning best interests. Also, in the one view rendered on the substance on the topic, the Committee stressed the importance of the rights and the consequent positive and procedural obligations on the part of the state. However, the relationship between the two paragraphs (3) and (2) respectively of Articles 9 and 10 remains ambiguous. The need for further clarification is necessary especially since these two paragraphs connect children with an immigration background to children who do not have such a background. Immigration is an important -potential- modifier of rights and the tensions that such considerations pose have been evident already from the drafting stage of the Convention.

## 3.4 The right of the child to be heard

As already touched upon elsewhere in this dissertation, the right of the child to be heard is generally considered to have brought the rights of children closer to the rights of adults by offering them something close to 'due process' which is an uncontested human right for adults.[104] The right to be heard was meant to counterbalance other rights in the Convention such as the best interests which historically was perceived as a vehicle meant to secure the protection of children. The ultimate insertion of Article 12 brought about more criticism to the CRC as a whole as it was generally feared that the voice of children could be used by the state against parents and families.[105]

Similarly to the other two rights discussed herein, this section will start by looking into the discussions carried out at the time of the *travaux préparatoires* of the CRC, followed by a focus on the relevance of the right to be heard to contemporary discussions.

### 3.4.1 The right to be heard during the drafting process of the CRC

Neither the first draft nor the commentaries to the initial Polish draft included provisions on the child's right to be heard. [106]Article 7 titled "The

104 Clooney/Webb 2021; Zhang 2009.
105 In this sense, see also Chapter 2 of this dissertation and the references therein.
106 Legislative History of the CRC 2007, Document E/CN.4/1324 and Corr 1 and Add.1-5.

child's right to express opinions" was introduced for the first time in the revised Polish draft in 1979 and it read as follows:

> "The States parties to the present Convention shall enable the child who is capable of forming his own views the right to express his opinion in matters concerning his own person, and, in particular, marriage, choice of occupation, medical treatment, education and recreation."[107]

Subsequently, the discussions on what was to become Article 12 were closely interlinked with the discussions on Article 3(2). In 1981, in the context of the negotiations on Article 3, the United States proposed the following text as paragraph 2 of this Article:

> "In all judicial and administrative proceedings affecting a child that has reached the age of reason, an opportunity for the views of the child to be heard as an independent party to the proceedings shall be provided, and those views shall be taken into consideration by the competent authorities."[108]

The United States then proposed a similar text, slightly amended in the context of discussions concerning Article 7.[109] The slightly revised text introduced the idea of a child capable of forming his own views instead of 'a child that has reached the age of reason'. Further, the possibility of hearing children directly or indirectly was also added.

The ensuing discussions focused in the first place on whether the text should be a subparagraph of Article 3 or an Article on its own. Also, the idea of a child as an independent party to the proceedings was discarded in favour of the more neutral language: "in a manner consistent with the procedures followed in the State Party for the application of its legislation."[110] Some of the proposals also indicated the areas where a child could express his opinions.[111] These areas were ultimately deleted as it was felt that it was not appropriate to limit such a right.[112] Proposals to include the word "effectively" as a means to ensure that the child could *effectively* express his opinion were equally deleted.[113] Other than these discussions which took place in 1981, no other significant developments occurred until the moment of the second reading of 1988-1989. The final text as it now stands resulted

107 Legislative History of the CRC 2007, Commission on Human Rights document E/CN.4/1349.
108 Legislative History of the CRC 2007, Commission on Human Rights E/CN.4/1475.
109 Legislative History of the CRC 2007 document HR / (XXXVII)/WG.1/WP.3.
110 Legislative History of the CRC 2007, para 30.
111 Legislative History of the CRC 2007, para 76 They included education, religion, marriage, choice of occupation.
112 Legislative History of the CRC 2007, para 78.
113 Legislative History of the CRC 2007, para 77.

mainly from a proposal of Finland made at the second reading on behalf of a drafting group.[114]

The discussions carried out during the drafting process are indicative of some of the tensions surrounding the conceptualization of the right. One such tension concerned the types of proceedings for which children should be heard. Initially, several proceedings such as 'marriage, choice of occupation, medical treatment, education and recreation' were expressly included.[115] While such limitation was ultimately deleted it is indicative of the concern States had on the potential breadth the right to be heard might have. Second, the manner of expressing the views was subject to concern. The proposals for a provision mandating independent child representation and the expression of views directly were ultimately removed in favour of a more neutral language giving priority to national laws and procedures. Finally, the interlink between the best interests concept and the right to be heard is evident as the right to be heard was originally seen as a guarantee for securing the best interests of the child.

### 3.4.2 Current relevance

The right to be heard is one of the four fundamental principles of the CRC.[116] It is also a provision which has been extensively discussed in academic literature, and which, it has been argued, plays an important role in ensuring that children are rights holders and not mere beneficiaries of protection.[117]

In 2009, the CRC Committee published the General Comment No. 12 on the right of the child to be heard (hereinafter "GC 12").[118] Here the Committee recognizes that Article 12 is a unique provision of the Convention situated at the juncture between autonomy and protection.[119] One important point that comes out is that no age limits should be imposed for children so as to allow them to participate in the proceedings.[120] This point had also been made earlier in General Comment No 7 dedicated to children's rights in early childhood when the Committee argued that the views and feelings of young children (under the age of 8 as per the aforementioned General Comment) are frequently overlooked and rejected as inappropriate on the

114 Legislative History of the CRC 2007, Document E/CN.4/1989/WG.1/WP.35.
115 Legislative History of the CRC 2007, Commission on Human Rights document E/CN.4/1349.
116 General Comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child, CRC/GC/2003/5 27 November 2003, para 12.
117 See among many other authorities: Freeman 1998; Parkes 2013; Daly 2018; Lundy 2007.
118 General Comment No. 12 (2009): The right of the child to be heard CRC/C/GC/12, 20 July 2009 (GC No. 12).
119 GC No. 12, para 1.
120 GC No. 12 para 21.

grounds of their age.[121] The Committee affirms that babies and infants are also able to express their opinion, albeit in a different manner.[122] More recently, the same point was made in the context of a communication procedure. In the case of *C.E. v. Belgium*, the CRC Committee found that Belgium infringed Article 12 CRC as it did not hear a 5 year old child.[123] The Committee stressed that Article 12 does not set an age limit for allowing children to express their views and that moreover, the low age or the vulnerability of the child (including his immigration status) should not be used as justifications for depriving children of their right to express their views.[124]

In its legal analysis of the right embedded in Article 12, the Committee underscored that states have no discretion in ensuring its full implementation.[125] In the same vein, Lundy has argued that Article 12 embodies positive obligations for states to take all the necessary measures to ensure that children have the opportunity to express their views.[126] The Committee further highlighted that the States' obligations under Article 12 are underpinned by two elements: the first one is to put in place mechanisms for obtaining the views of children and the second one is to ensure that these views are given due weight.

Furthermore, as per the GC 12, the reference in Article 12 to children capable of expressing their views should not be construed as a limitation but rather as a presumption in favour of capacity.[127] In other words it is for the state authorities to prove that a child is incapable of expressing his views and not the other way around, i.e. for the child to prove that he is capable. Commentators have noted that there is some confusion in practice between the *capacity* of children and their *maturity*.[128] It has been submitted that there is no correlation between children's capacity to express a view and their ability to form a mature view.[129] Thus, all children, mature or not, should be able to express their views with *maturity* playing a role only at the second stage of the analysis: that of giving such views 'due weight'.

One important point to be made is that the right of the child to be heard encompasses the possibility for children to refuse expressing their opinion, even if the matter is affecting them; in other words it is entirely up to the child if he or she chooses to express the views.[130] After a child is heard, the second step in complying with the obligation under Article 12 is to give the

121 GC No. 12 para 14.
122 GC No 7, para 16.
123 *C.E. v. Belgium*, Communication no. 12/2017, 24 October 2018.
124 *C.E. v. Belgium*, para 8.7.
125 GC No. 12 para 19.
126 Lundy 2007, p. 933-934.
127 GC No. 12, para 20.
128 Lundy 2007, p. 935; Daly 2018, p. 440.
129 Lundy 2007, p. 935.
130 GC No. 12, paras 16 and 22.

views "due weight in accordance with the age and maturity of the child."[131] Here again, the Committee stresses that "age alone cannot determine the significance of a child's views" and that the assessment should be made on a case by case basis. [132] Crucially, the Committee does not detail on how the maturity of a child should be assessed; this should be done by states on a case by case basis.

Giving the voice of children 'due weight' has been identified as one of the most problematic and complex parts of Article 12 CRC.[133] This is because due weight is on the one hand linked to the age and maturity of the child and also because it is dependent on the adults' perception of children's maturity.[134] Even if the Committee does not elaborate much on how authorities should give due weight to the voice of children, it highlights that children should be capable of influencing the outcome of cases which concern their rights.[135] This capacity of children to influence outcomes and the fact that authorities can shield away from giving children an actual right to be heard by using more paternalistic and entrenched approaches such as best interests is a key point of criticism for some commentators.[136] This point shall be further elaborated upon in the following section which discusses the balancing of the three core rights of children as identified in this chapter.

Further, the Committee expresses a preference for directly hearing children wherever possible.[137] Direct participation refers to situations where the child meets and communicates directly with the decision maker whereas indirect participation refers to situations where the child is expressing himself through a representative or appropriate body.[138] The GC 12 does not indicate that there is an obligation derived from Article 12 for children to benefit from independent representation by a lawyer or other professional, such as a guardian *ad litem.*[139] It does stress however that where there is a risk of a conflict of interests, "it is of utmost importance that the child's views are transmitted correctly to the decision maker".[140] More recently however, in the General Comment no 14 concerning the best interests of the child the need for separate representation for children in cases of conflicts of interests was made clearer. Here, States are urged to establish a procedure to allow the child to approach an authority to establish separate representation

131 GC No. 12, para 28.
132 GC No. 12, para 29.
133 Parks 2013, p 35, Alderson 2007, p. 2275; Daly 2020, p. 482.
134 Lundy 2007, p. 937.
135 GC No. 12, Para 44.
136 Eekelaar 1994, p. 48., Daly 2018, p. 385, Archard/Uniacke 2021, pp.534-535.
137 GC No. 12, para 35.
138 Parks 2013, pp. 37-38.
139 Similarly Freeman has highlighted the shortcomings of Article 12 on account of a lack of provision for separate representation for children. Freeman 2000, p. 288.
140 GC No. 12, para 36.

if necessary.[141] Also, it is recommended that codes of conduct are drafted for child representatives.[142] Further the practice of allowing children to choose between different forms of representation has been considered in line with Article 12 CRC.[143]

One further interesting aspect is the Committee's interpretation of the phrase "in a manner consistent with the procedural rules of national law" included at the end of the second paragraph of Article 12. Here the Committee specifies that such provision should not be interpreted as encouraging a limitation to the right to be heard but rather as an 'encouragement' for states to comply with the basic rules of fair proceedings, such as the right to defence and the right to access to one's own files.[144]

The Committee also outlines four important steps in appropriately discharging with states' obligations to hear children: (i) the preparation of the child before the hearing; (ii) the hearing of the child, including who hears the child and where, (iii) the follow up of the hearing and finally (iv) how the voice of the child is taken into account in the final judgement.[145] Lundy has used a different frame to express essentially the idea that giving children a true voice in proceedings that affect them requires a delicate balance between certain aspects which are interrelated.[146] Her position, similar to that of the Committee, is based on the fact that children are different from adults but that these differences should not result in ignoring their voices. For children to express themselves effectively it is important to create a safe space where children are not afraid of reprisals or rebuke.[147] Second, giving children a voice implies access to child friendly information and proceedings as well as time to understand the issues.[148] Third, adults should actually listen to children, a notion which is implicit in the idea of 'due weight', and which also recognizes that children do not always express themselves in the same way as adults do.[149] Last but not least, children should be capable of influencing the outcomes of the proceedings they are involved in.[150] It has been recognized that if implemented inadequately, the right of the child to be heard may have negative consequences for children.[151]

The Committee is arguing for child participation in all contexts, provided that child sensitive proceedings are in place.[152]

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141 GC no. 14, para 90.
142 Parks 2013, p. 38.
143 Mol 2019, p. 97.
144 GC No. 12, para 38.
145 GC No. 12, paras 41- 47.
146 Lundy 2007.
147 Lundy 2007, p. 934.
148 Bennett Woodhouse 2003, Lundy 2007, p 935.
149 Lundy 2007, p. 936.
150 Daly 2018, p. 385, plus Lundy 2007, p. 937
151 Parkes 2013, p. 33.
152 GC No. 12, paras 90-132.

To conclude, it can be observed that Article 12 CRC embodies a procedural right for children. The obligations of states under Article 12 are complex and the Committee has shown that children should not only be heard by such right needs to be effective. As a minimum, the Committee emphasises that all children should have the right to express their views. While preference is given for direct contact with the decision maker, indirect contact is also a viable alternative. Second, even if not initially set out, more recent General Comments highlight that children should have the right to independent representation in cases of conflict of interests. This is an important element, as cross border separation cases are by their very nature susceptible to conflicts of interests between parents and children. Third, giving the voice of children 'due weight', means that the more 'mature' a child is the more weight should the voice carry and that in any event children should be able to influence the outcomes in their particular cases. Here, there is an obvious link between Article 12 and Article 5 of the Convention.[153] There is no requirement for a child's opinion to be decisive, however it should have an impact on the decision. Fourth, children have the right to be heard in all decisions concerning them. At the same time, the right embodied under Article 12 CRC stops short of offering children independent standing in legal proceedings or entitling them to challenge decisions in courts of law.

## 3.5 The relationship between the child's best interests, the right to have contact with both parents and the right to be heard

The CRC offers a holistic vision of children's rights, meaning that the rights enshrined in the Convention are equally important, indivisible and interrelated.[154] Thus, even if the rights identified as 'core' for parental separation cases have been analysed separately, in practice considerations concerning all three of them may and will overlap and decision-makers, courts in particular, will have to analyse them together. The wording of Article 9 clearly illustrates this relationship as it mentions the three rights together. The first paragraph only allowed for the child's separation from parents if due process was followed and subject to a determination of the child's best interests. The second paragraph provides that all interested parties (thus the child as well) shall be given the right to participate in the proceedings and make their views known.

The Committee in its General Comments frequently refers to the interaction between the rights of the CRC. For example, in General Comment No. 12 the Committee identifies the best interests as a procedural right entailing that states introduce steps into the action process, and among these steps,

153 For a discussion on this link see also Chapter II, Section 2.3.2 of this dissertation.

154 CRC Committee, *General Guidelines for Periodic Reports*, UN Doc CRC/C/58, 20 November 1996, para 9.

states have the obligation to hear children.[155] It is further clarified that no tension exists between Articles 3 and 12, but rather that Article 3 provides the objective and Article 12 deals with the methodology. In short, the best interests of the child cannot be realised without giving their voice due weight. The same point has been reiterated more recently in General Comment No. 14.[156] There is also a link between Articles 3, 12 and 5 in that with maturity children's views should weigh heavier in the assessment of their best interests.[157] The Committee envisages thus that children should have the possibility to determine their best interests, and for this to be accomplished Article 12 plays a crucial role. It is here that most tensions have been perceived between Articles 12 and 3 as the latter has emerged as a paternalistic principle with adults determining what is best for children whereas the former embodies children's agency. On the face of it they are irreconcilable. Yet if it is accepted that children should be able to determine their own best interests, their voice carrying a bigger weight the more mature they become, then a more balanced approach between best interests and agency emerges. Nevertheless, it has been highlighted that considerations about best interests (seen from an adult perspective) tend to prevail over the voice of children.[158] Adults often substitute their own beliefs for those of children to the effect that especially in family cases children's voices are given 'due weight' in the sense of being able to influence outcomes only to the extent that they accord with the judges' / decision – makers perception about what is in the best interests of children.[159]

It remains to assess how the right to have contact with both parents fits in relation to best interests and right to be heard. Not much has been written about this right in and of its own, yet, Articles 9 and 18 in particular have arguably provided the justification for modern custody laws laying down the principles of joint parental responsibility of parents even after divorce or separation.[160] Furthermore, the text of Article 9 has been interpreted to mean that it is in the best interests of children to maintain personal relationships with both parents even after separation. This means that this right brings substance to the otherwise vague concept of best interests. At the same time, it could be perceived as an element of the best interests concept, and it has been indeed listed as one especially in family law jurisdictions using checklists for determining the best interests of a child in a particular dispute.[161] The relationship between Article 9(3) and 10(2) in particular has also not been explored in detail in literature in particular in so far as it concerns issues of immigration and residence. As it has been discussed

155 GC No. 12, para 70.
156 GC No. 14, para 43.
157 GC No. 14, para 44.
158 Daly 2018; Archard/Skivenes 2007.
159 Daly 2018; Archard/Skivenes 2007.
160 Mavrogordatos 1996, p. 10.
161 For example Section 1 Children's Act for the United Kingdom; Section 60 of Family Law Act 1975; For the US, Caulley 2018; Elrod 2016.

above, neither the *travaux préparatoires* to the CRC nor the recent case law of the CRC Committee support the interpretation that states are entitled under Article 10 to deport a parent, thus breaking up an existing relationship between a child and a parent. Article 10(2) seems to apply to situations where parents already live in different states. Nevertheless, to date there is no official interpretation on these provisions, and as has been shown above, immigration was one of the salient points during the drafting of the CRC.

## 3.6 Manifestations of the three rights in post-separation parenting disputes: the parental alienation syndrome

The best interests of the child, the right to have contact with both parents and the right to be heard have gained substantial importance in post parenting separation disputes across liberal democracies. Parental child abduction is also one such dispute, and these rights are important as well, albeit in a more limited fashion.[162] At the same time, discourses around children's rights have developed alongside wider debates in family law between feminist groups and groups representing father's rights movements. These tensions form the backdrop of many current-day family proceedings as well as parliamentary debates on changing legislation. The different positions are briefly discussed below, with the explicit disclaimer that the present dissertation focuses on the rights of the child, while also acknowledging the close link between the child and their parents.[163]

The BIC is now universally accepted as the guiding principle in post separation parenting disputes across the Global North.[164] Legislation in all European Union countries, Australia, Canada, New Zealand, United States and United Kingdom mandate that the best interests of the child shall guide decisions after parental separation. At the same time it is widely accepted that the best interests is one of the most amorphous legal concepts of all times.[165] As discussed in the preceding sections, its vagueness has prompted some commentators to disregard it as a valid legal standard.[166] Nevertheless, the BIC remains the key determinant around which parental separations are organised.

While the BIC has been enshrined in family law since the 1800s, the right to maintain contact with both parents has had a much shorter existence. Sociologists have shown that the introduction of no-fault divorce in the late 1970s resulted in a reconfiguration of the previously accepted legal position of the child in relation to their parents after separation.[167] The *logic*

162 See Chapter 4.
163 See also Chapter 4.
164 Daly 2018; Boele-Woelki 2008; Van Krieken 2005.
165 Smyth 2015, p. 71.
166 Mnookin/Maccoby 2002; Guggenheim 2005, supra Section 3.3.
167 Thery 1986; Van Krieken 2005.

*of substitution* which existed until that time, had focused on the mother as the centre of the child's emotional development assuming that both parents will re-partner and that children will gain a step parent to substitute for the departing parent. [168] It was subsequently replaced by the *logic of durability* which focused on continuing contact between the child and both parents even after their separation.[169] Divorce became a way of redefining relationships over a long period of time rather than ending them.[170] "The best interests standard was reconceptualised to include a 'right' to contact with both parents after separation, leading to arguments either for joint custody arrangements or some alternatives to the concept of custody itself."[171]

These transformations in family law resulted in an increased focus on the right of the child to maintain contact with both parents, manifested through presumptions in favour of contact, shared parenting laws or joint physical custody.[172]

Amid these legislative changes, the debates over child custody became increasingly gendered. Mothers' rights groups have argued that modern post separation parenting arrangements (including shared care provisions, alternative dispute resolution, presumptions for contact, etc) do not adequately take into consideration the realities of domestic violence and may result in harming children.[173] Their arguments focused on the vulnerability of victims of domestic violence,[174] the failure of the courts to take into account the harm inflicted on children by exposure to domestic violence or the harm on children of the rigid application of the presumption of contact.[175]

On the other hand, supporters of the fathers' rights movements have insisted on the positive impact of children to maintain a relationship with their fathers and the gatekeeping roles which mothers have played in denying this contact.[176] Fathers' rights groups focused on the benefit for children of the presumption of shared parenting and increased father involvement in the upbringing of children after divorce.[177]

In 1992 Gardner published a study introducing the term 'parental alienation syndrome' to distinguish between substantiated and unsubstantiated allegations of sexual abuse towards children in high conflict custody litigation.[178] He defined parental alienation syndrome (the "PAS") as:

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168 Thery 1986 has coined the two terms: logic of substitution and logic of continuity; Van Krieken 2005, p. 26
169 Thery 1986, Van Krieken 2005, p. 26.
170 Schepard 1999, p. 396.
171 Van Krieken, p. 34
172 DiFonzo 2014; Kaganas 2018; Treloar/Boyd 2014.
173 Scott/Emery 2014, p. 69.
174 Schuller and Vidmar 1992; Chesler 1991.
175 Bailey-Harris/Barron/Pearce 1999; Cohen/Gershbain 2001, p. 121.
176 Kruk 2010.
177 Pruett/Cowan/Cowan/Diamond 2012.
178 Gardner 1992.

"a disorder that arises primarily in the context of child-custody disputes. Its primary manifestation is the child's campaign of denigration against a good, loving parent, a campaign that has no justification. It results from the combination of a programming (brainwashing) parent's indoctrinations and the child's own contributions to the vilification of the target parent. When true parental abuse and/or neglect is present the child's animosity may be justified, and so the parental alienation syndrome diagnosis is not applicable."[179]

Gardner further qualified PAS as mild, moderate and severe and listed several symptomatic manifestations.[180] The use of PAS rapidly expanded beyond allegations of sexual abuse of children and it forms now an important consideration for courts and legislators across the world.[181] It is also being argued that the severe form of parental alienation, resulting in prolonged lack of contact between a child and the target parent amounts to emotional child abuse.[182] In this view, parental alienation represents a significant form of harm to the child's well-being and the abuser is the alienating parent.[183] Contrary to Gardner's original proposal, it has also been suggested that the only reason a child may refuse contact with a parent is because of alienation as otherwise "it is counter-instinctual for a child to reject a parent, even an abusive parent."[184]

The scientific value of PAS continues to be contested and there is a wealth of literature from various disciplines engaging with its usage in family courts.[185] The WHO International Classification of Diseases clarifies that there are no evidence-based health care interventions for parental alienation.[186] It is beyond the scope of this dissertation to undertake a detailed exploration of contemporary usages of PAS. It is however important to note that it is now widely understood that PAS applies to questions of contact and judges are inclined to consider whether the refusal of a child of contact

179 Gardner 2002, p. 192.

180 According to Gardner these manifestations are 1. A campaign of denigration 2. Weak, absurd, or frivolous rationalisations for the deprecation 3. Lack of ambivalence 4. The "independent-thinker" phenomenon 5. Reflexive support of the alienating parent in the parental conflict 6. Absence of guilt over cruelty to and/or exploitation of the alienated parent 7. The presence of borrowed scenarios 8. Spread of the animosity to the friends and/or extended family of the alienated parent. See Gardner 2002, p. 193.

181 Johnston and Sullivan 2020; Rathus 2020.

182 Kruk 2018.

183 Kruk 2018, p. 145.

184 Kruk 2018, p. 144, he also refers to research in the child protection field, Gottlieb, L. J. 2012.

185 For example the Center for Knowledge Management at Vanderbilt University hosts a database with more than more than 1,000 books, book chapters, and articles published in mental health or legal (see https://ckm.vumc.org/pasg/), last accessed on 18 October 2023. On the other hand in their study, Saini and others cite 45 research papers and 13 doctoral dissertations on the topic Saini, Johnston/Fidler/Bala 2016.

186 The Index uses the term 'parental estrangement', see << https://www.who.int/standards/classifications/frequently-asked-questions/parental-alienation>>.

with a parent is genuine or whether it is due to PAS. Johnston and Sullivan indicate that courts tend to identify a binary problem: a situation is either abuse or it is PAS.[187] In their view the question is more complex and courts generally fail to identify whether a child's refusal of contact with a parent is the result of other factors such as inadequate parenting, an over-anxious protective parent or ill-fitted access schedule.[188] They also caution against assuming a singular motivation and towards an identification of whether the allegations are rooted in actual events or trauma and abuse and the extent to which a parent's motivation -even if misguided- is motivated by an attempt to cope and protect the child rather than to spite the other parent.[189]

From the perspective of children's rights, it has been proposed that, while contact with both parents is indeed important for children, an excessive focus on contact which negates children's agency is contrary to their rights.[190] Based on her research in 11 liberal democracies, Daly identified that children have little influence in decisions concerning their interests and that there is no methodology for ascribing due weight to children's views.[191] She also found that even when children are heard, their voice is hardly ever capable of influencing the outcome of the proceedings; her findings indicate that this usually only happens when there is a convergence between the child's voice and the outcome to which a judge agrees.[192] The failure of courts to give children's voices due weight in proceedings has been echoed in other research focused on child participation.[193] It has also been highlighted that among professionals working with children in disputed contact cases there is a very real concern that children have been coached by the resident parent to refuse contact with the non-resident parent or that hearing children places excessive responsibilities on their shoulders.[194] From the perspective of children's rights this also brings to the fore the careful balance which must be drawn between protection and participation as an overemphasis on protection of children results in a corresponding devaluation of children's participatory rights.

Daly has proposed that children's wishes are prioritised in best interests proceedings (which include parental separation proceedings) and she has used arguments on the basis of children's autonomy in support of this claim.[195] In her view, children's wishes should be capable of influencing the

187 Johnston/Sullivan 2020, p. 275.
188 Johnston/Sullivan 2020, p. 272.
189 Johnston/Sullivan 2020, p. 272.
190 Daly 2018.
191 Daly 2017.
192 Daly 2018, p. 63.
193 Taylor 2012, Birnbaum/Bala/Boyd 2016; Holt 2018.
194 Tisdall/Morrison/Warburton 2021, p.18; Höjer/Röbäck 2009; Rap/Smets 2021 note that in high conflict cases professionals' worries about the child's safety take over the involving children in the decision-making process, Rap/Smets 2021, p. 57.
195 Daly 2018, p. 86.

outcome of the proceedings provided that no significant harm to the child arises from following their wishes. Daly's proposal is that children should also choose if they wish how they are involved in the proceedings.[196] This proposal stems from her criticism to domestic courts' current processes whereby, she argues, children are exposed to higher standards of rationality than adults and where not much reasoning is usually provided by decision makers as to why the child's voice had not been considered or how it had been accorded due weight in a specific best interests determination.

Finally, from the perspective of children's rights it is important to note that the CRC Committee has not expressed any position on the PAS or on the issue of undue influence of one parent in relation to the right of the child to maintain relations with the other parent. The CRC Committee has however considered that joint parental responsibilities is in the best interests of children and has ruled that states have a positive obligation to enforce contact with children.[197] However, at the same time, when looking at the right of the child to be heard, both the CRC Committee and scholars have proposed that giving due weight implies the acceptance that children's voices must have some impact on the outcome of proceedings. As shown above, the CRC Committee has been criticised for its vagueness on the application of the due weight criterion. Nevertheless, the Committee appears to accept that the child's voice should be an important if not the most important factor in assessing the child's best interests. From a children's rights perspective thus the child's voice should guide the assessment of the contact with both parents, rather than the opposite. The nuances of weighing children's voices have been assessed in the relevant section.

## 3.7 Conclusions

Cases involving parental separation entail changes in how the relationship between the child and each of the parents unfolds. If parents do not share the same household, decisions on where the child will live and how they will spend time with both parents are inevitable. Each case of this nature, be it national or with cross-border elements, involves as a minimum the assessment of three rights: the best interests of the child, the right to have contact with both parents and the right of the child to be heard. For this reason, this dissertation identifies these three rights as 'core rights of the child'. This chapter analysed these three rights primarily from the perspective of the CRC. Sections 3.2, 3.3 and 3.4 analysed the three rights starting with the *travaux préparatoires* of the CRC and then focusing on CRC based interpretations. The *travaux préparatoires* revealed that there was not much disagreement on the inclusion of any of these rights in the Convention. This is hardly surprising especially since, as shown in the historical overview, all

196 Daly 2018, p. 83.
197 G.C. no. 14, para 67. See also Section 3.3.2 above.

three core rights were known to national jurisdictions well before the drafting of the Convention. When disagreements arose, they revolved around immigration issues. States showed clear reluctance to having an international instrument encroaching on their power to regulate immigration. Further, disagreements arose in relation to the right to be heard. This is because it was believed that children would receive an independent litigation position via Article 12. Put differently, states agreed whenever they saw the Convention as a mere extension of existing concepts of national family laws. They disagreed whenever the rights of children and their families arguably extended to new areas. These new areas changed children's position from passive recipients of protection to active agents in their own name. These tensions are yet a new exposition of a recurrent theme: children's rights are largely agreed upon if the core element is *protection* and significantly less so when protection should give way to *agency*, or when protection means changing existing approaches (as in the case of migration).

Further, the analysis of the current interpretation of these three rights focused on the existing CRC Committee General Comments and academic commentaries around these General Comments. The choice was explicit as scholarly works on each of the three rights is abundant and it would be largely impossible to cover the material within a single study. Second, the aim was to ascertain what the CRC has changed or is aiming to change regarding these specific rights. For each of the three rights it could be concluded that the CRC as interpreted by the CRC Committee encourages individual decision-making in a way that is suitable for children. The best interests of the child and the right of the child to have contact with both parents are two interrelated principles, in that it is generally agreed that it is in the best interests of the child to have contact with both parents. Further, the CRC Committee so far did not distinguish between national situations and situations with cross border elements. This dissertation thus posits that the right to have contact with both parents can be seen as an element adding substance to the otherwise vague best interests principle. Further, as has been shown in Section 3.3.2 it is generally through reasoning and procedures that the best interests could gain significance and depart from being a paternalistic principle to becoming a true right of the child. In the specific context of judgments, judges are encouraged to articulate the considerations which led them to find that a particular course of action is or is not in the best interests of the child. The right to be heard acts as a balancing factor, meaning that the Committee encourages the decision makers to attach more weight to the views of children (in light of their evolving capacities) and explain why the voices of children have not been taken into account, should that have been the case. This would result in children increasingly being able to influence outcomes in cases concerning them. It can hardly be argued that the child's best interests were upheld if the child was not heard in a particular matter. In General Comment no 12, the CRC Committee proposes that children of all ages are heard. The more mature the child,

the heavier their voice should weigh. There is a clear link between the right to be heard and the procedural side of the best interests principle. A child rights-based approach obliges judges to explain *how* the voice of children has been given due weight in particular cases. Children should be able to influence judicial outcomes in cases concerning them.

The discussion concerning children and their (alleged) impossibility to influence the outcome of proceedings has been briefly contextualised in Section 3.6 with reference to contemporary debates between different interest groups. These discussions, and underpinning policy considerations form the backdrop of contemporary family proceedings, and they inform policy making, legislation and judicial decision-making. From the perspective of post-separation parenting, it is important to acknowledge the influence of parental alienation syndrome. It is equally important to distinguish it from a child rights-based approach.

To sum up, it could be seen that the best interests of the child, the right to have contact with both parents and the right to be heard were well-known principles in family law procedures across liberal democracies well before the drafting of the CRC. Their inclusion in the Convention was not so problematic from the perspective of family law, but states were significantly less ready to agree to apply them to immigration proceedings or to give children's voices an independent status in litigation. Through its General Comments and more recently through the views expressed in the context of the communication procedure, the CRC Committee is encouraging states to move further towards a child rights-based approach. In the context of individual decision-making this means that judges should explain what they mean when they argue that a particular decision is in the best interests of the child. That equals to giving substance to the concept. Further, neither the Convention nor the CRC Committee appear to distinguish between the right of the child to have contact with both parents depending on their immigration status. Last, the right to be heard is increasingly being interpreted as mandating that children are being granted independent representation in proceedings if there is a conflict of interests between the parties and that children should have the capacity -in certain conditions- to influence cases concerning them. All these factors should contribute to bringing about childrights-oriented judgments.

# Part II
# The Child Abduction Framework

# 4 Parental Child Abduction and Children's Rights

## 4.1 Introduction

The aim of this chapter is to identify if and how a child rights-based approach can be incorporated into the Child Abduction Convention. For this, it is necessary to briefly outline the private international law context within which this instrument operates.

The international family law landscape is framed by several conventions drafted under the auspices of the Hague Conference, an intergovernmental organisation whose aim is the unification of private international law.[1] The Hague Conference has been involved in drafting conventions concerning children and private international law already as of the beginning of the twentieth century.[2] Currently, three conventions are of particular importance for the rights of children in the aftermath of their parents'[3] separation. These are: the 1980 Child Abduction Convention, the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (the "1996 (Child Protection) Convention") and the Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance (the "Maintenance Convention").

Of them, the one which has assumed the greatest importance is the Child Abduction Convention. Several factors attest to its prominence in the cross-border family context. First, it is the most ratified Convention. To date 103

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1 Article 1 of the Statute of the Hague Conference adopted during the Seventh Session of the Hague Conference on Private International Law on 31 October 1951 and entered into force on 15 July 1955. Amendments were adopted during the Twentieth Session on 30 June 2005 (Final Act, C), approved by Members on 30 September 2006 and entered into force on 1 January 2007.

2 The first Convention drafted was the Convention related to the settlement of Guardianship of Minors adopted on 12 June 1902 (the "1902 Guardianship Convention") during the fourth Hague Conference. Subsequently, under the influence of a ruling of the International Court of Justice exhibiting the limitations of the Guardianship Convention, The Hague Conference drafted in 1960 the Convention concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Minors, first signed on 5 October 1961 (the "1961 Child Protection Convention"). For details on these instruments and the relevance of children's rights see Dyer 1996, p. 625.

3 In this dissertation the term 'parent' is used broadly to encompass all individuals with parental responsibility in relation to a child.

countries are parties to the Child Abduction Convention as opposed to 54 the Child Protection Convention and 49 parties to the Maintenance Convention. Further, it is widely regarded as the most successful instrument of the Hague Conference.[4] It is also the first Convention (of the three) which saw the light of day. This means that the subsequent instruments build upon the Child Abduction Convention, which has set the parameters for dealing with cross-border cases. For example, the Child Protection Convention uses the same concepts of custody and access rights as well as that of 'wrongful removal' as set out in the Child Abduction Convention. Further, it is the international instrument that has been the most thoroughly scrutinised by the world's highest courts.[5] Despite its prominence in literature, it should be noted that child abduction cases worldwide are not that frequent. For example, the latest statistical analysis published in 2023 analysed 2,579 incoming applications from 71 states.[6] However, the importance of the Child Abduction Convention does not lie solely in the number of child abduction applications given that not all child abduction cases follow the procedure under the Convention. Also, the mechanism of the Convention forms the backbone of international family law laying down the principle that whenever parental responsibilities are joint, children should remain in the jurisdiction of habitual residence. Thus, laws and practices of many states have been directly or indirectly influenced by the Convention: child abduction has been criminalised in many countries since the adoption of the Convention; the Hague Conference has contributed to increased harmonisation between countries by publishing Guides to Good Practice and by filing *amicus* briefs before the highest domestic courts. States have also used their diplomatic influence to deter other countries from enacting or implementing legislation which was perceived as going beyond the scope of the Convention.[7] Consequently, the (interpretation of) Child Abduction Convention has important implications for other areas of law, including but not limited to family law, criminal law, and as shall be argued in this dissertation, immigration law.

This chapter contributes to the first sub-research question. The analysis here will determine how the child rights-based framework contoured in the previous two chapters can inform child abduction cases. Section 4.2 delves into the conceptualization of the triangle parents-children-state during the *travaux préparatoires*; Section 4.3 explains the operation of the Convention against some key contemporary debates. Section. 4.4 looks at the Child Abduction Convention together with the 1996 Child Protection Convention. Finally, Section 4.5 offers a reflection on the role of children's rights within the Child Abduction Convention.

4 Elrod 2023, p. 48.
5 George 2014, p. 311.
6 Global Report 2023, Preliminary Document No. 19A, para 12.
7 Yamaguchi/Lindhorst 2016, p. 8.

## 4.2 Children parents and the state at the drafting stage

The drafting of the Child Abduction Convention followed the working methods of the Hague Conference. The issue of 'legal kidnapping' had been brought to the attention of the Conference from the early 1970s, however it was only six years later, in 1976, that it was added to the agenda of a Special Commission at the suggestion of a Canadian expert, Bradbrooke Smith.[8] During the meeting of October 1976, it appeared that there was a sharp increase in child abductions in all the Hague Conference Member States.[9] This increase was caused by the ease of international transport, the international marriages and the recognition of divorce.[10]

Adair Dyer published a sociological report in 1978 on the legal and social aspects of the phenomenon.[11] This report revealed, among others, that there were difficulties in locating the children; international disputes were complicated and difficult to resolve; local and foreign authorities were often unable or unwilling to provide assistance; characterising and labelling the issue was a challenge for the courts.[12] Moreover, the taking parent often sought to secure a favourable custody decision in the country where the child was abducted, which led to two conflicting custody orders in respect of the same child.[13]

The inclusion of the topic on the agenda of the Hague Conference received substantial support from States Parties, yet disagreements arose concerning the format of a future instrument.[14] Negotiations also showed differences on the approach to be taken to the best interests of the child. One of the issues was the inappropriateness of a semi-automatic return of a child to states with a different level of social and legal development.[15] The conditions for the return of the child equally raised tensions.

Ultimately, the Convention is the result of a compromise formula that diverges from traditional private international law mechanisms.[16] The success of the proposal was that it presented a simple mechanism that avoided pronouncements on custody but rather used the premise that it was against the best interests of children to be subject to unilateral removals.[17] So as to achieve consensus, the states' objections over the best interests of the child had been included in a series of exceptions permitting some assessment of the rights of children.[18] One area of concern at the time of drafting was in

8 Beaumont/McEleavy 1999, p. 17.
9 Ruitenberg 2015, p. 25.
10 Ruitenberg 2015, p. 25.
11 Schuz 2014, p. 8.
12 Schuz 2014, p. 8.
13 Stewart 1997, pp. 320-321.
14 The three avenues considered where whether (i) the envisaged instrument was to follow classical private international law rules on recognition or enforcement, (ii) to limit jurisdiction to a single state or (iii) to focus on international cooperation, see Schuz 2014, p. 9
15 Beaumont/McEleavy 1999, p. 19, referring to Anton 1981.
16 Beaumont/McEleavy 1999, p. 21.
17 Beaumont/McEleavy 1999, p. 21.
18 Beaumont/McEleavy 1999, p. 22.

relation to the automatic return of children with some states being fearful of a wide interpretation of the Convention and some others that the Convention did not allow for a sufficient weight for the best interests of the child.[19]

Ruitenberg comments that at the time there was a growing recognition in many states that the child had the right to contact with both parents.[20] However, as there was also a clear distinction between custody and contact, it was thus considered that frustrations in the exercise of contact rights could result in the abduction of the child by the contact parent from the parent having custody.[21] These assumptions also demonstrate in Ruitenberg's views the underlying rationale of the Convention was the protection of custody rights rather than the best interests of the child.[22] Regardless of whether the aim was the protection of the best interests of the child or those of the parent exercising custody, commentators agree that the Convention had a clear factual scenario in mind: that of a parent without custody who takes the child abroad from the parent with custody.[23] For the drafter the parent with custody was also the primary carer or the child, whereas the taking parent was the parent having contact rights. The drafters did consider that parents may have joint custody, yet this possibility did not receive much attention as joint custody was not the norm at the time.[24]

The Convention in its current form was adopted by the 14th Session of the Hague Conference in 1980.[25] Under Article 37, the Convention was open for signature and ratification by the States Members to the Hague Conference at the time of its 14th Session. In addition, Article 38 allows any other country to accede to the Convention; however legal effects shall exist only as regards the relations between the acceding State and the Contracting States which have declared their acceptance of the accession.

## 4.3 The operation of the Child Abduction Convention

### 4.3.1 Policy goals (object and purpose of the Convention)

Article 1 of the Convention sets out its two goals: to secure the prompt return of wrongfully removed children and to ensure the effective exercise of custody rights. The Convention assumes that the abductor is the parent without custody rights who is taking a child away to obtain a favourable custody decision in another jurisdiction.[26] At the same time, the Explana-

19 Schuz 2014, p. 9.
20 Ruitenberg 2015, p. 30.
21 Ruitenberg 2015, p. 30.
22 Ruitenberg 2015, p. 43.
23 Schuz 2014, Beaumont/McEleavy 1999, Freeman/Taylor 2020, p. 155.
24 Pérez-Vera, E. (1982). Explanatory report on the 1980 Hague child abduction convention. *Netherlands: HCCH Publications*, para 84.
25 Schuz 2014, p. 9.
26 Pérez-Vera Explanatory Report (1982), para 13.

tory Report conveys an image of the child as somebody strongly integrated and suddenly uprooted from their "family and social environment in which its life has developed"[27] Situations falling outside this premise, -when the removal of the child could be justified for objective reasons- , are dealt with by the exceptions to the prompt return mechanism.[28]

Other than in the Preamble, the Convention does not include references to the best interests of the child. Nevertheless, the Explanatory Report, -while recognising the difficulties associated with the best interests standard-, clarifies that the Convention had been drafted in the desire to protect children.[29] In the Explanatory Report the best interests of the child are equated to the right of the child not to be removed or retained from their habitual residence.[30]

Academic literature later delved into clarifying the notion of the best interests of the child in the context of child abduction proceedings. It has been considered that the Convention furthers the best interests of all children affected by international child abductions *collectively* without individualised best interests inquiries.[31] Beaumont and McEleavy pointed out that the novelty lies especially in the fact that 'the welfare of the individual child is not the first and paramount consideration'.[32] The Convention serves the child's interests by bringing clarity to the proceeding and also by applying a single interpretation to this concept.[33] The Child Abduction Convention thus allows only for limited consideration of the rights of individual children. The main reason is the concern that individual assessments of the best interests may lead to the inoperability of the return system all together.[34] The return mechanism under the Child Abduction Convention prioritises trust in the legal system of the country where the child is to be sent to.[35] The logic of the Convention is that the authorities of the country of habitual residence will decide the custody proceedings fairly.[36] On this basis, some courts and commentators have argued that return should be ordered even if it is against the interests of an individual child.[37]

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27 Pérez-Vera Explanatory Report (1982), para 11.
28 Pérez-Vera Explanatory Report (1982), para 25.
29 Pérez-Vera Explanatory Report (1982), para 24.
30 Pérez-Vera Explanatory Report (1982), para 24.
31 Vivatvaraphol 2008, p. 3335.
32 Beaumont/McEleavy 1999, pp. 28-29.
33 Beaumont/McEleavy 1999, pp. 28-29.
34 Pérez-Vera Explanatory Report (1982), para 34; Silberman 2004, p. 1051.
35 This view was also expressed in the Pérez-Vera Explanatory Report (1982) paras 35-37 where Pérez-Vera has argued that the nature of the Convention is one of cooperation among authorities.
36 This logic can also be seen in the text of Article 38 according to which accession of a country to the Convention has to be accepted by another country so that the Convention becomes operable.
37 See Secretary for Justice (New Zealand Central Authority) v. HJ [2006] NZSC 97, [2007] 2 NZRL 289; referred to in Heneghan et al 2023, p. 2.

The scholarly discussions outlined above are illustrative of the dilemmas between substantive human rights and comity considerations which are prevalent in the Child Abduction Convention. The solutions offered ranged from equating the best interests of the child to the right not to be removed, to focusing on the fairness of the proceedings in the country of return or to presenting the interests of the children as a collective, outweighing the interests of individual children. The sections below look into how legislative and sociological developments across States Parties to the Hague Conventions have amplified some of the tensions to children's rights posed by the Convention's policy goals.

### 4.3.2 The return mechanism

The success of the Abduction Convention lies in its simplicity: it does not deal with the substance of custody rights; instead, under the Convention, whenever a child has been wrongfully removed/retained from their country of habitual residence, the courts where the child is located should order their speedy return to the country of habitual residence. The remedy offered is the return of the child to their country of habitual residence, which is the most appropriate forum for deciding questions of custody and access.

The Convention rests on some key concepts which have a (semi) autonomous meaning. First, for the purposes of the Convention, a *wrongful removal/retention* under Article 3 exists if (i) it is in breach of custody rights attributed to a person, an institution, or another body under the law of the state in which the child was habitually resident at the time of the removal or retention provided that (ii) such custody rights were actually exercised, or would have been exercised save for the removal or retention. A wrongful removal/retention is assessed by reference to the laws of the child's habitual residence, which is in principle the place where the child should return, unless the parent filing the return request has subsequently moved.[38] *Habitual residence* becomes the jurisdictional trigger under the Convention where the return should be ordered within 6 weeks of filing an application (Article 11).

38 The obligation to return the child to the place of habitual residence is only mentioned in the Preamble to the HC '[…] desiring to […] establish procedures to ensure their prompt return to the State of their habitual residence'. However, in practice there might be situations where, even if there is an obligation to return, such obligation does not apply to the state of habitual residence but to the state where the (one) of the custodians lives. This situation would arise where, subsequent to the wrongful removal the custodian has moved to a different place, therefore it would make little sense to order the return of a child to a place where none of its custodians lives. This interpretation is supported by the provisions of Article 12 as well as by the Pérez-Vera Explanatory Report 1980, para 110 which reads " […] when the applicant no longer lives in what was the State of the child's habitual residence prior to its removal, the return of the child to that State might cause practical problems which would be difficult to resolve. The Convention's silence on this matter must therefore be understood as allowing the authorities of the State of refuge to return the child directly to the applicant, regardless of the latter's present place of residence."

There are five limited situations where authorities in the host state may refrain from ordering a return. These are prescribed under Article 12 (the settlement exception); Article 13 (a) (non-exercise of custody; consent or acquiescence by the left-behind parent); Article 13 (b) (return would expose the child to a grave risk of harm), Article 13 (2) (objection of the child to return); and Article 20 (return would be contrary to fundamental principles). Moreover, under Article 4 only children under 16 years old fall under the personal scope of the Convention.

The smooth operation of the Convention is to be ensured through Central Authorities -administrative bodies designated by each Contracting State which cooperate with each other to achieve the return of the child (Articles 6 and 7 of the Convention). If Central Authorities do not achieve the voluntary return, judicial and administrative proceedings are initiated to this effect. The role of Central Authorities in facilitating the initiation of judicial proceedings depends on each state, the Convention allows for the possibility of, for example, the Central Authority acting as a representative of the left-behind parent in the proceedings (Article 7 (g) of the Convention).

In essence, courts should order the return of the child if (i) (s)he was habitually resident in the requesting state at the date of wrongful removal/retention and if (ii) there was a breach of custody rights, provided that (iii) no exceptions to return are applicable. These three steps shall be analysed in turn below.

#### *4.3.2.1 Habitual residence*

Habitual residence is a key connecting factor for the Child Abduction Convention as it determines the country with jurisdiction for the merits of the parenting dispute(s). Conversely, if a child is found to not be habitually resident in the requesting state, the remedy of return does not apply. Indeed, in 2015, 25% of applications were dismissed on this ground.[39]

Habitual residence is a question of fact, and as such it was not defined in the Convention. The lack of a definition was considered as a key strength of the concept, which entailed a more flexible manner of responding to the demands of modern society.[40] Nevertheless, the key importance of habitual residence as a jurisdictional trigger resulted in scholars and courts alike endeavouring to outline key relevant factors for judicial decision-making. In the past 20 years, three main approaches have been crystalised: (i) the *parental intention approach*, (ii) the *child-centred approach* and (iii) the *hybrid*

39 Lowe and Stephens, Prel. Doc. No 11 A of September 2017 – Part I — A statistical analysis of applications made in 2015 under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* — Global report, (Lowe and Stephens 2017) available at <https://assets.hcch.net/docs/d0b285f1-5f59-41a6-ad83-8b5cf7a784ce.pdf>>, 25 April 2023, p. 16.

40 Beaumont/McEleavy 1999, p. 89.

*approach*.[41] Under the *parental intention approach*, the parents' intention dominates the habitual residence meaning that time-limited travel to which the parents agree does not change the child's habitual residence. Courts following this approach have held that children's habitual residence had not changed if their parents agreed to move to another country for a limited period of time (which may be of several years).[42] Under this view the duration of the move or the child's integration in the new country are of little relevance as the parents' intention was not to move permanently.[43]

The *child-centred approach* "determines the habitual residence by looking at the child's acclimatisation in a given country rendering the intentions of the parents largely irrelevant."[44] This approach does not take into account parental intentions.[45]

Finally, under the *hybrid approach* the judge must consider all relevant factors in order to "determin[e] the focal point of the child's life — 'the family and social environment in which its life has developed' — immediately prior to the removal or retention".[46] It appears that the hybrid approach is now the favoured one across many jurisdictions. For example, with reference to the parental intent approach, in its amicus brief to the US Supreme Court, Reunite has identified a departure of the UK Supreme Court (UKSC) from the parental intent focus towards a more holistic analysis where parental intent is but one factor within a broader factual enquiry.[47] In Europe the catalyser for the change in approach has been the CJEU which has laid down a set of criteria for defining habitual residence. For the CJEU habitual residence "corresponds to the place which reflects some degree of integration by the child in a social and family environment."[48] So as to assess the degree of integration, courts are to look at several aspects, including the conditions and reasons for the child's stay, the child's nationality, the age of the child, parental intentions, stability of the child and the family.[49]

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41 *Office of the Children's Lawyer v. Balev*, 2018 SCC 16, [2018] 1 S.C.R. 398, para 109, see also Brief of Amicus Curiae Reunite International Child Abduction Centre in support of neither party (on Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit) (August 21, 2019), see also Schuz 2001, p.7 for a different classification at the time into (i) the *dependency model* where the child's habitual residence followed the residence of the parent with whom (s) he lives; (ii) the *parental rights(or parental intentions) model* under which the habitual residence of the child is that of the parent who has the right to decide where the child lives and (iii) child-centred model, under which the child is seen as an individual and the courts' primary focus when assessing the habitual residence is on his integration in a particular country.

42 Mozes v. Mozes 239 F 3rd 1067 (9th Circuit 2001).

43 For example Mozes v. Mozes 239 F 3rd 1067 (9th Circuit 2001) where the court suggested that evidence of a child's acclimatisation could be taken into account only exceptionally.

44 *Balev*, para 41

45 *Balev*, para 41; Friedrich v. Freidrich, 983 F.2d 1396, 1401 (6th Cir. 1993) where it was held that "the court must focus on the child, not the parents, and examine past experience, not future intentions."

46 *Balev,* para 42, 43.

47 Reunite Amicus Brief 2019, p. 18.

48 CJEU, 2 April 2009, C-523/07, 2009 I-02805 (*A.*), para 44.

49 CJEU, 22 December 2010, C-497/10 PPU, ECLI:EU:C:2010:829 (*Mercredi v. Chaffe*), paras 51-56, for a more elaborate discussion on the contribution of the CJEU to the concept of habitual residence see Chapter 6 below.

The hybrid approach has also been adopted in Canada following the Supreme Court judgement in *Balev.* Among the reasons for changing its case law the Canadian Supreme Court referred to the need of harmonisation with the practices of courts in other countries, including the European Union, some states in the United States, Australia and New Zealand.[50] It should be also noted that this approach gives courts the maximum flexibility in deciding matters concerning children as they do not need to follow set presumptions, allowing them to consider all the relevant factors.[51] This may entail that parental intentions weigh heavier in some circumstances (especially for young children), or become less relevant in others.

The hybrid approach is emerging as the accepted standard for determining habitual residence; it is thus important to outline some of its implications for children.[52] First, as its name suggests, compared to the parental intentions view, there is more room for taking into account the rights of children. Courts are encouraged to look at the children's actual integration into a particular environment, by assessing whether they attend school, or other educational institutions.[53] In addition, the integration of the child is seen as a separate matter to that of a parent, which allows for a distinct analysis of the child's position.[54] Such separate analysis has in practice resulted in courts finding that children's habitual residence has changed following a unilateral relocation. Such a finding would not have been possible under the parental intentions approach. This was the case in *Balev* where the mother moved from Germany to Canada pursuant to an agreement with the father that they would take up residence for 16 months only.[55] The same happened in *M*, where the parents agreed that the mother would take the children to the UK for a period of 12 months.[56]

Another significant aspect of the hybrid approach is that it leaves more room for children's own perceptions to play a role in determining habitual residence.[57] In the case of *Re LC (Children)*, Lord Wilson writing for the majority agreed that adolescent children's perceptions about their habitual residence should be considered by courts.[58] That case concerned the strong objection of three children, aged 13, 11 and 9 at the date of the relevant proceedings to their return to Spain on the ground that during the year

50 *Balev*, para 49.
51 *Balev*, para 65.
52 Schuz 2023, p. 3 noting subtle differences between countries in formulating the hybrid approach.
53 Eg, A v. A [2013] UKSC 60.
54 For example M (Children) (Habitual Residence: 1980 Hague Child Abduction Convention), [2020] EWCA Civ 1105 paras 73 and 74; also [2020] HCKA 317, para 2.
55 *Balev,* para 2.
56 M (Children) (Habitual Residence: 1980 Hague Child Abduction Convention), [2020] EWCA Civ 1105 paras 4 and 5.
57 George 2014.
58 LC (Children) [2014] UKSC 1.

they spent there they never felt at home. The majority however agreed only to the proposition that the perception of *adolescent* children should be considered as one of the relevant factors. According to Lord Wilson, "what can occasionally be relevant to whether an older child shares her parent's habitual residence is her *state of mind* during the period of her residence with that parent."[59] Albeit framed as an exception, it was also admitted that such a possibility was created by the departure from a parental intent standard to one where courts need to assess the child's integration into a particular environment.[60] Lady Hale's dissent centred on the fact that the opinions of all the three children should have been taken into account when assessing habitual residence. She highlighted

> "It is the child's integration which is under consideration. Each child is an individual with his own experiences and his own perceptions. These are not necessarily determined by the decisions of his parents, although sometimes these will leave him with no choice but to buckle down and get on with it."[61]

She also stressed that these questions are particularly relevant for

> "peripatetic families, who move from one country to another […]. If so, the perception of the children is at least as important as that of the adults in arriving at a correct conclusion as to the stability and degree of their integration. The relevant reality is that of the child, not the parents. This approach accords with our increasing recognition of children as people with a part to play in their own lives, rather than as passive recipients of their parents' decisions."[62]

Indeed, a recent judgement of the Ontario Court of Appeal indicates that, for younger children (in the specific case, aged 8 and 6) the assessment of whether children are integrated is *not* based on their opinion.[63] A different approach has been taken in Canada where courts considered the views of children (in this case ranging from 9 years old to 15) among other relevant factors for establishing the habitual residence.[64]

Notwithstanding the above, parental intention continues to play an important role in determinations of habitual residence. This is particularly true for infants and younger children for whom the social environment is less relevant.[65] The 'age' factor was highlighted by the CJEU in the *Mercredi* judgement. According to the Court

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59 LC (Children) [2014] UKSC 1, para 37
60 LC (Children) [2014] UKSC 1, para 37.
61 LC (Children) [2014] UKSC 1, Para 62.
62 LC (Children) [2014] UKSC 1, Para 87.
63 Re M [2020], paras 72 to 74.
64 Ludwig v. Ludwig, 2019 ONCA 680, (para 52).
65 For eg *Balev*, para 44.

> "The factors to be taken into account in the case of a child of school age are thus not the same as those to be considered in the case of a child who has left school and are again not the same as those relevant to an infant. As a general rule, the environment of a young child is essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of."[66]

Another important aspect is the relationship between lawful and unlawful moves. Article 3 of the Convention indicates that habitual residence is assessed at the date of the *unlawful* removal or retention. Any period after that shall not be considered. However, whenever the move is *lawful*, habitual residence may change very fast. For example, stays of some days or months have been considered sufficient to change children's habitual residence.[67] Indeed, it is envisaged that whenever the move is lawful, and there is a settled intent to reside in the new country for a longer time, habitual residence can change in a day.[68] Also, it is not permanency that is important but stability and the intention to reside in a new place for a significant period of time.[69] In the Netherlands, the Supreme Court looked closely at the integration of the mother in the new environment and thus accepted that a move of about one year did not result in a change of habitual residence.[70] Nevertheless even if the intentions of the parents play a decisive role for young children, so far it has been considered that habitual residence cannot be established without the child having actually lived in a country. This means that the parents' residence before the birth of a child is irrelevant; only periods after the child's birth can be taken into account.[71]

Consequently, current approaches to habitual residence reveal that courts' have started to consider children as separate individuals when establishing their habitual residence. This was evident in the courts' assessment of children's integration separately from that of their parents. Furthermore, particularly for adolescent children, their state of mind may sometimes

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66 CJEU 22 December 2010, C-497/10 PPU, ECLI:EU:C:2010:829 (Mercredi/Chaffe), paras 53 and 54.

67 [2020] HKCA 317 referring to *LM v. HTS* concerning a stay of four months; Monasky v. Taglieri, 589 U.S. ___ (2020), where the mother left Italy two months after the child's birth; B (A Child) (Abduction: Habitual Residence) [2020] EWCA Civ 1187, 10 September 2020 concerned a stay of two weeks; J (A Child) (Finland) (Habitual Residence) [2017] EWCA Civ 80 the lengths of stay was of 4 months; See also CJEU 22 December 2010, C-497/10 PPU, ECLI:EU:C:2010:829 (Mercredi/Chaffe), indicating that for lawful moves one day may be sufficient in changing the habitual residence.

68 *A v. A and Another (Children: Habitual residence) Reunite International Child Abduction Centre intervening)* [2013] UKSC 60, para 44, Baroness Hale DPSC declined to accept that it was impossible to become habitually resident in a single day." CJEU 22 December 2010, C-497/10 PPU, ECLI:EU:C:2010:829 (Mercredi/Chaffe) paras 51,55.

69 Schuz 2023, pp 6-7.

70 Ibili.Fatih/Olland 2019, p. 21 referring to ECLI:N:HR:2011:BQ4833, 17 June 2011.

71 Schuz2023, p. 8, CJEU 17 October 2018, C-393/18 PPU, ECLI:EU:C:2018:835 (U.D. v. X.B.).

influence a finding of habitual residence. On the other hand, younger children's assessment of integration is less evident, and for this group, the intentions of the parents will play a more important role. As a result, particularly for younger children, their habitual residence may change after a very short stay if both parents agreed to the move abroad. Finally, it should also be stated that habitual residence remains a question of fact thus highly case-specific which means that courts may adopt different approaches depending on the facts of the case.

#### *4.3.2.2 Custody rights*

After the habitual residence has been determined, the next step is to analyse whether the parent requesting the return had custody rights in light of the laws of the state of habitual residence.

For the purposes of the Convention, 'custody rights' is a semi-autonomous concept, meaning that the content of the right rather than its name is relevant in evaluating whether such custody rights existed at the time of the removal.[72] The prevailing view at the moment is that custody exists, irrespective of actual residence arrangements, whenever one parent can veto the other parent's relocation with the child, – the so called *ne-exeat* rights.[73] This view has been consolidated since 2010 when the United States Supreme Court delivered a landmark judgement holding that the right to veto a relocation was the key factor in determining whether custody existed, irrespective of the actual living arrangements of the child.[74]

It should be added that the concept of custody rights under the Child Abduction Convention is now the functional equivalent of the more recent 'parental responsibilities.'[75] The Convention will apply irrespective of the actual living arrangements of the child and regardless of whether the child was removed by the parent with whom (s)he spent most of the time. It has been suggested that this evolution in the interpretation of the Convention effectively blurs the lines between access rights and custody rights which had been originally envisaged.[76] It is in this context that the notion of 'primary caretaker' gains importance as recent statistics show that children are being removed by their primary caretakers, in contradiction with the original assumptions of the Convention.[77] The sociological paradigm which

72 Overall Conclusions of the Special Commission of October 1989 on the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, 26 October 1989, Section 9, p. 3.

73 Commentary of the International Child Abduction Database available at <www.incadat.com/index.cfm?act=search.detail&cid=34&lng=1&sl=1>, 8 January 2021.

74 Abbott v. Abbott, 130 S. Ct. 1983 (2010).

75 For the European Union it was codified in the Brussels II *bis* Regulation.

76 Freeman 2000, p. 50.

77 Original assumptions Silverman 2005, Beaumont/McEleavy 1999; most recent statistics Global Report 2023, Preliminary Document No. 19A.

determined the adoption of the Child Abduction Convention has thus fundamentally changed.

In some jurisdictions custody rights have been interpreted extensively and the Child Abduction Convention was applied even in cases where the person applying for return did not have custody rights in the country of habitual residence.[78] The case of *Re K* applied the notion of inchoate custody rights to child abduction proceedings to account for situations where the primary carer of the child did not have parental responsibility but had in fact exercised duties akin to such responsibilities. It was considered that this approach gave indirect recognition to the child's right to have contact with both parents.[79]

Furthermore, under Article 3(b) the Convention shall apply provided that at the time of the removal or retention the custody rights were actually exercised, either jointly or alone or would have been exercised save for the removal or the retention. Commentators have shown that courts rarely find that a parent was not actually exercising custody rights.[80] Moreover, the inclusion of *ne-exeat* rights in the definition of 'custody rights' has also resulted in diminishing the need for courts to analyse whether left-behind parents were actually exercising their rights; having a veto right to relocation automatically implies that that parent may wish to exercise it.[81]

A determination that the child has been removed or retained in breach of the rights of custody of the left-behind parent results in an obligation to order the return of the child, unless one of the exceptions to return are met. These exceptions shall be addressed in turn below.

### 4.3.3 Exceptions to return

The Explanatory Memorandum accepts that in some situations the removal of the child could be justified by objective reasons and in these circumstances a derogation from the return mechanism is permissible.[82]

The first exception, derived from the text of Article 12(2) of the Hague Convention, envisages that the return of the child shall not be ordered if the proceedings have been initiated more than one year after the removal or retention and it is demonstrated that the child is now settled in the new environment. The text of Article 12(2) includes thus two cumulative conditions for its application. First, the proceedings should have been commenced more than one year after the wrongful retention/removal and second that the child is settled.

78 Re K (A Child)(Reunite International Child Abduction Centre Intervening [2014] UKSC 29.
79 Schuz 2015, p. 613.
80 Schuz 2014, pp. 156-157, Ibili/Fatih/Olland 2019, and Ruitenberg 2015, Global Report 2023, Preliminary Document No. 19A.
81 Schuz 2014, p. 157.
82 Vera Perez Explanatory Report (1982), para. 25.

It has been considered that proceedings have commenced for the purposes of Article 12 only if the left-behind parent has lodged a petition with the authority which has the power to order the return.[83] Such wording raised difficulties for situations where the taking parent has absconded with the child. Some courts in the United States have previously ruled that the term of one year only starts running from the moment the left-behind parent locates the child.[84] More recent case law from the United States Supreme Court rejected this approach, confirming that the one-year time is not interrupted by the concealment of the child.[85] This approach (of not interrupting the one year) is being applied in several other jurisdictions and it is deemed to be more in line with the intention of the drafters to take into account the child's integration and actual living circumstances in the new country.[86] Nevertheless, the behaviour of the taking parent can be taken into account by courts in determining whether the child has settled, in that absconding in itself can prevent settlement.[87]

It has been considered that settlement can be ascertained by looking at the child's emotional and psychological state and the physical environment.[88] Rhona Schuz has further argued that the emotional element should be tested from a child's perspective, in light of the ways children become connected to an environment and not through an adult lens.[89] This would mean that due account should be given to factors such as the child's sense of time which does not usually entail long term planning.[90] Similarly to the determination of habitual residence judges look at several factors when assessing whether the child has settled in the new environment.[91] However, as opposed to habitual residence, it appears that older children's opinions as to their integration carry more weight in findings of settlement.[92] A recent Canadian judgement, reasoned that in cases raising the issue of settlement courts are concerned with the impact of another uprooting on the child who has already crossed international borders.[93] Furthermore, it was noted that

83 Ruitenberg 2015, p. 354. This means that generally an application with the Central Authority is not sufficient as Central Authorities do not usually have the power to order the return.
84 Erler 2018, referring to Furnes v. Reeves, 362 F.3d 702, 723 (11th Cir. 2004).
85 Lozano v. Montoya Alvarez, 134 S. Ct. 1224, 1236 (2014).
86 Schuz 2014, p. 227 referring to Canon v. Canon [2004] EWCA Civ 1331.
87 Schuz 2014, p. 231.
88 Schuz 2014, p. 229-230; *Simpson v. Hamilton* CA398/2018 [2019] NZCA 579, paras 30 45; *Wallace v. Williamson* 2020 ONSC 1376.
89 Schuz 2014, p. 230.
90 Schuz 2014, p. 230.
91 For example the US courts have identified 6 relevant factors: child's age; (2) "the stability of the child's [new] residence"; (3) "whether the child attends school or daycare consistently"; (4) "whether the child attends church regularly"; (5) "the stability of the [parent's] employment"; and (6) "whether the child has friends and relatives in the new area." in Norris 2010, p. 175.
92 Re M. (Children) (Abduction: Rights of Custody) [2007] UKHL 55, [2008] 1 AC 1288; CA Paris 27 October 2005, 05/15032.
93 Wallace v. Williamson 2020 ONSC 1376, para. 45.

conflicting views have emerged especially concerning the settlement of younger children.[94]

Finally, it should be also noted that states differ in their approaches to discretion under this Article. Some jurisdictions interpret that a court may order the return of the child even if the settlement exception has been established whereas others find that this exception, if met, leaves no room for courts to order the child's return.[95]

The second exception is included in Article 13(1)(a) and provides that return may be refused if the person having the care of the child was not actually exercising custody rights at the time of the removal or has subsequently consented or acquiesced in the retention. This exception by its very wording seeks to secure the protection of the left-behind parent's right to custody and as such it cannot be considered child-centric.[96] It is a parent who can waive this right, and there is no suggestion that the child's right to maintain contact with both parents also needs protecting.[97] Moreover, it is an exception which in practice has been very difficult to establish given the high standard of proof.[98] The taking parent should demonstrate by clear and cogent evidence that the acquiescence was unequivocal.[99]

In practice, it is Article 13(1)(b) which proved the most contentious and litigated exception to the Hague Convention.[100] Article 13(1)(b) provides that

> "the judicial or administrative authority of the requested State is not bound to order the return of the child if […] there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."

This Article poses particular challenges of interpretation and application. On the one hand, claims about violations of individual children's rights are most frequently made out in the context of the grave risk exception. The Explanatory Report of Vera Pérez acknowledged that the exceptions

94 Incadat commentary, exceptions to return: settlement of the child available at <https://www.incadat.com/en/case/596>.

95 Schuz 2014, Ruitenberg 2015.

96 Schuz 2014, p. 245; Ruitenberg 2015 p. 321who notes that this is an exception reflecting the policy goals of the Convention rather than the child's best interests.

97 Schuz 2014, p. 266.

98 A search on the INCADAT database retrieved 25 results and of these results the exception had been met on two occasions, see: Townsend & Director-General, Department of Families, Youth and Community (1999) 24 Fam LR 495, [1999] FamCA 285, (1999) FLC 92-842; Director-General, Department of Families, Youth and Community Care v. Thorpe (1997) FLC 92-785, [1997] FamCA 45. According to Lowe and Stevens 2018 Article 13 1 (a) has been applied in 7% of the cases.

99 In re H and others (Minors) (Abduction: Acquiescence) [1998] A.C. 72 (H.L.); Katsigiannis v. Kottick-Katsigiannis (2001), 55 O.R. (3d) 456 (C.A.).

100 The Global Report, para 21 mentions that Article 13(1)(b) was the most common sole reason for refusal in 2021 which was applied in 29% of the cases.

listed under Articles 13(1)(b) and 13(2) clearly derive from a consideration of the interests of the child.[101] On the other hand, this exception should be assessed in light of the overall policy objective, that of return, as otherwise there is a risk of undermining the prompt return mechanism envisaged therein.[102] Child abduction proceedings are not custody proceedings, thus a full best interests assessment would go contrary to its objective.[103] Consequently, whenever Article 13(1)(b) is brought into question, courts should carefully balance the rights of the individual child with the policy of the Convention – taking into account that the full best interests assessment should be conducted only in the context of custody proceedings. Eekelaar has argued that decisions in child abduction proceedings only affect children indirectly and thus courts should adopt a narrow view to the best interests assessment.[104]

It is this very balancing exercise between the individual child and the policy of return that has posed problems and has generated many commentaries and case law from national and international courts.[105] In 2020, the Hague Conference published a Guide to Good Practice to Article 13(1)(b) (the "Guide (to Good Practice)") setting out several guidelines for the proper application and interpretation of the grave risk exception.[106] The Guide is not binding, however it represents the most recent authority in the field and it has been drafted in collaboration with numerous experts. For this reason, the overview below is largely based on this instrument.

First, the Guide reiterates the framework for assessing the grave risk of harm, focusing on the idea that the exceptions are to be interpreted narrowly in light of the object of the Convention and the underlying international comity duties.[107] According to the UKSC however the very terms of this Article are of restricted application, hence there is no need for such a narrow construction.[108]

The text of Article 13(1)(b) envisages three types of risk, (i) physical harm, (ii) psychological harm or (iii) intolerable situation; however the Guide clarifies that these are usually intertwined in practice.[109] As to the standard for grave risk, the Guide adopts the approach of the UKSC:

> "It is not enough as it is in other contexts such as asylum, that the risk be "real". It must have reached such a level of seriousness as to be characterised as "grave".

101 Pérez-Vera Explanatory Report (1982), para 29.
102 Pérez-Vera Explanatory Report (1982), para 34.
103 Guide to Good Practice Article 13 (1) (b), para 26.
104 Eekelaar 2015 p. 15.
105 Henaghan et al 2023; Schuz 2023; Skelton 2023.
106 Guide to Good Practice under the HCCH 1980 Child Abduction Convention, which deals with a crucial provision of the Convention: Article 13(1)(b) (the grave risk of harm exception), Published by The Hague Conference on Private International Law – HCCH Permanent Bureau, 2020 ((Guide to Good Practice Article 13(1)(b)), Part VI.
107 Guide to Good Practice Article 13(1)(b), paras 15-25.
108 Re E (Children (FC), [2011] UKSC 27, para 32.
109 Guide to Good Practice Article 13(1)(b), para 31.

> Although grave characterises the risk rather than the harm, there is in ordinary language a link between the two. Thus, a relatively low risk of death or really serious injury might be properly qualified as "grave" while a higher level of risk might be required for other less serious forms of harm."[110]

Another important aspect is that this exception covers solely risks to the child and not to the taking parent. This is reiterated on several occasions throughout the Guide, although the Guide accepts that there may be situations where the exception may be triggered if there is sufficient evidence that, because of a risk of harm directed to a taking parent, there is a grave risk to the child.[111]

In practice, the best interests of the child have been raised by taking parents who sought to have the return proceedings dismissed. The burden of proving the existence of a grave risk is incumbent on the party opposing the return.[112] Given the consensus on the restricted scope of application of the exception it has also been submitted that the burden of proof should be a high one.[113]

The Guide further recommends a two-step approach in dealing with the exception. First, courts should be sufficiently satisfied that there is enough evidence to establish potential harm or an intolerable situation. Second, even if such evidence exists, courts should assess whether adequate measures of protection are available or have been put in place to protect the child from grave risk.[114] Finally, having established that there is a potential grave risk and that there are no adequate measures of protection, courts retain the discretion to nevertheless order the return of the child.

The issue of 'adequate measures of protection' is dealt with extensively in the Guide and more broadly, it has been considered a thorny aspect in the application of the Convention.[115] The Guide stresses that the protective measures are broad and include access to legal services, financial assistance, housing assistance etc.[116] The Guide envisages that protection measures do not need to be put in place at the time of the child's return to the country of origin, rather they should be available and readily accessible.[117] Further, although the language used is 'adequate and effective' measures of protection, no particular guidelines are given as to the assessment of the effectiveness criterion. The Guide also mentions undertakings in the context of protective measures. Undertakings represent promises of the left-behind parent made to alleviate the taking parent which form the basis of a court's

110 Re E (Children (FC), [2011] UKSC 27, para 33.
111 Guide to Good Practice Article 13(1)(b), para 33.
112 Guide to Good Practice Article 13(1)(b), para 51.
113 Ripley 2008, p. 447.
114 Guide to Good Practice Article 13(1)(b), paras 40 and 41.
115 Schuz 2014, p. 291; Trimmings and Momoh 2021; Puckett 2017.
116 Guide to Good Practice Article 13(1)(b), paras 43-46.
117 Guide to Good Practice Article 13(1)(b), para 44.

order for the child's return.[118] However, while such undertakings are well known in common law countries, their effectiveness and enforceability is questionable in other systems of law.[119] Undertakings have mainly been used to alleviate allegations of domestic violence. Available data suggests that they are not taken seriously either by the parent making them or by the authorities in the state where they should have been enforced, leaving alleged victims of domestic violence utterly unprotected.[120] The Guide mentions that "they should be used with caution" but courts' reliance on them is not further dissuaded.

Among the procedural guarantees, the Guide dedicates three paragraphs to the topic of child participation.[121] The Guide makes a brief reference to the CRC and its impact on child participation, however it fails to encourage states to use the CRC Committee guidelines on child participation. The Guide defers on these matters to national laws, and asks states to consider some aspects such as, appointing a separate representative, informing the child about the proceedings, manner of assessing the weight to be attached to children's views and finally that the decision-making process is speedy.

Article 13(1) is highly fact specific, however in time several defences have been more commonly put forward.[122] A detailed analysis of these defences is outside the scope of the present research, however it should be highlighted that the Guide indicates a clear prioritisation of comity to a concrete assessment of the defences and their materialisation. For example, in the case of domestic violence, which so far has been the most litigated and controversial aspect,[123] the Guide stresses that evidence of the existence of a situation of domestic violence in and of itself is not sufficient to establish the existence of a grave risk of harm.[124] By stressing the importance of adequate measures of protection, the Guide envisages that

118 See for eg: Re (E) (Children) (FC) [2011] UKSC 27, 10 June 2011; RE Y (2013 EWCA CIV [2013] 2 FLR 649 [2013] 2 FLR 649.

119 Trimmings/Momoh 2021, pp. 12-13.

120 Trimmings/Momoh 2021, p. 12, *see also* Hüßtege, 'Article 13(1)b of the Child Abduction Convention in the Light of Judicial Practice' (2006) 11 Judges' Newsletter 37.

121 Guide to Good Practice Article 13(1)(b), paras 86- 88.

122 The Guide to Good Practice Article 13(1)(b), identifies the following defences which have most commonly put forward: Domestic violence against the child and/or the taking parent; Economic or developmental disadvantages to the child upon return; Risks associated with circumstances in the State of habitual residence; Risks associated with the child's health; The child's separation from the taking parent, where the taking parent would be unable or unwilling to return to the State of habitual residence of the child, Criminal prosecution against the taking parent in the State of habitual residence of the child due to wrongful removal or retention, Immigration issues faced by the taking parent, Lack of effective access to justice in the State of habitual residence, Medical or family reasons concerning the taking parent, Unequivocal refusal to return, Separation from the child's sibling(s).

123 In this sense see also Section 5.3 below.

124 Guide to Good Practice Article 13(1)(b), para 58.

where legal protection as well as police and social services are available courts have ordered the return of the child.[125] Further, when it comes to claims of economic and developmental disadvantages upon return, courts should focus on the child's basic needs rather than embarking in a comparison between the living conditions in the two countries.[126] As to situations which may lead to the separation of the child from the taking parent, the Guide does not distinguish between cases where the taking parent will not return and those where the taking parent cannot return to the child's country of habitual residence.[127] For cases concerning criminal prosecution of the taking parent, undertakings of the left-behind parent of not pursuing prosecution are acceptable.[128] Impossibilities to afford legal representation or immigration considerations are in principle insufficient to establish the exception.[129] Finally, separation of siblings does not usually result in a grave risk determination for the child as in these cases it may be possible to maintain contact later on, through different arrangements.[130]

An analysis of the text of the Guide demonstrates a clear prioritisation of comity in dealing with the grave risk of harm exception. This is consistent with the object and purpose of the Convention – that of ensuring the smooth return of the child to the country of habitual residence. However, it has been highlighted that there is a conspicuous absence of references to human rights standards, in particular to the ECtHR which has developed substantial case law on many aspects dealt with in the Guide.[131] To this, it could be added that, although included, the references to the CRC are sparse, and there is no mention of any of the General Comments. While the Guide does address the topic of child participation, it fails to link it to the General Comment no 12 and to the standards therein. Furthermore, at no point does the Guide envisage addressing the grave risk exception from the child's perspective. In other contexts, such as risk of persecution for the purposes of refugee proceedings, commentators have pointed out that the risk should be addressed through the eyes of the child.[132] Children have different perceptions over risk, which are not necessarily the same as those of adults. Similarly, in the context of child abduction, including guidance on addressing the risk through the perspective of the child would have ensured a more child centric approach to the exception. Arguably, such an approach may delay proceedings, and for child abduction time is of essence,

125 Guide to Good Practice Article 13(1)(b), para 58.
126 Guide to Good Practice Article 13(1)(b), para 60.
127 Guide to Good Practice Article 13(1)(b), para 20.
128 Guide to Good Practice Article 13(1)(b), para 67.
129 Guide to Good Practice Article 13(1)(b), paras 68 and 69.
130 Guide to Good Practice Article 13(1)(b), paras74 and 76.
131 Celis 2020, blog post available at <https://conflictoflaws.net/2020/a-few-thoughts-on-the-guide-to-good-practice-on-the-grave-risk-exception-art-131b-under-the-child-abduction-convention-through-the-lens-of-human-rights-part-i/>>, last accessed on 20 June 2023.
132 Pobjoy 2013; Pobjoy 2017.

however a failure of the system to equip itself with appropriate procedures does not in itself discharge states from their obligations to comply with human rights.[133]

The two remaining exceptions to be analysed are included in Article 13(2) -the objection of the child to return- and Article 20 of the Convention -the fundamental rights exception. In practice, considerations arising under Article 20 are closely intertwined with those discussed in the preceding paragraphs concerning Article 13(1) and 13(2). Therefore, it appears more appropriate to address this exception first.

Pursuant to Article 20, the return of the child may be refused if "this would not be permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms."

The drafting of Article 20 was subject to extensive debate as it was feared that a wide policy defence would undermine the mechanism of the Convention.[134] Originally the proposed text envisaged that return could be refused if "such return would be manifestly incompatible with the fundamental principles of the law relating to *the family and children* in the State addressed."[135] This text was changed to reflect a narrower approach to the exception and to minimise the application of the internal law of the requested state which -it was feared- would alter considerably the text of the Convention.[136] Article 20 represents thus a compromise and under the new text the return can be refused if it is showed that (i) there is a contradiction between the fundamental rights principles of the requested state and those in the state of origin and (ii) that the "protective principles of human rights prohibit the return requested."[137]

As yet, this exception has been of little practical relevance, to the point of nearly fading without a trace.[138] This assessment is confirmed in the statistics of applications submitted on the basis of the Convention. In the 1999 statistical analysis, there were no reported cases of the application of Article 20.[139] The 2008 analysis revealed that on eight occasions (representing 8% of all cases of judicial refusal) Article 20 together with other Articles were raised in support of refusals; however in no case was Article 20 the sole

133 See among many authorities ECtHR 18 June 2019, no. 16572/17 (*Haddad v. Spain*), para 56; for the specific context of child abduction see ECtHR 21 September 2017, no. 53661/15 (*Severe v. Austria*) para 98.

134 Schuz 2014, p. 354.

135 Pérez-Vera Explanatory Report 1982, para 31.

136 Pérez-Vera Explanatory Report 1982, para 32.

137 Weiner 2003, p. 709; Pérez-Vera Explanatory Report 1982, para 33.

138 Weiner 2003, p. 702.

139 Lowe/Stephens 2012, referring to Lowe/Armstrong/Mathias, HCCH Prel. Doc. No. 3 (rev. version, Nov 2001).

basis for the decision.[140] The latest report indicates that in 2021 Article 20 was applied in two cases, representing 1% of the total judicial refusals.[141]

One of the explanations advanced by the scholars for its lack of use was precisely the language of the Explanatory Report.[142] Following the Explanatory Report, return could only be refused if domestic laws of the Contracting States expressly prohibit it as incompatible with fundamental rights.[143] Weiner argues for a less technical reading of Article 20.[144] In her view, an interpretation to the effect that return should not occur whenever it is inconsistent with the fundamental principles of the returning state, is more in line with the object and purpose of the Convention.[145] Another explanation for the limited use of Article 20 HC by the domestic courts, is its perceived overlapping scope with Article 13 (b) HC.[146] Thus, domestic courts preferred to analyse cases under the angle of Article 13(b) rather than Article 20 HC. Weiner suggests however that the personal scope of Article 20 is broader than that of Article 13(b) as an Article 13 defence may only be used to a risk of harm against the child, whereas Article 20 allows for its application to situations concerning the mother.[147] Schuz has identified three broad categories of claims which have been made in the context of Article 20.[148] First, applicants have argued that return of the child without an assessment of the child's best interests is against the fundamental principles of the requested state.[149] As shown above, a welfare inquiry is prohibited under the Convention. It was considered that a balanced approach between the best interests of the child as envisaged under the Hague Convention and a return order subject to conditions in the state of return, would serve to reconcile the best interests of the individual child with the goals of the Convention.[150] The best interests of the child has also been raised in relation to proceedings in the country of origin. The Barcelona Court of Appeal ruled that a return would be contrary to the basic principles of the Spanish law as a mother had been declared a 'rebellious wife' by a Rabbinical court,

140 A statistical analysis of applications made in 2003 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, 2007 update (Prel. Doc. No 3, Part I, of September 2008), *available at hcch.net*, last accessed on 13 January 2021.

141 Global report 2023, available at hcch.net, last accessed on 13 January 2024.

142 Pérez-Vera Explanatory Report 1982, para 118; *see also* Weiner 2003, p. 715.

143 Weiner 2003, p. 712 who argues that Pérez-Vera subconsciously added the words « the laws » to her commentary, to the effect that the text should be implicitly read as « would not be permitted by *the laws reflecting* the principles related to human rights and fundamental freedoms».

144 Weiner 2003, p. 712.

145 Weiner 2003, p. 712.

146 Smetzer/Mast 2003, p. 251.

147 Weiner 2003, p. 714.

148 Schuz 2014, p. 356.

149 Schuz 2014, p. 356.

150 Sonderup v. Tondelli 2001 (1) SA 1171 (CC), para 31.

due to the fact that she had removed her daughter.[151] The Rabbinical Court granted sole custody to the father as a form of punishment for the mother's rebellion. At the same time the Spanish court held that the interests of the child would not have been taken into account in the domestic proceedings, should the child be returned to Israel.

Second, Article 20 was raised in connection with due process requirements such as the length of proceedings in the home state.[152] Immigration considerations and refugee claims have also been discussed under Article 20.[153] The third category of cases in which the fundamental rights exception became relevant are those where the right to freedom of movement of the taking parent was at stake. These cases have sometimes been dismissed on the ground that the return order concerned the child and not the taking parent.[154] However, cases where the taking parent invoked objective reasons such as domestic violence, abuse or persecution have been considered to raise concerns because the taking parent had to choose between safety and the relationship with the child.[155] Debates as to the incidence of Article 20 have also been raised when the state where the child should return does not allow as a matter of law the relocation of the parent.[156]

The examples above indicate that the incidence of the fundamental rights exception is generally linked to the laws or their application in the state of origin. Only the first case discussed the incompatibility of the approach of the Convention with the fundamental rights -as applied- in the country of presence (the country ruling on the return). The other examples concerned aspects such as the impossibility of the taking parent to participate in custody proceedings in the country of origin; the impossibility as a matter of law to obtain custody; or the impossibility as a matter of law and practice to relocate with the child. In other words, cases under Article 20 raise due process concerns. In practice some of these concerns have been dealt with by expanding the interpretation of intolerable harm under Article 13(1)(b).[157] Also, little consideration has been given to the role of the ECtHR in the application of this exception.[158]

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151 Re S., Auto de 21 abril de 1997, Audiencia Provincial Barcelona, Sección 1a (INCADAT cite HC/E/ES 244).

152 Schuz 2014, p. 358 referring to the four year delay in hearing a relocation petition (Caro v. Sher 687 A.2d 354).

153 Schuz 2014, p. 358 citing State Central Authority of Victoria v. Ardito, 29 October 1997, or Weiner 2003, pp. 723-730 referring to refugee claims. However as will be shown below these considerations may also be linked to other Articles of the Convention such as Article 12 or 13 (b).

154 Schuz 2014, p. 360.

155 Weiner 2003, p. 731.

156 Schuz 2014, p. 361. Beaumont/McEleavy 1999, p. 11.

157 As has been the case of Domestic violence and separation of the child for the mother. For a detailed discussion, see Chapter 5 of this dissertation.

158 Schuz 2003, p. 355 criticising the ECtHR; see also Re M. (Children) (Abduction: Rights of Custody) [2007] UKHL 55; [2008] 1 AC 1288 (INCADAT cite HC/E/UKe 937), para 19.

Indeed, during the *travaux préparatoires*, the words "fundamental principles of the law relating to the family and children in the State addressed" have been replaced by the current wording "fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms." The proponents of this more limited scope of the exception agreed that some international consensus on the fundamental rights that could justify non return was necessary.[159]

Outside concrete cases, it was also suggested that the Convention mechanism whereby Contracting States have to accept the accession of a new state implies also an acceptance of the fundamental principles of that state and such an acceptance automatically bars the application of Article 20.[160] In this view, only if there has been a change in regime in the requesting state could courts apply Article 20.[161] This approach however appears hardly reconcilable with the *travaux préparatoires*. No such discussion existed at the time of drafting. Moreover, such interpretation suggests that the drafters of the Convention had the intention to adopt an Article largely devoid of purpose.

The last exception to be analysed, laid down by Article 13(2) reads:

> "The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views." The 2021 Statistics indicate that Article 13(2)(b) has been used as a sole reason for judicial refusal in 29% of the cases and together with other reasons in 46% of cases.[162] The data further show that the average age of the 'objecting child' was 9,8 years with the lowest age being 1 years old (albeit with an older sibling). Also, the average age of children involved in child abduction proceedings is 6,7 years old, with the greatest proportion of children aged between 5 to 7 years old.[163]

The 'child's objection' to return was primarily included in the Convention to make sure that older children, especially teenagers, are not returned against their will.[164] Article 13(2) is phrased as a two-prong test: first the competent authority must ascertain whether the child objects to return and second, such authority should determine whether that child has an age and degree of maturity appropriate to take into account their views.[165] The phrasing of the Hague Convention suggests that in abduction proceedings the voice of the child plays a role only to the extent that the child expresses an *objection* to return.[166] Furthermore, Article 13(2) is formulated in such a way to imply

159 Weiner 2002, p. 710.
160 Schuz 2014, p. 13.
161 Schuz 2014, p. 13.
162 Global Report 2023, paras 81-83.
163 Global Report 2023, para 52.
164 Pérez-Vera Explanatory Report 1982, para 30.
165 Elrod 2010, p. 677.
166 Fenton-Glynn 2014, p. 157.

that only the views of children who have an appropriate age and maturity will be considered at all in the proceedings.[167]

There is no clear obligation under the Child Abduction Convention to hear children as a matter of procedure. The wording of the Convention could be interpreted to mean that unless the taking parent raises the objection under Article 13 (2), there is no obligation for courts to hear children in the proceedings.[168]

Empirical research concerning several European countries showed that judges have not heard children as neither party had requested it and it was not mandatory under the national laws.[169] Substantive family laws, such as age limits, (discussed in the preceding chapter) shall determine whether children are heard in child abduction cases.[170] It has further been shown that in Belgium children under nine years old have not been heard; in France children under eight years old have not been heard.[171] Overall, a recent large-scale study of 17 European jurisdictions revealed that children had been heard in 194 out of 435 cases.[172] This represents less than half of all the cases.

However, it should be noted that some jurisdictions have laid down special rules for hearing children in abduction cases. For example, in The Netherlands children as of the age of six are invited to be heard directly by a judge whereas in parental separation cases hearing of children is mandatory only as of the age of 12.[173] Further, since 2018 each child as of the age of 3 shall be appointed a guardian *ad litem* in child abduction cases.[174] In Romania, the hearing of children in parental separation cases is only mandatory as of the age of 10.[175] The same age limit applies to child abduction cases; however the law implementing the Convention has added the requirement to have a psychologist available for children involved in abduction proceedings, a requirement which does not exist for other parental separation cases.[176] It has also been reported that in some cases children were not heard as they were not parties to the procedure and in this respect it is not clear whether there are differences between substantive family laws and child abduction cases.[177]

Furthermore, procedural aspects regarding whether children are heard directly or indirectly whether they have the right to separate representation

167 Fenton-Glynn 2014, p. 157.
168 Schuz 2014, p. 373.
169 Van Hof e.a. 2020.
170 Van Hof e.a. 2020.
171 Van Hoorde e.a. 2018, pp. 115, 123.
172 Hof e.a (2020).
173 Rap/Florescu 2020, p. 161, see also Van Hof et.al. 2019, pp. 327-351 indicating that pursuant to article 809(1) Dutch Civil Code the hearing of children over 12-year-old is mandatory in civil proceedings.
174 Lembrechts e.a., 2019, p. 9; Olland, Mink and Ibili 2019, p. 91
175 Article 264 of Law No. 287/2009, republished in the Official Journal of Romania no 505 from 15 July 2011.
176 Article 11 (*5)* of Law 369/2004 on the implementation of the Child Abduction Convention, published in the Official Journal of Romania no 888 of 29 September 2004. See also Florescu 2021, p. 279.
177 Van Hof e.a. 2020.

and the role of the representative also play a role in child abduction cases. There may be some variations, as discussed above where children benefit from more procedural guarantees in abduction cases as opposed to substantive family law proceedings.[178]

One important difference between child abduction and national family law concerns the purpose of hearing children and the ensuing impact of their voice on the outcome of proceedings. Article 13(2) provides that the competent authorities may refuse the return if the child objects and has the necessary age and maturity. Courts have interpreted this requirement to mean that *preferences* of children are not relevant for triggering Article 13(2).[179] In Australia, Section 111(1B) of the Family Law Act 1975 (CtH) ('FLA') provides that an objection by a child to return must not be allowed unless it imports "a strength of feeling beyond the mere expression of preference or of ordinary wishes." Similarly, in the Netherlands Dutch judges have underlined that mere preferences of the child will not be taken into account.[180] Even if a child forms an objection, if the objection is related to the country of habitual residence or one of the parents, there is a tendency to not take it into account.[181] In order to fall under Article 13(2), judges will assess whether the objection relates to the circumstances and the context of their return.[182] Objections resulting in the application of Article 13(2) related for example to the fact that return would hamper the normal development of the child or the child had the initiative in proposing contact with the left-behind parent. Furthermore, the assessment of the objection appears to be closely intertwined with the age of the child. This means that only mature children are seen as capable of objecting.[183] This reasoning has at least two implications. On the one hand, judges refuse to hear younger children on the ground that they are not mature enough and as such they could not object to return.[184] On the other hand, even when they do hear the children, judges apply a presumption of immaturity for young children which is directly linked to a view that young children cannot object to their return.[185] In the same vein, with a specific focus on young children, it has been remarked that the younger the child, the less likely it will be for a judge to find that such child is of a sufficient age and maturity to have his or her objections considered seriously.[186] Nevertheless, hearing very young children has been considered important as it helps judges understand the

178 For an overview of several jurisdictions see: Schrama e.a. 2021.
179 Lembrechts e.a., 2019, Fernando/Ross 2018.
180 Van Hoorde e.a. 2017, p. 133.
181 Van Hoorde e.a. 2017, p. 134.
182 Van Hoorde e.a. 2017, p. 135.
183 In some jurisdictions the exception has also been named the "mature child's objection", Spector 2019, p. 575.
184 Van Hoorde e.a. 2017, p.123. In the matter of LC (Children) (No 2) [2014] UKSC 1, 15 January 2014 On appeal from [2013] EWCA Civ 1058.
185 Van Hoorde e.a. 2017, p. 130.
186 Elrod 2010, p. 680.

child's self-perception of their interests and the reasons for an objection to return.[187]

Last but not least, it should be pointed out that even if children are considered sufficiently mature and they object, courts retain discretion to nevertheless order the return. For example, research on French case law showed that judges rarely consider the children's objections to be decisive in the final judgement.[188] A paternalistic approach of judges substituting their own best interests assessment for the children's views has been reported in Israel.[189] The Israeli Supreme Court considered that the children were mature and they did object to return, however, they were unable to understand that separation from a parent will cause them damage in the long term.[190] In Australia it was also held that two children -aged 14 and 12- had not formed an ability for abstract thought and future forecasting and thus they lacked the ability to predict the impact of their choices on the future relationship with the left-behind parent.[191] Interviews with judges also reported difficulties in assessing the child's objection. In particular judges found it was difficult to explain to children that a child abduction case is not a merits assessment of their best interests which remains to be analysed by the competent courts in the child's country of habitual residence.[192]

Consequently, based on commentaries and case law analysed above, it appears that despite Vera Perez' assertion that Article 13(2) was included to reflect the interests of the child the voices of the child are not always reflected in domestic judicial practice. Hague Convention proceedings allow for limited opportunities for children to participate and indeed commentators have highlighted that in many cases there is no indication of children having been heard.[193] High minimum ages for hearing children in national substantive family laws coupled with the low ages of children subject to abduction proceedings entail that many children are not heard in practice. Some positive examples have been noted where child abduction proceedings departed from the national substantive family laws by lowering the age of hearing children and/or appointing guardians *ad litem* or other experts to facilitate the expression of their views. It should equally be noted that even when children are heard, the narrow wording of the Article 13(2) exception implies that their voices are to be considered only to the extent they object to return. In other words, the possibilities of giving their voices 'due weight' as required under Article 12 of the CRC, remain limited.

187 Elrod 2010, p. 686.
188 Van Hoorde e.a. 2017, pp.123-126.
189 Schuz 2014, p. 325.
190 Schuz 2014, p. 325.
191 Fernando/Ross 2018 referring to RCB as litigation guardian of EKV, CEV, CIV, and LRV v. The Honorable Justice Colin James Forrest (2012) FLC 93-517.
192 Van Hof e.a. 2020, p. 347.
193 Van Hoorde e.a. 2018, pp. 115, 123; Hof e.a (2020).

## 4.4 Effects of a non-return order. The relationship of the Child Abduction Convention with the 1996 Child Protection Convention

The overview of the summary proceedings above outlined that they leave open several questions on the protection of individual human rights. A return order under the Child Abduction Convention enables the courts of habitual residence to decide on the merits of the parenting dispute. Less attention has been dedicated to the impact of a non-return order on the proceedings on the merits. In other words, if Hague courts refuse the return of the child, which courts have jurisdiction to adjudicate the merits of the custody dispute? An answer to this question, from the perspective of private international law, can shed light on different alternatives to summary proceedings. Such alternatives in turn could arguably offer more robust human rights protection to children and their parents.

The instrument which determines the competent courts on parenting disputes after a non-return order is the 1996 Child Protection Convention.[194] Article 7 lays down that the authorities of the habitual residence of the child prior to the wrongful removal retain their jurisdiction.[195] Article 1 of the Convention clarifies that such jurisdiction includes the 'attribution, exercise, termination or restriction of parental responsibility'. Consequently, if the child's habitual residence was found to be in a different state, and the authorities in the state of presence have decided to refuse the return of the child, the 1996 Convention offers the possibility of continuation or initiation -as the case may be- of the parenting dispute in the country of habitual residence.[196] Thus, following the logic of the 1996 Convention, one parent and the child could continue to reside in a 'new' state while the courts of their former residence would decide on the substance of the custody dispute,

194 Under Article 3, the scope of the 1996 Convention is to determine *a)* the attribution, exercise, termination or restriction of parental responsibility, as well as its delegation; *b)* rights of custody, including rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence, as well as rights of access including the right to take a child for a limited period of time to a place other than the child's habitual residence; *c)* guardianship, curatorship and analogous institutions. It should equally be noted that in the 1996 Convention has been superseded in proceedings between EU Member States by the Brussels II *ter* Regulation (discussed under Section 7.3.2 of this dissertation). The 1996 Convention remains applicable for proceedings concerning one EU Member State and a third state, subject to Article 97 of the Brussels II *ter* Regulation.

195 Article 7(1) of the 1996 Convention offers a very narrowly tailored possibility to deviate from this jurisdictional rule where "*a)* each person, institution or other body having rights of custody has acquiesced in the removal or retention; or *b)* the child has resided in that other State for a period of at least one year after the person, institution or other body having rights of custody has or should have had knowledge of the whereabouts of the child, no request for return lodged within that period is still pending, and the child is settled in his or her new environment."

196 In this sense see also Spector 2015, pp. 391-394.

following all the rigours of the law in that state. If these courts ultimately vest the custody with the left-behind parent, then this parent can request the enforcement of the custody judgement in the country where the child is present. Article 23(2) of the 1996 Convention lays down six (6) grounds for non-recognition of judgments, of which particularly relevant to the present dissertation are those in paragraphs (b) failure to provide the child the opportunity to be heard, (c) failure to provide the parent the opportunity to be heard or if (d) such recognition is manifestly contrary to the public policy of the requested state, taking into account the best interests of the child.

A reading of these provisions of the 1996 Child Protection Convention indicates that this instrument has the potential to offer a more comprehensive protection of human rights than the very limited Child Abduction Convention. First, this Convention allows the child and one parent to remain in one country while proceedings on the substance are pending in another country.[197] Presuming that the child may remain in the country where (s)he is, the application of the 1996 Child Protection Convention avoids uprooting the child on repeated occasions. The 1996 Child Protection Convention also offers the possibility to enforce contact rights for the duration of contentious proceedings (for example under Articles 11 and 12). In addition, the 1996 Child Protection Convention includes a cooperation mechanism between courts aimed at deciding the best-placed State to determine the best interests of the child (Articles 8 and 9). Finally, the 1996 Child Protection Convention's non-recognition system reflects the standard public policy exceptions of private international law instruments which have the capacity to assess the procedural fairness for the child and parents as well as other wider human rights considerations.

All these considerations are important for examining the *potential* of the 1996 Child Protection Convention. Nevertheless, a more detailed analysis of this instrument is not offered here given that despite its potential, and the estimation of some scholars that the 1996 Child Protection Convention will in time replace in prominence the Child Abduction Convention, [198] the 1996 Child Protection Convention has fallen short of these expectations. To date, there is no evidence to suggest that domestic courts decide on the link between the Child Abduction Convention and the 1996 Child Protection Convention in the manner described above. Such an outcome may be caused by the low ratification rate of the 1996 Child Protection Convention (51 States Parties[199]), and the significantly less dedicated attention to this instrument as opposed to the Child Abduction Convention, both in the aca-

197 This has been confirmed in a recent case from the United Kingdom where proceedings on the substance of parental responsibility continued in the United Kingdom (country of habitual residence) after the court where the child had been removed dismissed the return request. See Trimming et al 2024, pp. 5-6, referring to *B v. L* [2022] EWHC 2215 (Fam).

198 Spector 2015, p. 386.

199 Status table available at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=70>, last accessed on 15 June 2024. According to the HCCH website, there are a total of 55 Contracting Parties, 4 of which have only signed but not ratified the Convention.

demic literature and judicial practice. Nevertheless, this dissertation argues that the 1996 Child Protection Convention can offer a viable alternative to concerns raised by the Child Abduction Convention to both substantive and procedural human rights.

## 4.5 The place of children's rights within the Child Abduction Convention

The Child Abduction Convention is without a doubt an instrument tackling a very topical problem, that of unilateral removals of children. Recent developments in migration patterns where globalisation has resulted in an exponential growth of movement of people across country borders attest to the necessity of an international instrument regulating the situation of children caught in the middle of their parents' conflict. The underlying policy objectives of the Convention continue to receive support from countries across the world and this is evident in the number of ratifications as well as in the fact that the mechanism set out in 1980 has not been amended to date, nor is there any envisaged future amendment.

Commentators have moreover highlighted the importance of the Convention for securing the rights of children, and its consistency with the provisions of the CRC.[200] Indeed, Article 11 of the CRC mandates states to take measures for combating the illicit transfer of children abroad and to enter into bilateral or multilateral agreements to this effect. Accession to the Child Abduction Convention is envisaged under Article 11(2) of the CRC and this is clearly reflected in the preparatory works of the latter instrument. It has been pointed out that Article 11 CRC had been drafted with the Child Abduction Convention in mind and it was kept simple precisely to avoid overlapping with the Abduction Convention.[201] In other words there is an inextricable link between child abduction and the rights of children.

The best interests of the child, albeit not expressly included in the body of the Abduction Convention, were one of its key policy goals. It would however be inaccurate to argue that the rights of children were the sole, or even the main consideration of the Convention.[202] Other important policy considerations are comity (mutual respect for judicial decisions of foreign courts); deterrence of abductions, justice between parents, upholding the rule of law or determination of the appropriate forum for deciding on the substance of custody disputes.[203] Case law examples have shown that these policy goals may lead to conflicting results in concrete situations. For

200 Khazova and Mezmur 2020, p. 337, Baker and Groff 2016, Duncan 2000 p. 122-123.
201 Tobin, Lowe and Luke 2019, pp.370-375.
202 The Pérez-Vera Explanatory Report (1982) as well as the Dyer Report posit that children were at the heart of the Convention. However, this has been disputed by other authors, See Ruitenberg 2015.
203 Schuz 2014a, pp. 47, 63; Mol/Kruger 2018, p. 444.

example, the aim of return which serves the best interests of the child in general may go against the interests of the individual child. At a theoretical level, these cases have questioned whether it can be justified to sacrifice the interests of a few children in the name of children in general.[204] This utilitarian approach was deemed inconsistent with the normative values of autonomy and equality and with the Kantian principle that a person should always be treated as an end in himself, rather than a means to an end.[205]

Against this background, scholars and courts have developed mechanisms to integrate human rights considerations in the Child Abduction Convention.[206] Many agree that human rights should guide the interpretation of the Child Abduction Convention.[207] This is all the more evident due to the fact that human rights instruments form part and parcel of the international normative landscape. Article 31(3)(c) of the Vienna Convention on the Law of Treaties supports a harmonious approach to treaty interpretation by providing that any relevant rules of international law are applicable in the interpretation of an international treaty. Thus, not only does the CRC take into account the Child Abduction Convention but this Convention should equally be interpreted in light of the CRC. The principle of evolutive interpretation requires decision-makers to consider not only the intention of the drafters but the changing applicable rules of international law.[208]

On this basis it can be concluded that the Child Abduction Convention is an instrument reflecting in general the rights of children. However, competent authorities should also interpret the Convention on a case-by-case basis in a way that is consistent with the principles of the CRC. Section 4.5.1 below analyses the tensions between children's rights and the policy aims of the Convention, Section 4.5.2 analyses the only decision to date of the CRC Committee and finally Section 4.5.3 applies the rights-based framework of Chapter 2 to child abduction cases.

### 4.5.1 Comity versus human rights

The first aspect which has caused difficulties in reconciling the return mechanism with substantive children's rights is the principle of comity. This doctrine has been used in a sense of judicial courtesy in order to show deference to other sovereign states.[209] It has been considered that the doctrine of comity can be understood as a theory that provides general justification for the need to apply foreign laws and recognize foreign judgments.[210] Comity

204 Schuz 2015 pp. 607-633; referring to Freeman 1997, pp 34-35.
205 Schuz 2015 pp. 607-633; referring to Freeman 1997 pp 34-35.
206 Eekelaar 2015; Schuz 2005, Mol/Kruger 2018.
207 Although this is not the position of all, see for example Eekelaar 2015, Silberman 2010.
208 Article 31(3)(c) VLCT, see also Arato 2010.
209 Schuz 2014a, p. 39.
210 Schuz 2014a, p. 39.

within the Child Abduction context is reflected in several ways. First, the return mechanism is based on the comity principle that the state of origin is willing and able to protect children.[211] Therefore children should be returned as they will have the benefit of a fair decision-making process on the custody proceedings in the country of habitual residence. Second, the exceptions to return provided under Articles 13 and 20, expressly allow for discretion in ordering the return even if the conditions to raise the exception have been met.[212] The discretion is intended to show that judges in one country trust the system in the other country, to show deference, and it has been indeed applied in this spirit.[213] Comity was also the basis for developing the practice on undertakings – discussed above – where judges order the return subject to compliance with certain specific conditions upon return.[214]

There is an undeniable tension between comity and substantive children's rights. Comity requires deference whereas substantive children's rights require an examination of the situation of the individual child and a careful balancing of all the competing rights.[215] A children-rights approach does not entail that the rights of children always prevail but it requires an individual assessment by courts.

The tension has been reconciled in the text of the Convention by allowing for limited assessment of individual children's rights whenever exceptions to return are raised. This has led to the view that the Convention does allow for a narrow interpretation of the best interests of the individual child. However, to meet the requirements of a child rights approach courts need to actually assess the interests of the individual child in the limited way envisaged in the Convention, rather than automatically applying the return mechanism. Indeed, as Lord Justice Ward held "The interests of the children in remaining here should not be sacrificed at the altar of comity between nation states."[216] It has also been argued that "today, courts and others seem to take the view that states actually have an interest in returning abducted children so that the international community will consider those states compliant with the Convention."[217] However, measuring the success solely in terms of the returns ordered rather than by ordering the return only where it is necessary, is not in line with a child rights approach as the essence of the latter approach is an individualised assessment of the child's situation.[218]

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211 Schuz 2014a, p. 50.
212 Schuz 2014a, p. 48.
213 Mol/Kruger 2018, pp. 444-445 citing judgements where return was ordered even if the exception was met.
214 R Schuz 2014, p. 48.
215 See also Chapter 2 above.
216 Schuz 2014a, p. 53 referring to Re T (Abduction: Child's Objections to Return) [2000] 2 FLR 192, 220.
217 Schuz 2014a, p. 66.
218 See also Schuz 2014a, p. 68.

Furthermore, it could be argued that more recent developments in international law have diminished the importance of some comity interests. At the time of the adoption of the Convention, the effect of the non-return order was that jurisdiction on the merits of the custody dispute was changed from the country of origin to the country of presence. Such change of jurisdiction affected the comity interest of allowing the country of origin to decide the substance of the custody dispute. Under the Child Protection Convention as well as the Brussels II *bis* Regulation such a change of forum does not necessarily follow from a non-return order.[219] In other words, even if the return is refused the state of habitual residence retains competence to decide on custody while the child remains in another country. The development of electronic means of communication can also allow for the possibility to hear parties via video conferencing thus alleviating any concerns about fairness and at the same time avoiding the disruption to the child's life by having to relocate (potentially twice).[220] Evidently, there will be situations where return is not the most appropriate remedy (see also below the sections discussing immigration considerations) and -if jurisdiction for custody adjudications remains with the country of origin- comity and children's rights are both reconciled under other international instruments. The efficacy of such instruments is dependent on the possibilities of effectively exercising cross-border contact between the child and the left-behind parent during the dispute on the merits. While this is something for the competent authorities to decide on a case-by-case basis, it is important to highlight that there is an international framework in place to facilitate this.[221]

Other tensions between comity and individual children's rights can be identified from the fact that there is no possibility to monitor the situation of the child after the return. The text of the Convention envisages that the child shall return to the country of habitual residence on the *assumption* that decisions on the merits shall be fair and that the child shall not be exposed to a grave risk of harm or other human rights violations. Return is thus ordered following assumptions about the *future* of the child. Practice has shown that child abduction cases sometimes require protection measures in place in the country of habitual residence. Undertakings have proven particularly unreliable, specifically due to their unenforceability. Furthermore, there is nothing in the Convention to require any form of monitoring of the child's situation post return. Arguably, the lack of any provision to this effect is justified by mutual trust and respect for the systems of another country – two comity considerations. Following the 2017 Hague conference questionnaire, states indicated that even if protection measures are put in place to ensure the safety of the child upon return, neither the sending state or the receiving state see themselves competent under the Hague Convention to monitor the

219 In this sense see also Section 4.4 above.
220 Hof/Kruger 2018, p. 148, Schuz 2014a, p. 74.
221 For example, the Brussels II *ter* Regulation; The 1996 Child Protection Convention.

effectiveness of the protection measures.[222] Some states however considered that such follow up would be necessary to ensure the protection of the child whereas others rejected this idea.[223] The reasons put forward against the follow up mechanism related to the restrictive language of The Hague Convention. However, from the perspective of children's rights, the existence of a follow up mechanism would ensure *effective* protection of children upon return. Moreover, international developments in the field of human rights go against a restrictive view of comity in this sense. For private international law, the Child Protection Convention does include provisions about inter-state cooperation on a broader basis than the Child Abduction Convention.[224]

### 4.5.2 Child abduction before the CRC Committee

As mentioned in Chapter 2 of the present dissertation, the OPIC has entered into force on 14 April 2014, giving the possibility to the CRC Committee to issue Views in individual communications, and to further elaborate on the intersection between the Child Abduction Convention and the CRC. To-date[225] three individual communications have been submitted to the CRC Committee.[226] Of these, one communication was declared admissible and analysed on the merits.

*N.E.R.Á. on behalf of J.M. v. Chile v. Chile* was filed by a mother on behalf of her three-year-old son who had been diagnosed with language delay and a form of autism. Before domestic courts, the father claimed that the child had been wrongfully removed from Spain to Chile. Opposing the return, the mother submitted that the child's habitual residence remained Chile. She also argued that there was a grave risk of harm for the child on several accounts. First, an arrest warrant for international child abduction had been issued against her which placed her, as the child's primary caretaker, in an impossibility to return with the child. The separation of the child from the mother would amount to a grave risk of harm for the child. The mother had

222 HCCH questionnaire 2017, see the answers of Belgium, Croatia, Finland, France, Germany, Ireland, Netherlands. Available at hcch.net.

223 HCCH questionnaire 2017, Available at hcch.net. Supporting countries: Czech Republic, Malta, Portugal, Romania, Switzerland, Denmark. Against France, Netherlands, United Kingdom, Germany, Ireland.

224 See Articles 29-32 of the Child Protection Convention.

225 15 June 2024.

226 J.*S.H.R. v. Spain*, Communication no 13/2017, 15 May 2019, *N.E.R.Á. on behalf of J.M. v. Chile*, Communication no 121/2020, 20 June 2022; *W.W. and S.W. v. Ireland*, Communication no. 94/2019, 12 September 2022 – while this Communication has been declared inadmissible, it should be noted that three CRC Committee Members dissented on the ground that Ireland had not observed the interim measure requesting Ireland to suspend enforcement of the return order. This case further shows the tensions between the expediency required under the Hague Convention and procedural incidents which may occur in these types of complaints. For a commentary, see also Paul, *Communication No. 94/2019: S.F. on behalf of W.W. and W.F v. Ireland,* Leiden Children's Rights Observatory, Case Note 2023/02, 29 March 2023.

also claimed that she had been the victim of psychological abuse from the father, however these claims were not further elaborated upon. Finally, she claimed that due to the child's medical condition and treatment which he was following in Chile, return to Spain would expose him to severe psychological trauma. In Chile, two of the lower courts dismissed the father's return request, accepting that the child's habitual residence has remained in Chile. It appears that these courts also considered that the child's best interests would be severely impacted if returned. It is not clear if this consideration formed part of Article 13(1)(b) analysis or if it was an *obiter dictum* for the Chilean lower courts. On 3 September 2019, the Chilean Supreme Court allowed the father's appeal on points of law and ordered the child's return to Spain. It does not appear that the Supreme Court analysed any of the exceptions to return put forth by the mother; it simply declared her allegations as unsubstantiated. The Supreme Court found essentially that the father's rights had been infringed.

The complaint was brought to the CRC Committee under Article 3, 9 and 23 of the CRC. It their defence, the state relied heavily on the policy aims of the Child Abduction Convention, arguing that these policy aims, *per se*, reflect the best interests of the child and thus bar any individualised assessment of the best interests.

In its interpretation of Article 3(1) CRC, the CRC Committee relied on the General Comment no. 14 which requires an individualised approach to the best interests of the child, depending on "their personal context, situation and needs".[227] It also accepted that the CRC should be interpreted in the light of the Hague Convention, by virtue of VLCT as well as under Article 11 of the CRC which calls upon states to take measures against the illicit removal of children. However, it did not accept the argument that the Hague Convention is directly intended to ensure compliance with the best interests of the child. On the contrary, while ascribing to the objectives of the Hague Convention, the CRC Committee reasoned that the exceptions to the Convention call for an individualised assessment of the best interests of the child.

As a standard of assessment, the CRC Committee established two steps. First, national courts must effectively assess the elements which may constitute an exception to the duty to return a child and make a sufficiently reasoned decision on this point. Second, the elements must be assessed in the light of the best interests of the child.[228] When it comes to the content of the best interests assessment, the CRC Committee considered that it falls within the competence of domestic courts. Consequently, following this reasoning, the obligations imposed by the CRC in child abduction cases are mostly procedural, rather than substantive.

227 *Communication No. 121/2020 N.E.R.Á. on behalf of J.M. v. Chile*, para 8.2 referring to GC no 14, paras 17 and 32.

228 *Communication No. 121/2020 N.E.R.Á. on behalf of J.M. v. Chile*, para 8.5.

On the facts of the case, a violation of Article 3 CRC was found on the ground that that the Chilean Supreme Court did not assess the concrete circumstances of the child including the real possibilities of the parent to return to the child's country of habitual residence and maintain contact with him. The case concerned a 3 year-old boy with autism whose mother had been his primary carer. The Chilean Supreme Court did not assess any of these elements; it simply ordered the return on the ground that the father had not consented to the child's move to Chile. It also declared her complaints unsubstantiated without further elaborating upon this.

This case is the first and only one to date where the CRC Committee undertook a merits assessment of the interrelation between the CRC and the Hague Convention. It is also important in that it both sets the standard of assessment for the CRC Committee while also illustrating the existing tensions generated by the interpretation of the Hague Convention. As has been acknowledged in commentaries to this View, the CRC Committee dismissed the proposal that the collective best interests override individual best interests in child abduction cases.[229] Indeed, as discussed in this dissertation this is one point of contention.[230] The argument that the Child Abduction Convention does not allow for an individualised assessment of the child's best interests was also put forward by the Chilean government in the *N.E.R.Á* communication. The Committee found that the best interests of the child should be a primary consideration in deciding whether a return should be carried out.[231]

Questions in academic literature remain as to the compatibility with the CRC of the discretionary powers of courts to order return even when it has been established the return is against the best interests of the individual child.[232] For example, Skelton considers that it is likely that the Committee will accept as compatible with the CRC situations where after assessing the best interests of the child, domestic courts use their discretionary powers and order the return.[233] In this view, this is an instance where the best interests of the individual child are overridden by the best interests of children, as a group.[234] On the other hand, Tobin et al argue that a return against an individual child's best interests goes against the CRC.[235] On this point, it should be stated that there may be a conflation between the best interests of the child and a grave risk of harm or an intolerable situation. From a child rights perspective a distinction should be made between ordering the return when it has been established that it may not be in the best interests of the child and a situation where the return would expose the child to a

229 *Communication No. 121/2020 N.E.R.Á. on behalf of J.M. v. Chile,* para 8.4; Skelton 2023, p.293 referring to Tobin et al. 2019, p. 389.
230 See also Section 4.3.1 of this dissertation.
231 *Communication No. 121/2020 N.E.R.Á. on behalf of J.M. v. Chile,* para 8.4.
232 In this sense Skelton 2023; Tobin et al. 2019, p. 389; Freeman 2022; Schuz 2014.
233 Skelton 2022, p. 297.
234 Skelton 2022, p. 297.
235 Tobin et al 2019, p. 390.

grave risk of harm. A child rights perspective may be said to be compatible with a return order against the best interests of the individual child given that their best interests are only a primary consideration in the return proceedings. They are not the only consideration and hence they could arguably be outweighed by other factors.[236] Moreover, it should be stated that this situation does not cover discretionary instances under the Child Abduction Convention, but rather situations when the grave risk defence has not been met. However, this dissertation argues that a situation where it has been established that return exposes the child to a grave risk of harm or to an intolerable situation, is incompatible with the CRC and, depending on the facts of the case, with the principle of non-refoulement.[237] Clearly, as discussed herein, protective measures may be taken so as to ensure that the child is not exposed to such a grave risk of harm, however, these protective measures should equally be tested for their compatibility with a child rights-based approach.

Further, available commentaries on the CRC Committee's View also show that whereas the standards established by the CRC Committee are not controversial in and of themselves, their application in practice remains a point of contention.[238] This type of criticism is mirrored in judgments of the ECtHR as well as in the available commentaries to those judgments.[239] Referring to *N.E.R.Á. on behalf of J.M. v. Chile,* Basi and Pedreño argue that in this case the Committee substituted their view to the domestic judgment, by implying that Article 13(1)(b) may be incident. This argument is made despite the fact that the Committee clarifies, and it is not disputed by the Chilean Government, that the judgment of the Chilean Supreme Court lacked any reasoning concerning the concrete situation of the child and to the arguments put forward by the taking parent in that regard.[240] The commentary also considers that the vulnerabilities of the child have not been sufficiently evidenced.[241] Nevertheless, it is not questioned that it had been proven that the child had autism; that the taking parent was the primary carer and that she was subject to criminal proceedings in the country of habitual residence. It appears that the commentary focuses on the possibilities for a safe return, even though these possibilities had not been entertained at domestic level. It therefore appears that even if this commentary accepts *prima facie* that the Hague Convention allows for some individualised assessment of the rights of children, it rejects any scrutiny which may lead to a finding that children's rights warrant the application

236 See also section 2.4.2 of this dissertation.
237 Section 11.1.2 of this dissertation.
238 Basi/Pedreño, *Communication No. 121/2020 N.E.R.Á. on behalf of J.M. v. Chile,* Leiden Children's Rights Observatory, Case note 2022/3, 31 October 2022.
239 In particular the case of ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC)*) and the commentaries thereto referred in Section 8.3.3. and 8.4.
240 *Communication No. 121/2020 N.E.R.Á. on behalf of J.M. v. Chile,* para 8.7, *in fine*.
241 Basi/Pedreño, *Communication No. 121/2020 N.E.R.Á. on behalf of J.M. v. Chile,* Leiden Children's Rights Observatory, Case note 2022/3, 31 October 2022.

of the exceptions to the Convention. As this dissertation argues, the burden of proof is set to an extent to which it becomes insurmountable for the person raising it. On the contrary, the standard set by the Committee is a purely procedural one which in fact should lead domestic courts to a more contextual analysis of the rights of children in complex abduction cases. It is for the domestic courts to carry out such analysis and to demonstrate how they have looked at the rights of children. The CRC Committee indicated that the right to maintain contact with both parents will form part of the analysis and that it shall supervise that domestic courts adopt reasoned decisions. The CRC Committee went even further by mentioning that "it seems unlikely that an adequate respect for the procedural safeguards […] would result in a substantive violation of Article 3 of the Convention."[242] There is a clear commitment thus to a harmonious interpretation of the CRC and The Hague Convention.

Finally, it should be said that the position of the CRC Committee is similar to that of the ECtHR which is discussed at length in Chapter 8. It could be argued that the CRC Committee adds a novel element to the ECtHR's case law by expressly mentioning that the best interests of the child should inform the assessment of the exceptions to return. However, as discussed in this section and in the chapter dedicated to the ECtHR it appears that divergences occur when it comes to factual assessments, rather than on the standards of review themselves.

### 4.5.3 The three core children's rights in the Child Abduction Convention

Many references have been made throughout this chapter about children's rights and the Child Abduction Convention. This section aims to provide a clearer and more coherent picture on the challenges children's rights pose to the Abduction Convention. It should be recalled that Chapter 2 proposed following Tobin's rights-based approach to judicial decision-making which includes four stages, starting from the identification of the rights at stake and culminating with showing in the judicial reasoning how the rights have been balanced within the context of an individual decision. Throughout this chapter it has been discussed that the Child Abduction Convention does not permit an evaluation of the merits of custody dispute and that it has been considered that the impossibility of an in-depth analysis also bars an individualised assessment of the rights of children. However, while it is indeed a fact that the Child Abduction Convention does not amount to a custody determination, this dissertation follows the VLCT's systemic integration approach which calls for a harmonious interpretation of international treaties. The proposition is thus that children's rights as formulated within the CRC, and the application of a rights-based approach are not per se incompatible with the Abduction Convention. The question is rather about how

242 *Communication No. 121/2020 N.E.R.Á. on behalf of J.M. v. Chile,* Leiden Children's Rights Observatory, Case note 2022/3, 31 October 2022, para 8.5.

courts could achieve the appropriate balance in individual cases. As with the other chapters, the focus of the following paragraphs is on the three core rights: the child's best interests, the right to have contact with both parents and the right to be heard.

In abduction cases, children's rights are included in two ways: as a matter of policy and as individual rights. These two considerations could sometimes be seen as pointing in different directions but as has been argued herein, through a harmonious interpretation policy considerations can and should be reconciled with individual rights (consistent with the narrow reading of the Convention).

Similarly to substantive family laws, at policy level the best interests of the child in abduction proceedings is intimately linked to the right to contact with both parents. It has been held that the Hague Abduction Convention complies with the CRC as the Convention promises that the child will be separated from the left-behind parent only where this is absolutely necessary.[243] It has been held that the Convention gives effect to the rights of the child set out under Article 9(3) and Article 10(2) of the CRC.[244] Empirical research has also shown that in concrete cases courts tend to rely on the best interests of the child as a policy consideration when ordering the return, rather than when applying the exceptions to the Convention.[245] It was also found that many judges do not refer to the interests of the child at all in the proceedings.[246] Eekelaar has proposed that child abduction cases are decisions *indirectly* affecting the child as they are about the *best place to make a decision* and, consequently, the courts are not bound to undertake a detailed investigation into the child's interests.[247] If it is accepted that the Child Abduction Convention does allow for limited consideration of the best interests of the child in an individual case, then a child rights approach would also entail that judges identify in each concrete case what these interests are and subsequently balance them against the interests of the other parties or of the policy interests of the Convention more in general.[248] This does not appear to systematically happen in these proceedings.

Furthermore, while indeed considerations about the right of the child to have contact with the left-behind parent play a significant role at policy level, questions about separation between the child and the taking parent should also be taken seriously into consideration. This is all the more important as now the taking parents are in most cases also the primary caretakers of the children.[249] No significant attention appears to have been given on the impact separation from the taking parent may have on the child and on

243 Sthoeger 2011, p. 539.
244 Baker/Groff 2016, p. 148.
245 Mol/Kruger 2018, pp. 421-454. The authors found that judges used the best interest of the child more in decisions ordering return rather than in cases when the return was refused.
246 Mol and Kruger 2018, pp. 437, 444.
247 Eekelaar 2015, p. 12.
248 See also Chapter 2.
249 Chapter 5, Section 5.4.1; Introduction, Section 1.4.

the circumstances which could justify a non-return order on this ground. Clearly, reasons for not including these considerations relate to the fact that child abduction should be punished and the Convention should also have a deterred effect for potential abduction. These considerations, valid as they may be, fail to take into account situations where the taking parent is in an objective impossibility to return and which necessarily will result in the separation from the child.[250] Also, if it is accepted that children should not be made responsible for the behaviour of their parents, then concrete cases may raise the requirement of a more detailed analysis of the child's relationship with both parents. An example of trying to reconcile the Convention with the interest of the individual child has been noted in Switzerland where Article 13(b) has been expanded at legislative level.[251] The Federal Act on International Child Abduction and the Hague Conventions on the Protection of Children and Adults included the following definition of intolerable situation:

> "Under Article 13(1)(b) of the 1980 Hague Convention, the return of a child places him or her in an intolerable situation where:
> (a) placement with the parent who filed the application is manifestly not in the child's best interests;
> (b) the abducting parent is not, given all the circumstances, in a position to take care of the child in the State where the child was habitually resident immediately before the abduction or this cannot reasonably be required from this parent; and
> (c) placement in foster care is manifestly not in the child's best interests."[252]

The application of this Article is very restrictive in that all three conditions should apply cumulatively but it does attempt to take into account the situation of the child post return and the relationship between the child and both parents.

Furthermore, an important aspect to address is the extent to which the Convention allows for the perception of the child in concrete determinations. As has been shown, the child's perception is essential for a child rights approach as it is through including their perceptions that children can exercise their autonomy. In child abduction proceedings children's perceptions may play an important role at various levels: including for example when determining the habitual residence, settlement, the grave risk of harm or whether they object to return. In addition, children's views may play a role whenever states accept the existence of inchoate custody rights in the determination of the care relationship with the left behind parent, even if such parent does not have custody rights within the sense

250 See for eg discussion on the case law of the ECtHR, Chapter 8.
251 Van Hof/Kruger, p. 138.
252 Van Hof/Kruger, p. 138.

of the Child Abduction Convention.[253] As many aspects require assessments of fact rather than laws it is arguable that children's views should be considered also outside the provisions of Article 13(2) of the HC. However, concerns have been expressed that children are not systematically heard in proceedings and when they are heard, it is usually solely for the purposes of assessing whether they object to return, which is a very narrow construction of Article 12.

There are also many positive developments, and as has been shown above, states increasingly accept that children can determine their habitual residence or whether they are settled in a new environment. It should be noted however that these positive developments are mainly in place for older children. At the same time, the Child Abduction Convention affects mostly younger children, the average age being six years old.[254] This approach is in clear contradiction both with General Comment no 12 on children's right to be heard as well as with General Comment no 7 on Implementing Children's Rights in early childhood, where the CRC Committee does not distinguish between children's rights on the basis of their age.[255] The commentaries on the child's right to be heard included in Chapter 2, are equally relevant and shall not be reiterated here. However, it should be pointed out that outside the limited context of Article 13(2), there is nothing to suggest that children's voices, if appropriately expressed, could not be taken into account for determining several questions of fact in the Convention, including the grave risk of harm exception, habitual residence or whether custody rights were actually exercised. Such an approach would ensure that return orders comply with both the policy objectives of the Convention and with the interests of the particular child. Moreover, as discussed in Chapter 3 above, family courts could equip themselves with the appropriate tools for ensuring that children are heard in accordance with their specific needs.

It has also been held that comity interests of not having one's legal system subject to scrutiny justify states in not assessing whether the child has the opportunity to be heard in another legal system.[256] In this study, it is argued that the European supranational structure has a different understanding of comity and that under this system courts should make sure that minimum conditions for hearing children are in place in the country of return.[257]

Further, in this dissertation it is argued that the voice of children should play a more important role especially in cases concerning separa-

253 Inchoate righs have been applied to child abduction cases following the case of Re K (A Child) (Reunite International Child Abduction Centre Intervening [2014] UKSC 29; see also Schuz 2015, p. 613.

254 Lowe/Stevens 2015, p. 9; Lowe/Stevens Global Report 2023, para 84.

255 Skelton 2023, p. 290.

256 Schuz 2014, pp. 72-74.

257 See chapters 7 to 9, below.

tions from the primary caretaker where the latter cannot return for reasons independent of his or her will. This argument will be elaborated upon in Chapter 6, Preliminary Conclusions, which also addresses the incidence of immigration-based defences within child abduction proceedings.

Another aspect to be mentioned concerns the discretion envisaged under the Convention. Here, courts are given the possibility to order a child's return even when, for example, it was established that the child could be subjected to a grave risk of harm. The exercise of discretion to order a return even when the narrowly worded exceptions are met is hardly reconcilable with a child rights approach. It could be counter-argued that children's rights should not trump all other rights, therefore a different outcome may exist when return does not reach a grave risk of harm, but it is nevertheless contrary to the child's best interests. Be that as it may, in cases of serious allegations of human rights violations, a return order would hardly be defendable from a children's rights perspective.

Finally, one aspect that may merit further attention in the future is the return as the remedy under the Convention. It has been argued that this remedy in itself could be seen as treating the child as an object rather than a rights holder.[258] In this spirit it is believed that future discussions should focus on cross border exercise of contact between children and parents as well as possibilities to decide speedily on custody without the need for return so as to avoid damaging situations arising from extended custody litigation and/or multiple relocations. This possibility is ever more present now with the advent of new technologies, but it has been little explored in this specific context.

## 4.6 Conclusions

This Chapter has dealt extensively with the Child Abduction Convention. The mechanism of the Convention has been outlined. It was argued that the Convention leaves room for an individualised application of children's rights in the exceptions to return. Further, the Child Abduction Convention has been contrasted with the 1996 Child Protection Convention; the argument was that despite the emphasis in literature and practice on the Child Abduction Convention, the Child Protection Convention has the capacity to reconcile the human rights tensions within the former instrument. Section 4.5 has analysed the Child Abduction Convention from the perspective of children's rights, exposing the tensions within the instrument as well as some solutions which have been found. The overall conclusion is that despite the push for a very restrictive interpretation of the Convention

258 R Schuz 2015, p. 614.

so as to minimise or eliminate individual rights considerations, the text of the Convention permits the incorporation of individual children's rights without jeopardising the return mechanism, which is extremely valuable in a globalised world.

# 5 Contemporary Dilemmas

*Determining The Relevance of Children's Rights to Primary Carer Abductions, Domestic Violence and Immigration Cases*

## 5.1 Introduction

This dissertation has so far focused on the rights of children, first from the perspective of the CRC and subsequently as understood under the Child Abduction Convention. It has been shown that the rights of children are primarily used to justify the Convention's policy of return. Simply put, as a matter of policy, the premise is that it is best for children in general to return to the country where they have lived their entire life. Individual children's rights may be considered within the exceptions to the return of the child.[1] In practice, individual children's rights challenge the policy considerations of the Convention particularly because they are raised to oppose the return of the child to the country of habitual residence. It has been stated on numerous occasions that the success of the mechanism rests precisely on its simplicity and the fact that substantive custody litigation considerations have been left out of the Convention.[2] In this light, commentators have argued against an individualised assessment of the rights of children on the ground that such an assessment goes against the prompt return mechanism and could undermine the value of the Hague Convention.[3]

However, it is precisely this simplicity, and arguably the limited engagement of the child abduction courts with the sociological shift in the profile of the abductor, that has generated criticism of the Child Abduction Convention. For example, to date, there has been little dedicated attention to how or if children's rights can inform the assessment of the allegations of separation of the child from the primary caretaker.[4] Similarly, allegations of domestic violence have been dealt with principally from the perspective of the parent and not as a child rights issue. There is a wealth of literature on the interaction between child abduction and domestic violence, focusing on

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1 Chapter 4 has also discussed the relevance of children's rights for the assessment of habitual residence, and it has shown that it is possible to include substantive rights considerations even outside the exceptions to return; however as the same Chapter has discussed the individual children's rights considerations remain primarily relevant for the exceptions to return.

2 Bruch 1996, p. 55, Vivatvaraphol 2008, p.3336, Beaumont/McEleavy 1999, at 229.

3 Anton 1981, p. 553; Silberman 1994, p. 33;Walsh/Savard 2006, p. 33.

4 There have been some recent works looking into how courts have dealt with the issue of the separation of the child from the taking parent. See for eg. Van Hof/Kruger 2018. This contribution and others where it was argued that the CRC position has been taken into account lack a comprehensive assessment of how children's rights have been conceptualised under the CRC. This dissertation has carried out this analysis in Chapters 2 and 3.

how this affects the taking parent.[5] Nevertheless, an overview of the Hague Conference's Guide to Good Practice on Article 13(1)(b) indicates that many of the exceptions to return relate more directly to the taking parent than to the child. The risk of domestic violence, criminal prosecution upon return, the lack of access to a court, the financial status of the parent, the immigration situation of the parent, are all defences where a grave risk to the child has been raised, but where it is difficult to entertain the allegations without a broader look into the situation of the taking parent. In other words, the grave risk to the child is intersectional: it juxtaposes the parent child relationship, a foreign legal system and the taking parent.[6] While there is a rich body of literature on the relationship of domestic violence and child abduction, no such dedicated attention has been given to the other exceptions to return raised.

This Chapter addresses the principal exceptions to the return of the child which do not *prima facie* concern children: domestic violence, separation from the primary carer and immigration considerations. Section 5.2 analyses the concept of domestic violence as it has emerged in feminist literature and subsequently from the perspective of children's rights. Section 5.3 discusses the relevance of domestic violence to child abduction cases. Section 5.4 addresses the topic of primary carer abductions first against the change in the sociological profile of the abductor and second as it has been brought within child abduction proceedings. Section 5.5 presents substantive discussions around immigration law and how it influences the power balance in family litigation in general and Section 5.6 deals with the way immigration considerations have been brought within child abduction proceedings. Finally, Section 5.7 concludes this chapter.

## 5.2 Substantive considerations regarding domestic violence

### 5.2.1 The meaning of domestic violence

Discourses around the concept of domestic violence, – also known as intimate partner violence (IPV) – have dramatically changed over the past 50 years.[7] Originally, violence within the family largely fell within the domain of private affairs, the home and the family escaping the regulatory powers of the state.[8] Under the influence of liberal philosophy of the nineteenth century, the family was construed as a *private* space, a sanctuary free

5 Masterton 2016; Freeman/Taylor 2020; Trimming/Momoh 2021; Bruch 2004; Lindhorst/Edelson 2012; Salter 2014; Gray 2023; Weiner 2021.

6 Intersectionality is used here as coined by Crenshaw who used it as a lens for understanding the multiple identities of individuals: See Crenshaw 1991.

7 Johnston/Steegh 2013, p. 63.

8 Moore 2003, p.95.

from state intrusion.[9] The *public* space on the other hand represented the domains where state intervention was allowed and included the government, politics, or the workplace.[10] The public-private dichotomy justified the non-intervention of the state in family affairs and this was reflected in the overall response of the state system to abuse. Domestic violence was not considered a criminal offence, nor was marital or date rape, no available remedies existed for stalking or harassment post-separation, and family courts were poorly equipped to address allegations of violence in divorce and custody proceedings.[11] Even the most egregious forms of violence such as the murder of a spouse did not always result in prosecution on account of the 'private nature' of such violence.[12]

Feminist scholarship challenged the public-private divide and social studies exposed the propensity for violence of the 'family home', indicating that most of these victims were women.[13] Gradually, under the influence of feminist academic literature, the private dimension of violence was recognized in international instruments. For example, Article 1 of the 1993 U.N. Declaration on the Elimination of Violence against Women defined violence against women as: "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in *private* life [*emphasis added*]".[14]

The earlier UN Convention on the Elimination of All forms of Discrimination Against Women (the "(CEDAW) Convention"), adopted in 1979 by the UN General Assembly and in force since 1981, does not include any provisions regarding gender-based violence. Within the CEDAW system, violence against women has been considered a specific form of discrimination against women and it has been condemned as such in later Recommendations of the CEDAW Committee.[15] General Recommendation no 19 of 1992 is particularly relevant as it deals specifically with violence against women.[16] Paragraph 6 of this General Recommendation links discrimination with gender-based violence. Violence against women is defined as "acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty." The same instrument clarifies that state responsibilities extend to violence perpetrated by private individuals.[17]

The interpretation of the CEDAW Convention has thus evolved to encompass gender-based violence as a specific form of discrimination

9 Moore, p. 95.
10 Moore, p. 95.
11 Johnston/Steegh 2013, pp. 63-64.
12 Chinkin 1999.
13 For example Thomas/Beasley 1995; Chinkin 1999; Kelly 2003.
14 Adopted by the General Assembly Resolution 48/104.
15 Simonovic 2014.
16 *CEDAW Committee General Recommendation No. 19: Violence against women* 1992.
17 *CEDAW General Recommendation No. 19 (1992),* para 9.

against women. Domestic violence is also prohibited in several binding instruments, most notably the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, adopted at Belem Do Para, Brazil in 1994, in force since 3 May 1995[18] and the Council of Europe Convention on preventing and combating violence against women and domestic violence (the "Istanbul Convention"), adopted in Istanbul, Turkey in May 2011, in force since 1 August 2014.[19] Under Article 3 (b) of the Istanbul Convention domestic violence "shall mean all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim."

Over time, a wealth of research has been dedicated to intimate partner violence (IPV), delineating various types of IPV, such as intimate terrorism or violent coercive control,[20] and situational couple violence.[21] Violent coercive control has been understood as comprising a pattern of tactics whose main aim is to exert control over a partner and it includes physical or sexual assault, intimidation, isolation or any other means to coerce a partner in a behaviour they would not otherwise adopt.[22] On the other hand, situational couple violence does not take place with the aim to control a partner, rather it is provoked by situations of conflict, anger or frustration.[23] It has also been argued that situational partner violence is perpetrated by both men and women, whereas coercive control is a form of gender-based violence, perpetrated primarily by men against women.[24] Stark has coined the term coercive control, and he has posited that the key dynamic of coercive control is the deprivation of a woman's autonomy in the context of an abusive relationship.[25] Stark has argued for a broader conceptualization of violence against women beyond safety to take into account women and children's freedom.[26] For him, the lack of understanding of control and how it is being exercised in an abusive relationship was a key factor in the authorities' poor response henceforth to cases of domestic violence.[27]

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18 << https://www.oas.org/juridico/english/sigs/a-61.html>>, last accessed on 18 May 2023.

19 Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No. 210), in force since 01 August 201. See also, <<https://www.coe.int/en/web/gender-matters/council-of-europe-convention-on-preventing-and-combating-violence-against-women-and-domestic-violence#:~:text=The%20Convention%20entered%20into%20force,and%20a%20form%20of%20discrimination>>, last accessed on 18 May 2023.

20 Kelly/Johnson 2008.

21 Kelly/Johnson 2008; Brenda Hale has pointed that the distinction between situational couple violence and intimate terrorism is primarily drawn in North American scholarship. See Hale 2017, p. 15.

22 Kelly/Johnson 2008.

23 Crossman e.a. 2016, p. 455 referring to Ansara/Hindin 2010; Graham-Kevan/Archer 2003; Johnson/Leone/Xu, 2008.

24 Crossman e.a. 2016, p. 455.

25 Hanna 2009, p. 1458.

26 Stark 2009. See also Downes e.a. 2019, p. 269.

27 Stark 2009.

More recently, social studies have also indicated that coercive control can exist without violence (non-violent coercive control) and that the effects on the victim-survivor of non-violent coercive control are similar to the ones of intimate terrorism.[28] Non-violent coercive control also poses additional challenges as legal systems overall do not consistently acknowledge coercive control as domestic violence.[29] It has been argued that, particularly for upper socioeconomic status relationships, violence is usually suppressed and control is extreme.[30]

Social science literature is abundant with examples of acts that alone or taken together can amount to coercive control.[31] In the United Kingdom, where coercive control has been criminalised since 2015, the House of Commons defined controlling behaviour as: "a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour."[32]

Empirical research has indicated that a couple's separation increases the risk of violence.[33] Separation increases the risk of physical violence, even if physical violence did not exist during the relationship.[34] Control post separation is also manifested through the use of custody proceedings and contact arrangements with the child.[35]

### 5.2.2 Domestic violence and children

Feminist scholars have argued for a conceptualization of domestic violence as a particular form of gender-based discrimination. Academic literature is abundant on the effects of domestic violence on women; children have generally been considered indirect or collateral victims of abuse, especially if there is no evidence of direct violence upon them.[36] Difficult questions on how to account for the position of children or their rights have arisen particularly in post-separation parenting disputes on custody and parental

28 Crossman e.a. 2016, p. 467.
29 Crossman e.a. 2016, p. 468. The United Kingdom is an example where coercive control has been criminalized under Section 76 available at <https://www.legislation.gov.uk/ukpga/2015/9/contents/enacted>, last accessed on 20 March 2024.
30 Meier 2015.
31 Lux/Gill 2021, pp814-824, with further references.
32 Monk/Bowen 2021 referring to House of Commons (2013) Home affairs section, Domestic Violence: A Library Standard Note to Extend the Cross-Government Definition of Domestic Violence, London: Library Standard Note, 6337.
33 Johnson e.a. 2014; Ornstein and Rickne 2013; Spearman e.a. 2023.
34 Brownridge 2006; Gutowski/Goodman 2023.
35 Van Horn/McAlister Groves 2006; see also the research of the Canadian Government https://www.justice.gc.ca/fra/pr-rp/jp-cj/vf-fv/freevf-rfcsfv/p4.html; Crossman e.a. 2016, p. 468.
36 See among many authorities: Gonzalez e.a. 2016.

responsibilities.[37] As discussed in Chapter 3, one interpretation of the right of the child to have contact with both parents has resulted in a focus on the parental alienation syndrome to the detriment of allegations of violence against children.

The assessment of the impact of violence on children has been further complicated by the different types of violence to which children are exposed to, from physical to non-physical forms and by the severity of the conflict or the child's gender or age.[38] As mentioned above, if at all, it was considered that children were indirect victims of violence and that exposure to violence caused various emotional and behavioural harms in children.[39] According to the World Health Organisation "Children who grow up in families where there is violence may suffer a range of behavioural and emotional disturbances. These can also be associated with perpetrating or experiencing violence later in life."[40] Much of the academic literature portrays children as witnesses of domestic violence and focuses on the long-lasting impact of witnessing domestic violence on children's current and future well-being.[41] Definitions of domestic abuse largely exclude children as direct victims of such abuse.[42] Failure to include children as direct victims in national legislation, has many implications such as for example the unavailability of mental health and other forms of support destined for domestic violence victims/survivors.[43] Also, even if in the United Kingdom coercive control has been criminalised, the legislation does not allow children to be victims of such forms of violence.[44]

Nevertheless, from a children's rights perspective, children can be *direct* victims of domestic violence. Article 19 of the CRC offers a wide understanding of violence against children to include "all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child." In General Comment no. 13, the CRC Committee adopted an extensive definition of violence to include any form of mental violence, including domestic

37 Ver Steegh 2004.
38 Ver Steegh 2004, p. 1386 with further references.
39 Kolbo et.al. 1996; Edleson et.al. 2007.
40 <https://www.who.int/news-room/fact-sheets/detail/violence-against-women>, last accessed on 18 May 2023.
41 Callaghan e.a. 2018, p. 1554, and the studies cited therein. "The representation of children in situations of domestic violence as passive *witnesses* rather than as people who directly *experience* violence and coercion is reproduced in academic and professional discourses. We recently completed a review of 177 articles published between 2002 and 2015, focused on children who have experienced domestic violence (Callaghan, 2015). A total of 85% of these articles described children as "exposed" to domestic violence, and 67% used the term 'witness'."
42 Callaghan e.a. 2018, p. 1554.
43 Callaghan e.a. 2018, p. 1554.
44 Katz 2022, p. 41.

violence.[45] Also, the CRC Committee has condemned all forms of physical violence in the family, including corporal punishment.[46] Even if the CRC Committee does not further define domestic violence, its overall expansive approach can be interpreted to include as a form of psychological violence situations where children were not directly assaulted, but rather witnesses of violence against a parent.

The Istanbul Convention also recognizes children as direct victims of domestic violence in situations where they have witnessed the violence in the family.[47] Further, the Istanbul Convention mandates states to take into account incidents of domestic violence in the determination of custody and visitation rights. Paragraph 2 mentions in particular that visitation or custody should not jeopardise the rights and safety of the children or of the victim.

Recent scholarship has equally proposed that children are direct victims of coercive control, irrespective of whether they had been physically abused.[48] Empirical research has revealed that children are directly involved in controlling tactics, including isolation and blackmailing, and can be used by abusers to minimise, legitimise and justify violent behaviour.[49] It has been suggested that "the exercise of power in abusive and controlling relational dynamics can be most troubling and distressing for children."[50] Children experience coercive control similarly to adults and consequently they are not merely indirect victims or witnesses of domestic violence.[51] It has been further argued that the experiences of children with domestic violence should inform family courts' post-separation parenting decisions and in particular the presumption in favour of ongoing contact, which is a significant factor enabling post separation domestic violence.[52]

Clearly, children's rights scholarship and international instruments view domestic violence as a child rights issue. However, it is also important to highlight that the children's rights and feminist perspectives on domestic violence are not entirely overlapping. The initial inclusion of children who witness violence as direct victims of abuse has been credited to feminist scholars.[53] Feminists at the time were arguing for including domestic violence among the factors for the best interests determination in private

45 CRC Committee (2011). General Comment No. 13: right of the child to freedom from all forms of violence, UN Doc. CRC/C/GC/13, Para 21 (e) (GC No. 13).
46 GC No. 13, *para 22 (a);* Tobin and Cashmore have noted some definitional shortcomings in the General Comment no 13 in that the Committee does not clearly distinguish among various types of violence, such as maltreatment or abuse Tobin and Cashmore 2019.
47 As per the Preamble; see also Article 18 (3); Article 26.
48 Katz e.a. 2020; Callaghan e.a. 2018.
49 Johnson 2009; Stark 2009.
50 Callaghan e.a. 2018, p. 1572.
51 Katz e.a. 2020, p. 310.
52 Katz 2022, p. 334-335.
53 Houston 2017, p. 97.

custody litigation.[54] When children were not the direct victims of physical violence, it was proposed that they could become victims of harm in several important ways. On the one hand violence gave them an unhealthy perspective on relationships.[55] On the other hand, domestic violence against mothers impaired their ability to care for their children, resulting in a direct link between child abuse and spousal abuse.[56] Further, it was shown that spousal abuse could have a wide range of psychosocial consequences for children, including for example low self-esteem or depression.[57] The acceptance of this argument however had the unwanted effect of inviting social services interventions into the family as exposure to domestic violence resulted in child neglect.[58] As exposure to domestic violence was assimilated to a form of child neglect, children required protection from their mothers as well, if the child protection services demonstrated (1) a harm or risk of harm to the child and (2) a causal link between the harm and the failure of a parent to act.[59] Houston shows that such developments in the United States' laws and practice were not welcomed in the feminist scholarship who reacted by changing their stance and de-emphasizing the risks of harm to the child associated with exposure to violence.[60] She highlights that children need specific legal protections against domestic violence as the existing ones of their mothers will not in all cases be sufficient.[61] It should be accepted nevertheless that such specific protection for children from domestic violence may result at times in their protection against their mothers.[62]

It is important to highlight these tensions as children's rights in private custody litigation are often caught in between the more powerful advocacy groups of women and fathers' movement and for this reason they may be easily overlooked.[63] Also, the argument for assessing child maltreatment on the same footing with adult maltreatment has received wider support in the children's rights scholarship.[64]

The discussion is equally complex in the field of children's exposure to domestic violence where, as shown above, feminist advocacy groups are not entirely in agreement with the proposition given that in their view it may result in (over) intervention by child protection authorities. On the other side of the spectrum, fathers' groups have argued that allegations of violence amount to parental alienation which has a damaging effect on the right of

54 Ver Steegh 2004, p.1418.
55 Houston 2017, p. 97.
56 Houston 2017, p. 97.
57 Houston 2017, p. 97.
58 Houston 2017, p. 107.
59 Houston 2017, p. 108.
60 Houston 2017, p. 113.
61 Houston 2017, p. 113.
62 Houston 2017, p. 119.
63 Houston 2017, p. 117 makes the argument that the feminist advocacy in the domestic violence field is higher than that of child advocates.
64 Lansdown 2000; Freeman and Saunders 2014.

the child to maintain contact with both parents.[65] As discussed in this dissertation, the focus of some courts on the parental alienation syndrome has resulted in reversals of custody orders whenever domestic violence allegations made by a parent were not deemed credible (enough) in court.[66]

Weisberg has noted a recent change in approach when it comes to reconciling the rights of children with other competing rights and interests in post separation parenting.[67] Jurisdictions in Colorado and Australia have moved towards a rights-based approach, whereby the child's right to safety is prioritised in post separation parenting disputes.[68] Under this approach, the child's right to safety is understood to be of paramount importance in the best interests assessment.[69] Safety is understood broadly, to encompass emotional, mental and physical well-being of the child; all evidence must be evaluated through the lens of the child's safety.[70] Similarly, Weisberg points to law reforms in Australia whereby the need to protect the child from harm has been prioritised over a continuing relationship with both parents.[71] In other words the right of the child to have contact with both parents prevails only where considerations about child's safety are absent.[72]

The examples of these two jurisdictions are not indicative of a widespread practice in cases of domestic violence and children's rights. However, they show how legislation can be reframed to include a child rights perspective. The feasibility of such an approach shall also be considered in this dissertation, specifically from the perspective of child abduction cases with immigration considerations.

## 5.3 The relevance of domestic violence for child abduction cases

No direct reference to domestic violence exists in the Child Abduction Convention, nor have the implications thereof been discussed during the *travaux préparatoires*.[73] Internationally, domestic violence was first presented as an issue in 1997 at the third meeting of the Special Commission discussing the operation of the Child Abduction Convention where the participants recognized that "[T]he majority of children... were taken away from their country of habitual residence by their mothers, who not infrequently alleged that they or the children had suffered hardship and domestic violence at the hands of the father."[74] Earlier studies had considered that the abductor was

65 For a discussion on the parental alienation syndrome, See Chapter 3 above, Section 3.6.
66 See Chapter 3 above, Section 3.6.
67 Weisberg 2016.
68 Weisberg 2016, p. 257.
69 Weisberg 2016, p. 257.
70 Weisberg 2016, p. 257.
71 Weisberg 2016, p. 259.
72 Weisberg 2016, p. 260.
73 Weiner 2000.
74 Weiner 2000, p. 596.

the violent parent, and child abduction was yet another means to control the other parent.[75] The abductors were characterised as mentally unstable, revengeful, manipulative; they had abused drugs and were in relationships characterised by domestic violence.[76]

In passing, it was also recognized that abduction could have been motivated by the desire to protect a child and flee from domestic violence.[77] Scholarship focusing specifically on the situation where the abductor was the victim of domestic violence started developing at the beginning of the XXI$^{th}$ century.[78]

These scholars argued that a significant percentage of taking parents were mothers who were taking their children abroad in an escape from domestic violence. For example, Weiner pointed out that seven of nine cases having reached the United States Court of Appeals between July 2000 and January 2001 involved an abductor claiming to be the victim of domestic violence.[79] In an article published in 2005, Shetty and Edelson also found that about one third of published and unpublished cases in the United States included a reference to domestic violence, and 70% of these cases included details on adult domestic violence.[80] The link between domestic violence and mothers as the main demographic responsible for child abduction has been made in academic writings stemming from Europe[81], Australia,[82]New Zealand[83] or Japan.[84]

There are no official statistics about the prevalence of domestic violence in child abduction cases. However, since its first mention in 1997 at the Hague Conference, the topic of domestic violence has been frequently discussed within the Special Commission meetings and recommendations following the meetings, the Judges Newsletters and has been included in the Questionnaires sent by the Hague Conference.[85] In 2011, during the sixth

75 Agopian 1984.
76 Greif/Hegar 1994, p. 284 referring to Janvier et al (1990), Long/Forehand/Zogg (1991).
77 Finkelhor e.a. 1991, p. 806 referring to Agoprian 1984.
78 Kaye 1999; Weiner 2000; Shetty/Edelson 2005.
79 Weiner 2003, p. 765
80 Shetty and Edelson 2005, p. 120.
81 Hale 2017; Trimming/Momoh 2021; Freeman/Taylor 2022.
82 Gray/Kaye 2023.
83 Maxwell 2016.
84 Yamaguchi/Lindhorst 2016.
85 Domestic violence was included on the agenda of the 2000 Special Commission meeting. See Preliminary Document no 1, October 2000, available at < https://assets.hcch.net/docs/eb5e4390-834f-4283-83c3-3032c30c71bb.pdf> , last accessed on 20 May 2023; a recommendation for close cooperation in the case of domestic violence was made in 2001, following the Special Commission meeting of 2000, see Preliminary Document no 5, March 2001, available at https://assets.hcch.net/docs/ebe46c8f-cb62-44b9-b89a-35f63df4d575.pdf; the latest questionnaire is of January 2023 and it includes references to domestic violence and the topic of primary cares (question no. 43 et following), see Preliminary Document no 5 of January 2023, available at https://www.hcch.net/en/publications-and-studies/details4/?pid=8519&dtid=33, last accessed on 20 May 2023.

Special Commission Meeting the Hague Conference expressly considered the link between domestic violence and Article 13(1)(b).[86]

Since the early writings, a wealth of literature and studies has been dedicated to child abduction and domestic violence. Nevertheless, reconciling the original purpose of the Convention with the domestic violence defence, remains one of the biggest challenges to the Child Abduction Convention.

This dissertation does not address at length the difficulties generated by the domestic violence defence as this has been done elsewhere.[87] The following paragraphs discuss how domestic violence interferes with the return mechanism in order to give an overview of some of the main challenges encountered by courts. Section 5.3.1 looks into how domestic violence has been brought before domestic courts as well as into the academic commentaries on this topic. Section 5.3.2 presents the guidance for courts on this topic emerging from two authoritative sources: the HCCH and a European academic network. Finally, Section 5.3.3 briefly outlines how domestic violence has been incorporated into the national laws of Japan, a country which has only recently acceded to the Hague Convention. This example is useful in showing how legislators could reconcile some of the tensions between domestic violence and child abduction.

### 5.3.1 Domestic approaches and academic commentaries

Domestic violence and child abduction cases typically involve a parent who claims that the reason for fleeing is to protect (her)self and/or the child from the violence of the other parent. This parent is usually the mother and, in addition to allegations of domestic violence, she argues that she is the primary carer of the child. Sometimes it is only the parent who has been directly victimised by the other parent. Other times, the child has also been (psychically) abused, or the child has witnessed the physical and/or emotional abuse by the left-behind parent. The taking parent argues that a return to the country of habitual residence will expose the child to harm for various reasons: the child will be abused, the child will be exposed to violence against the other parent, or the harm will result from the separation as the taking parent will not return to the country of habitual residence (for fear of violence or other reasons). The intensity of violence to which either the child or the taking parent have been exposed to varied from isolated instances to severe violence. Even more, the parent could not always prove with official records that the violence had in fact happened. Sometimes that parent had filed police complaints before leaving, other times no such complaints had been filed. More often than not, there had been no final criminal

86 Hale 2017, p. 10.

87 See among many other authorities Masterton 2016; Weiner 2021; Trimmings e.a. 2022; Jenkins 2022.

decision in the country of habitual residence confirming whether violence had in fact occurred.

As discussed, the Child Abduction Convention offers limited opportunities for refusing the return, most notably under the exceptions mentioned under Article 13(1)(b) and Article 20.[88] Article 13(1)(b) only mentions the grave risk of harm to the child whereas Article 20 has been interpreted to mean that return should be incompatible with the fundamental principles, -laid down in the constitutions- of the returning states. Prohibition of domestic violence is not included *per se* in most of the constitutions of state parties, and therefore Article 20 proved to be of a limited use for the claim of domestic violence.[89] On the other hand there is no reference to the taking parent in Article 13(1)(b) which led to difficulties for judges whenever there was no evidence of the left-behind parent directly abusing the child. Even where such evidence existed, it was sometimes considered that an Article 13(1)(b) defence was not made out if the child had only been sporadically the target of physical violence.[90] Courts have interpreted the 'grave risk of harm' as requiring an elevated form of harm, directly against the child in order to meet the threshold of Article 13(1)(b).[91] The risk 'must be not only real, but a level of seriousness to warrant the qualitative description of harm'.[92] Some courts have not accepted that the domestic violence perpetrated solely against the taking parent was enough to meet the standards of Article 13(1)(b).[93] Under the influence of social studies, some domestic courts changed their approach and found that domestic violence against a parent can be harmful to the child.[94] However, it was considered that only cases of severe (physical) violence could potentially meet the high threshold imposed by Article 13(1)(b).[95]

When courts accepted that domestic violence may become relevant for the purposes of Article 13(1)(b), divergent approaches existed. One imminent question was whether the Child Abduction courts should establish the

88 It should be noted however that domestic violence allegations could also play a role in determining other elements of the Child Abduction Convention such as the habitual residence or whether the left-behind parent had exercised custody rights (See Weiner 2000, pp. 704-706).

89 For a view arguing in favour of Article 20 relevance in domestic violence cases see Weiner 2004.

90 Weiner 2021 and the case law cited therein.

91 See also Chapter 3 of this dissertation.

92 Gray/Kaye 2023 p. 14, referring to the approach in Australia. A similar approach has been taken by courts in other jurisdictions including England and Wales where such an approach originated: Re E (Children (FC), [2011] UKSC 27, para 33, United States (Reece 2022, p. 122), Reen 2022 Canada (p. 159).

93 This has been reported in relation to New Zealand, see Maxwell 2017; Brouwer/Ibili/Nederveen, 2022.

94 US *Walsh v. Walsh*, 221 F.3d 204 (1st Cir. 2000); Lindhorst/Edelson 2012; For UK, Hale 2017; Re E [2011] UKSC 27 [34]; Re S (A Child) (Abduction: Rights of Custody) [2012] UKSC 10 [6].

95 This appears to have been the case in Australia, see Gray/Kaye 2023, p. 15.

truthfulness of the domestic violence allegations.[96] This impacted heavily on the duration of return proceedings as judges had to administer evidence and follow various procedural rules which usually lengthened considerably the proceedings.[97] Other countries considered that it would be inconsistent with the Hague Convention to examine the veracity of the allegations and instead focused on whether the country of habitual residence was able to protect the child from a grave risk upon return.[98] Even within this latter approach, a dilemma emerged. When looking at the capacity of a system to protect the child upon return, should judges look at the system as a whole or should the focus be on concrete measures of protections for the child? Sometimes courts ordered the return without an analysis of the domestic violence allegations, on the ground that the country of habitual residence has institutions and regulations which can offer the taking parent and/or the child adequate protection.[99] On other occasions, courts went further and looked for the existence of measures of protection in the state of habitual residence. Measures of protection are to be understood broadly; they encompass undertakings or promises of the left-behind parent to behave in a certain way, the deposit of a sum of money, etc. In turn, protective measures could on the one hand directly secure protection against the grave risk of harm or they could be aimed at ensuring a 'soft landing' for the taking parent.

Whenever the focus was on the system's capacity to protect (either in the form of general statements or concrete protective measures), the emphasis was on the duty of trust in the foreign legal systems.[100]

Overall, two main approaches to the assessment of domestic violence have been identified: the assessment of allegations approach and the protective measures approach.[101]

Under the *assessment of allegations approach*, courts first consider summarily if the allegations of the domestic parent have merit. In the affirmative, courts then examine whether return poses a grave risk to the child and finally, as a last step, if there are available protective measures.[102] Courts following the *protective measures approach* have dispensed with the fact finding task of assessing the veracity of the allegations and have instead focused on whether the child can be adequately protected in the state of habitual residence.[103] For both approaches, courts could either opt for looking at whether the system in general is capable of protecting the child or whether

96 Hale 2017, p. 12.
97 Hale 2017, p. 12.
98 Weiner 2021, Hale 2017.
99 Weiner 2021, Hale 2017, Trimmings/Momoh 2021, p. 7.
100 In this sense see also Section 4.5.1 above concerning comity and child abduction.
101 Freeman/Taylor 2022; Trimmings/Momoh 2021.
102 Trimmings/Momoh 2021, p. 7.
103 Trimmings/Momoh 2021, p. 6; this approach has also been followed in Australia Gray/Kaye 2023, New Zealand Maxwell 2017.

concrete measures of protection should be in place and if these measures are effective.

Most recently, scholarship supported the assessment of allegations approach as the most suitable for domestic violence cases.[104] The reasons for this position, as well as the guidance of the Hague Conference are discussed more into detail in the following section.

### 5.3.2 The HCCH Guide to Good Practice and the POAM project

The Guide to Good Practice expressly mentions domestic violence as potentially triggering a grave risk of harm under Article 13(1)(b) of the Hague Convention. This Guide, although not binding, represents a recent authoritative interpretation of Article 13(1)(b). Paragraph 39 of the Guide clarifies that the steps of assessment of the grave risk of harm are the same, regardless of the subject matter of the risk. In paragraphs 40-42 the Guide proposes the *assessment of allegations approach.*

The first step is thus the summary determination of the merits of the domestic violence allegation. The Guide recommends here that courts look at the nature, frequency, and intensity of the violence.[105] However, in order to avoid protracted proceedings, the Guide discourages courts from seeking evidence abroad.[106] It is for the taking parent to prove the defence. Also, evidence of domestic violence alone is not sufficient for establishing a grave risk of harm.[107] At the same time, it is accepted that harm to the parent may, in exceptional situations, amount to a grave risk of harm to the child.[108] The Guide proposes that courts focus on the effects of the violence on the child upon return, and whether the effects meet the threshold of a grave risk of harm. Then, assuming that a grave risk of harm has been established, courts are encouraged to evaluate whether effective and adequate protection measures exist in the state of habitual residence. The Guide to Good Practice indicates as suitable protection measures the existence of legal protection in the state of return.[109] As to form, the Guide to Good Practice actively discourages the use of undertakings given the lack of enforceability.[110] Instead, mirror orders, or protective measures adopted pursuant to the 1996 Convention are considered acceptable.[111] On the types of protective measures, the Guide gives some examples such as access to legal services, financial assistance, housing assistance, health services or shelters.[112]

104 Trimmings/Momoh 2021; Gray and Kaye 2023; Freeman/Taylor 2022.
105 Guide to Good Practice Article 13(1)(b), para 58.
106 Guide to Good Practice Article 13(1)(b), para 53.
107 Guide to Good Practice Article 13(1)(b), para 58.
108 Guide to Good Practice Article 13(1)(b), para 33.
109 Guide to Good Practice Article 13(1)(b), para 59.
110 Guide to Good Practice Article 13(1)(b), para 47.
111 Guide to Good Practice Article 13(1)(b), paras 47-48.
112 Guide to Good Practice Article 13(1)(b), para 43.

In any event, protective measures should not exceed what is strictly necessary and they can only be in place for the shortest period of time to address the grave risk of harm.[113] Protection measures are different from practical arrangements or soft-landing measures, such as purchasing plane tickets or financial support -usually from the left-behind parent to the child and taking parent- upon return.[114]

Domestic violence has also been analysed in one recent European project: The Protection of Abducting Mothers in Return Proceedings (the "POAM") which has equally proposed a Best Practice Guide (the "POAM Guide") specifically designed to domestic courts within the European Union.[115]The POAM Guide aligns generally to the HCCH Guide to Good Practice; however, the former is exclusively targeting domestic violence and for this reason it is more detailed, and arguably it provides enhanced guarantees in certain respects. The POAM Guide equally endorses the *assessment of allegations approach.* This Guide however is more explicit in recognising that a grave risk of harm to the mother can trigger the application of Article 13(1)(b).[116] Domestic violence perpetrated on the mother alone shall impact the child as either it will impair her parenting capabilities or it will result in a separation of the child from the mother.[117]

Equally, the POAM guide recognizes more explicitly psychological violence as domestic violence.[118] The definition of grave risk of harm is that the risk must be real, of a level of seriousness to amount to grave and it should not be one that the child is expected to tolerate.[119] Similarly to the HCCH counterpart, the POAM guide clarifies that the nature, frequency and intensity of the violence are all relevant factors to take into account.[120] Harm is broadly divided into three categories – minor, middle and grave and most of the cases will fall within the second category.[121] The POAM guide subsequently analyses various pathways for protection orders which are applicable within the European Union. For child abduction cases outside of the European Union Trimmings and Momoh -who formed part of the research team of the POAM project-recommended cautiousness for courts when accepting undertakings in light of their general demonstrated inefficacy.[122]

113 Guide to Good Practice Article 13(1)(b), para 44.
114 Guide to Good Practice Article 13(1)(b), para, see also Trimmings/Momoh 2021, p. 12.
115 The website of the Project is: <https://research.abdn.ac.uk/poam/>, last accessed on 22 May 2023.
116 Trimmings e.a. 2022, p. 263.
117 Trimmings e.a. 2022; this was also the approach proposed by Hale 2017, p. 15.
118 Trimmings e.a. 2022, p. 262-264.
119 Trimmings e.a. 2022, p. 262.
120 Trimmings e.a. 2022, p. 264.
121 Trimmings e.a. 2022, p. 263.
122 Trimmings/Momoh 2021, p. 18.

The POAM Guide and the HCCH Guide to Good Practice have been presented above as they reflect the most recent authoritative works on child abduction and domestic violence.

### 5.3.3 National legislation implementing the Hague Convention

In addition to being raised to oppose return during court proceedings, domestic violence may also be included as an exception to return upon a state's accession to the Convention under Article 38 HC. Japan's accession to the Hague Convention in 2014 offers an example of expressly providing for domestic violence within Hague Convention Proceedings. Japan's act of implementation adds that when considering Article 13(b) courts are to examine, *inter alia*:

> "(ii) Whether or not there is a risk that the respondent would be subject to violence, etc. by the petitioner in such a manner as to cause psychological harm to the child if the respondent and the child entered into the state of habitual residence;
> (iii) Whether or not there are circumstances that make it difficult for the petitioner or the respondent to provide care for the child in the state of habitual residence."[123]

Scholars have considered this provision to be the "most lenient standard for Article 13(b) proceedings in the world."[124]

## 5.4 Separation of the child from the primary carer

### 5.4.1 The change in the profile of the abductor

The language of the Hague Convention is gender neutral: the person who has removed the child in breach of custody rights is guilty of child abduction.[125] In the Explanatory Memorandum to the Convention, Pérez Vera commented that the abductor is usually somebody from the child's circle of trust who is motivated by the desire to obtain a favourable custody order in the country of habitual residence. Despite the Convention's neutral language, many of the writings covering the *travaux préparatoires* have highlighted that the drafters originally envisaged fathers as the 'typical' abductors.[126] At the time the Convention was being negotiated, most

123 Weiner 2021, p. 245.
124 Stark 2015, p. 798.
125 Adair Dyer credits the Convention's success in time to its gender-neutral language. See Dyer, 2000, p. 3.
126 Cass 2020; Dyer, 'Report on International Abduction by One Parent ("Legal Kidnapping")' Preliminary Document 1 (1978), Actes et Documents of the XIVth Session, 17; Schuz 2021, p. 20. See also Section 4.2. of this dissertation.

countries drew a sharp distinction between custody and access rights and in practice women were usually granted custody and men access rights.[127] Against this background, the drafters considered that fathers would snatch their children away from their place of habitual residence in an attempt to secure a more favourable decision elsewhere.

Further, the Convention protects both access and custody rights and it clearly distinguishes between the two notions. Under Article 5 (a), 'custody rights' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence whereas "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence. Further, Article 7 covers the procedure for securing the effective exercise of access rights.

In time both the original assumption about the profile of the abductor as well as the distinction custody/ access rights have substantially changed.

All statistical analyses to the Convention have consistently indicated that most of the taking parents are mothers.[128] The percentage of taking mothers was 69 in 1999, 68 in 2003 and 2008, and 73 in 2015.[129] The latest study published in 2023 and covering child abduction applications filed in 2021 identified that during this year, the percentage of taking mothers rose to 75.[130]

This shift can be attributed to a change in the meaning of custody under national laws as well as the interpretation of this term under the Hague Convention. First, in most of the States Parties to the Convention and certainly in those countries with the highest incoming and outgoing abduction cases, 'custody' has largely been replaced by 'parental responsibilities.'[131] Parental responsibilities are usually exercised jointly by the parents from the birth of the child and include a wide range of rights for the parents.

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127 For a discussion, see Section 4.2 of this dissertation.

128 <https://www.hcch.net/en/instruments/conventions/publications1/?dtid=32&cid=24>, last accessed on 6 October 2023.

129 Prel. Doc. No 11 A of September 2017 – Part I — A statistical analysis of applications made in 2015 under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* — Global Report.

130 Lowe/Stevens, Global Report – Statistical study of applications made in 2021 under the 1980 Child Abduction Convention, Preliminary document 19A, October 2023, para 14.

131 For Europe, see Boele-Woelki e.a. 2007, <<http://ceflonline.net/parental-responsibility-reports-by-jurisdiction/>>, last accessed on 1 November 2020; Canada: Bala 2014; United States: Kline Pruett, Marsha, and J. Herbie DiFonzo 2014 discuss the changes in terminology. In the United States they mention that parental responsibilities after divorce is divided into decision-making and parenting time (p. 154); Bozzomo 2002. In the United States laws regulating the relationship between children and parents after parental separation are state laws, meaning that there are 50 different family statutes. In some states the functional equivalent of 'parental responsibility' is that of 'joint legal custody'. Australia: Section 61 B of the Family Law Act.

Most importantly, for the purposes of the Child Abduction Convention, 'parental responsibilities' include the right to veto the relocation of the child to another country.

At the same time, since 2010 when the US Supreme Court delivered its judgement in *Abott v. Abott*, the right to veto the child's relocation gradually became the single most important factor in deciding whether a person has custody for the purposes of the Child Abduction Convention.[132] In other words, regardless of actual living arrangements or whether a parent is factually involved in a child's upbringing, both parents will usually have custody over the child and be entitled to request the return under the Convention. This in turn has resulted in a de-emphasis of the Convention's provisions on access rights. In 2021 for example, Lowe and Stevens found that of a total of 2,180 applications only 399 concerned access rights[133]. The Convention and indeed the case law continue to use the word 'custody' but as Lady Hale has observed many of the return applications are brought with a view to restore contact with the left-behind parent rather than a child living with a primary carer.[134]

Therefore, the notion of 'primary carer' has been introduced to reflect the living arrangements of the child prior to abduction and to designate the parent who was responsible for the day-to-day care of the child prior to the abduction. In national legislations terminologies differ, from shared care, shared physical custody or the 'residential parent.'[135] In the Statistical analysis of 2015, Lowe and Stevens found that where the information was available, 80% of the taking parents were the 'primary carers' or 'joint primary carers'. Where the taking parent was the mother, they were the primary carers in 91% of the cases as opposed to fathers who were the primary carers in 61% of cases.[136] The latest statistical data of 2021 noted an increase in joint primary carers: 73% of the taking parents were joint primary carers of their children.[137] 15% were sole primary carers.[138]

The Convention applies in the same way regardless of whether the taking parent was the primary carer of the child before the abduction. Questions have arisen however as to the circumstances in which the separation of the child from the primary carer may amount to a grave risk of harm or intolerable situation to the child.

132 Abbott v. Abbott, 130 S. Ct. 1983 (2010).
133 Lowe/Stevens, Global Report 2023, para 22.
134 Hale 2017, p. 6.
135 Boele-Woelki e.a. 2007; Canada: Bala 2014; United States: Pruett, et al. 2014.
136 Lowe/Stevens, Statistical analysis 2017, para 3.
137 Global Report 2023, para 44.
138 Lowe/Stevens Global Report 2023, para 44.

### 5.4.2 Primary carer abductions: existing approaches and recommendations

It is now accepted that the sociological paradigm has changed in that primary carer parents, particularly women, are responsible for child abduction.[139] However, there is hardly any study, empirical or otherwise, analysing the implications of this change for the rights of children. It is also unclear how courts should approach such situations. The primary carer status has been analysed mainly in relation to allegations of domestic violence.[140] However, less attention has been dedicated to the separation of the child from the primary carer in other contexts such as criminal prosecution, immigration, state of health or for other reasons.

In practice the primary carer parents have submitted that they cannot or will not return to the country of habitual residence and the child will be exposed to a grave risk of harm due to this separation. The issue is also identified in the Hague Conference's Guide to Good Practice among one of the six most common defences to return.[141] This Guide indicates that domestic courts have rarely refused to return children on the basis of this argument.[142] The Guide further proposes that the focus is on the effects of the separation on the child rather than on the reasons for the parent, even though it is admitted that the parent's reasons may sometimes form part of the assessment.[143] In line with its approach to other defences to return, the Guide to Good Practice recommends that domestic courts apply a high threshold before considering the application of this exception, and that even where the threshold is met, return should nevertheless be ordered where protective measures in the state of habitual residence may alleviate the concerns of the parent.[144]

In a comparative study of 16 cases delivered by courts in Switzerland, France and Belgium, Van Hof and Kruger found that when considering the issue of the separation of the child from their taking parent, the courts set a high threshold before finding that a particular situation amounted to a grave risk of harm.[145] In their research which collected a total of 25 cases, the domestic courts had accepted that the grave risk of harm exception was met due to the separation of the child from the primary carer in 5 cases. Overall, the courts only considered that the threshold was met when the parent was in an objective impossibility to return and the left-

139 ECtHR 26 November 2013, no. 27853/09, *X v. Latvia.* concurring opinion of Judge Pinto de Albuquerque; See also Lowe/Stevens, Global Report 2023, paras 44-47; as of 2015 they also note an increase in the joint primary carer fathers who are responsible for child abduction.

140 Hale 2017.

141 Guide to Good Practice Article 13(1)(b), paras. 37-48.

142 Guide to Good Practice Article 13(1)(b), para 63.

143 Guide to Good Practice Article 13(1)(b), para 64.

144 Guide to Good Practice Article 13(1)(b), para 65.

145 Van Hof/Kruger 2018.

behind parent was not capable of caring for the child.[146] In practice courts have been highly reluctant in finding that a parent had demonstrated an objective impossibility to return. For example, no objective impossibility existed where the taking parent was pregnant and unable to move in the short term, lacked employment, was subject to domestic violence, risked imprisonment or could not live in the country of habitual residence due to the lack of immigration permission.[147] Further, it is not clear to what extent the courts have analysed the relationship between the child and the taking parent and if the parent child separation would expose the child to harm. In Switzerland however, it has been found that infants under the age of 2 could be exposed to harm if separated from their primary carers.[148]

The same approach is followed in Canada, where separation in and of itself has not been found to amount to a grave risk of harm.[149] The standard of the Canadian Supreme Court is similar to the one recommended by the HCCH and followed by the three domestic jurisdictions mentioned above. Canadian courts assess whether the parent has put forth reasonable grounds for not returning, and if so, whether protective measures are in place or the children can reside with the left-behind parent.

In practice, the application of this standard appears to result in an almost insurmountable burden for the taking parent. For example, in the case decided by the Canadian Supreme Court, the taking parent had demonstrated that she had a precarious residence status and that the laws in the country of habitual residence (United Arab Emirates) permitted a husband to physically punish women, that a woman would lose custody if remarried, and that she needed to obtain permission from her husband for accepting an offer of employment.[150] Nevertheless, the Canadian Supreme Court accepted, without further investigation, the father's undertaking to provide the mother with accommodation in the country of habitual residence, and his guarantees that children would be allowed to live with their mother despite existing custody orders to the contrary.[151]

To sum up, it does not follow from the existing research or from the judgement of the Canadian Supreme Court that any cooperation or discussions were undertaken between the relevant authorities in the states concerned to ensure that the children would be *effectively* protected against the identified risks upon return. In the judgement of the Canadian Supreme Court, it is accepted that "the objective of discouraging abduction must yield to the

146 Van Hof/Kruger 2018, pp. 149-150.
147 Van Hof/Kruger 2018, referring to Court of Appeal Agen (France) 1 December 2011, no. 11/01437; Federal Tribunal (Switzerland) 31 August 2010, no 5A 520/2010; Federal Tribunal (Switzerland) 3 September 2014, no 5A_584/2014; Court of Appeal of Poitiers (France) 6 May 2009, no. 09/00305.
148 Van Hof/Kruger 2018, p. 146.
149 F.v.N., 2022 SCC 51, 2 December 2022.
150 F.v.N., 2022 SCC 51, 2 December 2022, para 167.
151 F.v.N., 2022 SCC 51, 2 December 2022, para 13.

paramount objective of preventing serious harm to children."[152] Nevertheless, while the legal standard -objective impossibility to return- seems to be accepted its practical application was disputed between judges. It consequently appears that in practice the objectives of the Hague Convention for cross border cooperation weigh heavier than the rights of individual children to be protected from harm, especially since -as in the case at hand- objective allegations of risk are discounted on the basis of private undertakings, without any hard evidence as to the actual circumstances of the children upon their return.

Last but not least, it should be noted that, from the perspective of the rights of children and as discussed in the preceding section, the CRC Committee endorses an expansive definition of violence against children to include both psychological and physical violence.[153] The Committee does not distinguish between the two in terms of the legal protection children deserve.[154] In other words, to the extent that the risk of violence exists, it is irrelevant if that the source of the risk is psychological violence. Consequently, the separation of a child from the primary carer may amount to violence against children.

The appropriate balance between the rights of children and other comity considerations of the Child Abduction Convention shall be revisited in the Preliminary Conclusions (Chapter VI) as well as in the dedicated sections to the approach of the European Court of Human Rights (Section 8.4) and the Court of Justice of the European Union (Section 7.5).

### 5.5 Power imbalances; domestic violence and immigration law – substantive considerations

From a legal perspective, immigration and family law are two distinct areas of law, operating independently and following different principles.

Family law is regarded as the discipline establishing the legal rights and duties between family members, including the husband and wife, parents living with children and siblings or others related by blood or marriage.[155] Family law is concerned with statuses of individuals and stipulates when law may intervene to protect family members.[156] Traditionally, the regulation of marriages was at the core of national family law. In view of the evolution of the concept of family, modern family law is perceived to have

152 F.v.N., 2022 SCC 51, 2 December 2022, para 140.
153 CRC Committee, General Comment no 13, para 14.
154 CRC Committee, General Comment no 13.
155 di Torrella/Masselot 2004, p. 33.
156 Probert 2003, p. 3.

a more remedial function of, for example, protecting children who are perceived as the weaker parties in cases of marital breakdown.[157]

Substantive family law is still essentially national law. It is generally considered that family law systems are the product of religious and cultural factors, thus little harmonisation from supranational institutions is possible in this field.[158] Yet, national family laws in the Global North[159] converge on several core principles such as permission to divorce and that the best interests of children shall guide the post separation decision-making.[160] Family dis-unity is accepted and divorce is seen as transforming the relationships, rather than ending them.[161] In sociology, a shift has been noted where divorce is viewed as "a transition between the original family unit and the reorganisation of the family which remains a unit, but a bipolar one". [162] Divorce thus became a way of redefining relationships over a long period of time rather than ending them.[163] The best interests standard was reconceptualised to include a 'right' to contact with both parents after separation, leading to arguments either for joint custody arrangements or some alternatives to the concept of custody itself.[164] Post-separation parenting agreements retain the principle that parents shall exercise their responsibility over children jointly.[165] Custody, in the sense that one parent has rights and duties over a child, has virtually disappeared and the principle operating in Global North jurisdictions is that parents retain joint parental responsibilities over the child after divorce or separation.[166] Courts decide on the allocation of responsibilities between former partners; however both parents usually retain the right to veto a relocation – the essential component of custody for the purpose of the Child Abduction, regardless of

157 di Torrella/Masselot 2004, p. 33.

158 Parkinson 2016, p. 38; Silberman/Wolfe 2003, p. 247 also note that some exceptions exist in the case of Europe for Council of Europe and European Union Member States. These exceptions shall be discussed into more detail in Part 2 of this dissertation.

159 'Global North' includes the United States, Canada, England, nations of the European Union, as well as Singapore, Japan, South Korea, and even some countries in the southern hemisphere: Australia, and New Zealand. It is here acknowledged that the use of the term has been considered problematic see: Blicharska e.a. 2021. Notwithstanding these discussions the term is used as the countries of the 'Global North' after the same as countries with the highest number of outgoing and incoming abduction applications under the Hague Convention.

160 Van Krieken 2015, p. p.26; Parkinson 2016, p. 39.; Antognini 2014, p. 10, Sormunen 202, Mair/Orucu 2010, Pousson 2010.

161 Antognini 2014, p. 12.

162 Thèry 1986, p. 356.

163 Schepard 1999, p.396. van Krieken 2005, Antognini 2014, Thèry 1986.

164 van Krieken 2005, p. 34.

165 Lowe 2005; Parkinson 2008; Boele-Woelki 2004, CEFL principle 3.1. (c) Principles 3.10; 3.11; 3.12; 3.14.

166 van Krieken 2005; see also the literature cited above, Lowe 2005; Parkinson, 2008; Boele-Woelki 2004.

how much time the child spends with each of the parents.[167] In cross border cases, a primary caretaker is understood to mean the parent who spends most physical time with the child, the parent with whom the child lives the majority of time.[168]

Immigration law, on the other hand, is concerned primarily with regulations regarding the admission, naturalisation and citizenship policies within a country.[169] It is considered a matter of well-established international law that states have the exclusive prerogative to control the aliens' entry and residence in their territories.[170] Hence, there is no international instrument that guarantees such a right.[171] Immigration law typically recognises unified families, marriage migration continuing to play an important role in receiving immigration permission to live in a given country.[172] In many jurisdictions residence rights are granted via sponsorships, the dissolution of the marriage entailing the loss of the right to reside for the immigrant spouse.[173] Immigration law does not usually recognize the continuation of the right to reside post-separation. As opposed to family law where joint parenting laws have been justified by the right of the child to have contact with both parents; -with some exceptions – the same right of the child is

167 For example in Israel: Kritzman-Amir 2015, p. 263 "In general, an arrangement that allows the child to maintain a real and ongoing relationship with both his parents will be given preference"; see also van Krieken 2005; Lowe 2005; Parkinson, 2008; Boele-Woelki 2004; Picontó Novales 2012; Cottier e.a. 2017, p. 88.

168 See Section 5.4.

169 Lee 1999, p. 86.

170 This principle was first laid down in the *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, ECtHR 28 May 1985, Appl. nos. 9214/80 9473/81 9474/81, ECLI:CE:ECHR:1985:0528JUD000921480, para 67, and reiterated thereafter in virtually all cases concerning immigration questions.

171 For eg *Boultif v. Switzeland*, ECtHR 2 August 2001, appl. no. 54273/00, ECLI:CE:ECHR:2001:0802JUD005427300, para 39.

172 Antognini 2014, p. 21; Ricordeau 2012.

173 Antognini 2014, pp 43-46, See also Stoyanova 2018; see also Council of Europe, Committee on Migration, Refugees and Population, Report 'Protecting migrant women in the labour market', Doc. 12549 24 March 2011 (available at: <<https://pace.coe.int/pdf/a9e2db21d2fba624236aba7ee3336ee79e327fac69dc4f04944b31777807638d/doc.%2012549.pdf)>> para 29 explaining that "In most European Union member states, a woman who enters with a family reunification or "spouse" visa has to wait many years to be able to acquire a status autonomous and independent of her spouse. If she is a victim of domestic violence during this period or if she files for divorce, she is not entitled to a residence permit, nor does she have access to shelters. Leaving an abusive relationship would therefore mean becoming undocumented with very limited rights and being at risk of deportation. This dissuades many women who have suffered violence from making an official complaint. Linguistic barriers, family pressure, isolation and cultural traditions are additional problems which may prevent victims from making formal complaints." See also: Australia: Segrave 2018, pp. 128-129; Switzerland: Chen 2022; Menjívar, and Salcido 2002; England and Sweden, Voolma 2018; US: Antognini 2014, pp 43-46, for France (where the parent child relationship is taken into account in deportation decisions) see Langrognet 2018.

not considered relevant whenever one of the parents faces expulsion.[174] For Eekelaar as well, expulsion decisions are decisions about a parent, the child being only indirectly affected by such measures.[175] Migration scholarship has highlighted the limited engagement of immigration authorities with the best interests of the child in decision-making.[176] Even when some consideration is given to the best interests of the child, this generally benefits unaccompanied minors, and rarely children of separated parents.[177] As opposed to spouses who can sponsor a partner for migration purposes, migration law does not generally recognize the rights of children to derive residence rights onto their parents.[178] Where it has done so, children have been qualified as 'anchor children' and critics have emphasised the possibilities of parents to abuse immigration laws through their children.[179]

Even if there is no formal link between family and immigration laws, their different evolution and principles expose mixed-status families[180] to difficult conundrums. On the one hand, post separation parenting rules favouring joint parental responsibility require family members to live within close geographical proximity. On the other hand, immigration laws expose parents to deportation in the aftermath of the relationship breakdown. These tensions have been exposed in migration case law and literature focusing on the assessment of (separated) parents' right to reside in the same country as their children.[181] Migration law investigates whether a parent can claim legal residence rights on the basis of the relationship with the child. In this hypothesis, parents were subject to expulsion decisions, or their right to reside was otherwise being questioned before domestic courts. Generally, in jurisdictions where a parent cannot derive residence rights from the child,

174 For example in the US: Thronson 2005; Carr 2009; for Israel Kritzman-Amir 2015; Eekelaar 2015, pp. 19-21; within the European Union the situation is somewhat different due to the intervention of the ECtHR and the CJEU. However, arguments to the effect that parent child ties are irrelevant in the decision to deport a parent were put forth by several governments in their observations submitted in the CJEU Chavez-Vilchez case: see discussion and further references in Chapter 10, Section 10.2.1 below.

175 Eekelaar 2015, pp. 19-21.

176 Sloth-Nielsen/Collinson/Spalding 2023, discussing approaches in South Africa, United Kingdom and the ECtHR; Sullivan 2014 discussing the approach in the United States.

177 Bhabha 2014, pp. 61-95; Wolf 1996; Zug 2011.

178 For example, Kritzman-Amir 2015, p. 273, Sloth-Nielsen/Collinson/Spalding 2023, p. 4. In relation to Australia Segrave 2018, p. 134 writes: "Parents of Australian citizen children who are not citizens are not automatically eligible for Australian permanent residency or any other pathway towards citizenship. The extent to which this happens across Australia is unknown, and extremely difficult to quantify."
For a discussion on the EU supranational courts, see Chapter 10 of this dissertation

179 Martuscelli 2023.

180 'Mixed status families' are understood here to mean families where at least one family member is not a citizen or permanent resident of the host state.

181 For discussion concerning the European context see Chapter 10 of this dissertation. For other jurisdictions: the United States: Thronson 2005; Carr 2009; Israel: Kritzman-Amir 2015; South Africa: Sloth-Nielsen, Collinson and Spalding 2023.

the right to stay of such a parent on the basis of the relationship with the child is either non-existent, or subject to proving that leaving will expose the child and the parent to extreme hardship – a very stringent test.[182]

The same tensions have been presented to family courts in the context of decisions on custody and parental responsibilities. The question for family courts was related to the weight to attach to the immigration status of a parent. The responses have varied; sometimes family courts used the immigration status of one parent as a reason for depriving such parent of custody.[183] In other words, the lack of immigration permission to remain of one parent was the key factor for the courts' finding that it was in the best interest of the child to vest parental responsibility solely with the other parent.[184]

On other occasions, parents retained joint parental responsibilities, however, the parent with precarious immigration rights remained subject to expulsion as joint parental responsibilities for immigration law did not amount to an extraordinary circumstance allowing that parent to remain.[185] On yet other occasions, family courts changed the allocation of parental responsibilities following expulsion so as to reflect the fact that the parent was no longer in the country.[186] It has also been proposed that even when immigration status will not be taken into account in the final parenting order, such status "will serve the dangerous function of acting as a repository for the unconscious biases and punitive impulses of judges against immigrant parents."[187]

Overall, the different evolution of family and migration laws have exposed parents and children from mixed-status families to different push and pull factors and to navigating systems pointing to opposite directions: policy considerations call for keeping families within close geographical proximity in family law and policy considerations of restricting access to resources for nonnationals result in restricting immigration benefits to various categories of migrants.

In addition, another body of literature has examined how immigration laws create asymmetrical power relations between spouses and enable coercive controlling behaviours. The assessment has focused on the intersection between immigration law and domestic violence. Structural intersectionality, as part of the broader production of inequality, has offered a framework for examining how immigration laws compound the exposure to domestic

182 United States: 23 I&N Dec. 56 (BIA 2001); *Matter of Andazola-Rivas,* 23 I&N Dec. 319 (hardship clause), Mohsin 2023.

183 Such cases have been reported especially in the United States: see McFarland and Spangler 2008; Thronson 2007. Kritzman-Amir 2015 discusses these cases in Israel. The case law of the CJEU and the ECtHR outlined in Chapter 10 also identifies similar practices in European countries.

184 Ibidem.

185 Kritzman-Amir, 2015, pp. 279-280.

186 Thronson 2007, p. 463.

187 Abrams 2006, p. 88.

violence of migrant women who lack citizenship or permanent residence status.[188]

The argument was not that state agents are committing domestic violence but rather that migration laws enable perpetrators to threaten their victims with deportation, removal of children, economic precarity, or isolation.[189] The enabling factors have been precisely the legal regimes placing temporary migrants in a position of dependency on their partner. Such dependency is derived from legal residence rules which dictate that living in a particular country is conditioned on being sponsored for a certain period of time.[190] It follows that the dissolution of the relationship results in the loss of residence rights. Some jurisdictions have enacted specific legislative provisions allowing victims/survivors of domestic violence to retain independent immigration status even after the dissolution of the marriage.[191] It has been argued that despite these legislative caveats for survivors of domestic violence, policies discouraging immigration have rendered domestic violence waivers to legal residency rules difficult and sometimes impossible to access.[192] They usually do not cater for many of the individual scenarios that victims/survivors may find themselves in and this results in pushing domestic violence victims/survivors into remaining in abusive relationships.[193] In some cases, they cannot be accessed because threats with deportation are not included among forms of domestic violence.[194]

In addition, even when domestic violence waivers exist in theory, other laws and regulations leave temporary migrants in an impossibility to access

188 The structural intersectionality lens was based upon the writings of Crenshaw 1990. The link between immigration status and domestic violence has been developed among others by, Segrave 2017; Chen 2022; Menjívar, and Salcido 2002.

189 Segrave 2021, p. 35.

190 Australia: Segrave 2018, pp. 128-129; Switzerland: Chen 2022; Menjívar/and Salcido 2002; UK: Anitha 2011; US: Erez e.a. 2009, 2017; UK and Sweden Voolma 2018.

191 This is the case of The United States (<https://www.americanimmigrationcouncil.org/sites/default/files/research/violence_against_women_act_provides_protections_for_noncitizen_women_and_victims_of_crime.pdf>), Canada (<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/permits/family-violence.html>) ; Australia (<https://immi.homeaffairs.gov.au/visas/domestic-family-violence-and-your-visa>), and several EU countries. For an overview see also OECD 2024 report: <https://www.oecd.org/migration/mig/How-do-OECD-countries-respond-to-domestic-violence-against-migrants-Migration-Policy-Debates-No-34-January-2024.pdf>.

192 For example Stoyanova 2018 discusses how Article 59 of the Istanbul Convention which provides some immigration relief for domestic violence victims at the same time exclude, among others, victims (i) whose residence permit was not derived from their spouse; (ii) who were in an irregular or undocumented status at the time of application for the domestic violence waiver; (iii) whose abuse lost the residence rights prior to the victim/survivour application for the domestic violence waiver; (iv) who were not living with the abuser at the time of application. See also Olivares 2011 (discussing the legislation in the United States); Vasil 2023 (discussing experiences of immigrant women in Australia); see also Jelinic 2019; for Canada: Mosher 2023.

193 Segrave 2018, p. 131; Stoyanova 2018, p. 82; Villanueva Sainz-Pardo 2014, p. 686.

194 Segrave 2018, p. 135.

public funds such as housing or economic support while waiting for the decision on residence status.[195] Neither do they have the right to work during this time.[196]

In sum, migration law places the responsibility on the victim to leave the country or negotiate a complex administrative process that may or may not result in a path to citizenship.[197] Importantly, given the role of the state in the aforementioned dynamics, it has been argued that the focus should shift from perpetrators and individuals alone to identifying how the migration regime contributes to domestic violence.[198] In this view, an additional form of coercive control is exerted via the administrative legal, and regulatory regime.[199] The harm is produced by the migration laws and regulations which empower perpetrators to leverage the victim's migration status within the context of domestic family violence.[200]

### 5.6 Child abduction and immigration considerations

Interestingly, even though child abduction has consistently been flagged as a problem generated by globalisation and increased movement of people, child abduction scholarship has paid limited attention to the intersection between this phenomenon and immigration.[201] Immigration has mostly been analysed in the context of the settlement exception, where the question was if the precarious immigration status of the child and/or the parent could be seen as an obstacle in finding that the child has settled in their environment for the purposes of Article 12 of the Convention.[202] These cases are outside the scope of research as there is no immigration obstacle for the parent and child to return to the state of habitual residence. On the contrary immigration law may not allow them to remain in the country of refuge.

Immigration however, in the sense described in Section 5.5 above – as a factor potentially leading to the parent child separation- has been brought as an exception to return in the Child Abduction Convention. The following sections are primarily descriptive, they focus on identifying how child abduction courts have dealt with immigration considerations. First, Section

195 Anitha p. 1263.
196 Anitha p. 1280.
197 Segrave 2018, p. 131.
198 Segrave 2021, p. 26.
199 Segrave 2018, p. 131; immigration as a form of coercive control has also been accepted in Canadian legal practive: see Mosher 2023, p. 324.
200 Segrave 2021, p. 27; Jelinic 2019, p. 262.
201 A few contributions mention the issue of immigration see for example Martin 2014, p. 336; there are also several scholarly publications concerning the relationship between child abduction and asylum: see Walsh/Atkins 2022; Garbolino 2019; Loo 2016; Norris 2010.
202 Mendoza v. Mendoza, No. 08-55067, 18 March 2009 (United States Court of Appeal for the Ninth Circuit); Re C (A Child), [2006] EWHC 1229 (Fam) (United Kingdom High Court of Justice, Family Division). In this sense see also Cass 2020, Erler 2018, Schuz 2008.

5.6.1 outlines the methodology used for identifying the cases as well as the types of cases that have been selected for analysis. Then Sections 5.6.2 and 5.6.3 discuss domestic case law and practice in relation to the two main types of immigration considerations which came to the fore following the selection process described in Section 5.6.1, namely the lack of the relevant immigration permissions to enter, reside or work in the country of habitual residence and second, the application for asylum in the country of presence.

### 5.6.1 Identification of cases and prevalence of the issue

The cases analysed herein have been primarily selected from the Hague Conference's child abduction case law database.[203] An initial overview for the search terms "visa" and "grave risk Art 13 (1) (b)" yielded 147 judgments. A search for the word 'asylum' yielded 56 results. The scope of research was subsequently narrowed down to those cases where immigration considerations represent an obstacle to return for the taking parent. Within these considerations the question of the separation between the child and the parent becomes central.[204] For example the question of immigration status is also discussed in the context of the settlement exception. However, here it is usually the left-behind parent who objects to settlement and one of the arguments is that neither the taking parent and (usually) nor the child hold a valid residence permit in the country of abduction nor have they applied for asylum protection. In such cases there is no immigration based obstacle to return which would result in the parent child separation. For this reason, such cases have not been deemed relevant for this research.

Of the cases reviewed, a total of 43 judgments concerned the issue of the parent's immigration status as an obstacle to return. The relevant judgments originate from the United States, the United Kingdom, Switzerland, Japan, France, South Africa, Canada or Israel. They have been read in full whenever the original language was English or French; otherwise the analysis relied on the summary provided by the HCCH.

The overview above identified that the general category 'immigration considerations' can be further subdivided into obstacles to return caused by (1) the lack of the relevant immigration permissions to enter, reside and/

203 https://www.incadat.com/en, last accessed on 2 May 2023. The cutoff date for the purposes of the present dissertation is 15 June 2024. More cases have been added following the publication by the HCCH of Prel. Doc No 16 of August 2023, in the context of the Special Commission 10-17 October 2023.

204 Immigration has most commonly been analysed in the context of the settlement defence. The argument here was usually that the lack of (legal) immigration status of the child or of the taking parent should be considered as evidence that the child is not settled Mendoza v. Mendoza, No. 08-55067, 18 March 2009 (United States Court of Appeal for the Ninth Circuit); Re C (A Child), [2006] EWHC 1229 (Fam) (United Kingdom High Court of Justice, Family Division). In this sense see also Cass 2020, Erler 2018, Schuz 2008. These cases are outside the scope of research as there is no immigration obstacle for the parent and child to return to the state of habitual residence.

or work in the country of return (29 judgments) and (1) asylum applications (14 judgments). These two categories of immigration considerations raise different issues, and they shall be analysed separately below. All cases having addressed these issues have been reviewed, irrespective of the court deciding on the case.

In addition, for the purposes of this dissertation research has been conducted into the Central Authorities' responses to the Hague Conference's questionnaires on the operation of the Child Abduction Convention. These questionnaires illustrate the Hague Conference's assessment of topical issues in the field of child abduction. Both more general immigration considerations (such as a lack of visas) and concurrent asylum applications have been directly addressed in these questionnaires, an indication that despite the lack of visibility of immigration in academic literature dedicated to child abduction, it reflects topical practical concerns. Indeed, especially in the latest questionnaire circulated in 2023, 14 out of the 21 countries reviewed confirmed that they have dealt with concurrent child abduction and asylum claims.[205] The most recent conclusions adopted during the latest Special Commission on the operation of the Child Abduction and Child Protection Conventions have also mentioned the issue of child abduction and concurrent asylum claims, and the HCCH has published a Discussion Paper concerning parallel asylum claims during child abduction applications.[206] Moreover, in the recent Guide to Good Practice concerning Article 13(b), the Hague Conference identified immigration considerations as one of the commonly presented defences.

Lastly, it should be pointed out that the actual extent of parents facing immigration law obstacles to return is difficult to estimate for various reasons. On the one hand, not all abduction cases end up in court judgments and, even when they do, not all judgments are published. Also, as will be shown below, immigration is not usually put forth as a stand-alone argument which may sometimes result in this argument being minimised or overlooked in judgments. Moreover, as the responses to the Hague Conference's questionnaires show, child abduction courts hardly consider immigration as a relevant consideration in the return process. This in turn may arguably impact on the parents' willingness to put forth such arguments.

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205 The responses and the questionnaire are available at https://www.hcch.net/en/publications-and-studies/details4/?pid=8520&dtid=33, last accessed on 3 May 2023. It is recalled that this dissertation has looked in particular at European Union Member States and countries from the European Economic Area as well as the other countries which according to the 2023 Global Report have generated the largest number of outgoing cases, respectively Australia, Canada, New Zealand, the United States and the United Kingdom.

206 Available here: https://assets.hcch.net/docs/5b48f412-6979-4dc1-b4c1-782fe0d5cfa7.pdf, last accessed on 4 January 2024; see also Preliminary document no 16 Prel. Doc. No 16 of August 2023 - Discussion paper on international child abduction return applications where the taking parent lodged a parallel asylum claim. Here, the HCCH lists another 23 cases emanating from Canada, the US and the UK, some of which have not been added to the INCADAT database.

Nevertheless, in addition to the Hague Conference, a recent European Parliament study has indicated that issues of abduction and immigration are expected to increase.[207] References to immigration have also been included in academic writings on the topic, however except for several contributions addressing the impact of asylum proceedings on child abduction, this topic has received little dedicated attention.[208]

### 5.6.2 The lack of the relevant immigration permissions to enter, reside and/or work in the country of habitual residence

The 2010 Hague Conference questionnaire specifically inquired on the incidence of immigration/visa questions within the Hague Convention proceedings.[209] The question inquired on whether states had experiences with immigration/visa questions where the child/parent could not re-enter the state from which the child had been wrongfully removed.

Nine (9) of the 23 reviewed responses indicated that these questions have arisen in their jurisdiction. For example, the French authorities confirmed that they have been *frequently* confronted with these questions and that they have directed the parents to competent immigration authorities. When Germany was the country of return, the German Central Authority had sometimes assisted the taking parent in obtaining an entry visa for the duration of custody proceedings. There was no set practice whenever children had to leave Germany following orders under the Hague Convention. German courts have sometimes asked for mirror orders and/or undertakings. Spain equally mentioned being faced with cases where questions of visa arise. The Dutch Central Authority's response is illustrative of how immigration comes into play in child abduction cases. This response elaborates on the causes of immigration issues, namely that breakup results in

207 Children On the Move: A Private International Law Perspective, Directorate General for Internal Policies of the Union, Policy Department for Citizens' Rights and Constitutional Affairs, PE 583.15, 8- June 2017, p. 30, at p. 30: For example, this study mentioned the interview with the Dutch Central Authority where it was reported that a migrant father in The Netherlands requested family reunification with the mother and the child who at the time were located in another EU Member State. Given the mother's refusal, the father claimed wrongful retention by the mother. In another Dutch case, the left-behind mother applied for the return under the Hague Convention and while the application was pending the father and the child –third-country nationals – had left the European Union for the country of origin.

208 A few contributions mention the issue of immigration see for example Martin 2014, p. 336; there are also several scholarly publications concerning the relationship between child abduction and asylum: see Walsh/Atkins 2022; Garbolino 2019; Loo 2016; Norris 2010.

209 The questionnaire is titled 'Questionnaire concerning the practical operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children* (Prel. Doc. No 1 of November 2010)' and it is available at <https://www.hcch.net/en/instruments/conventions/publications1/?dtid=33&cid=24>, last accessed on 2 May 2023.

the taking parent losing residence rights or that residence permits or visas are revoked following a parent's departure from the jurisdiction. The Dutch Central Authority further clarified that practices between states vary with some states offering some form of visa. One case is also mentioned when return was refused on the ground that the caring parent could not return to the country of habitual residence. In The United Kingdom, the lack of immigration status was not a defence in its own right to a return application.

Further, on this point, the response to the HCCH questionnaire from the International Social Service (the 'ISS') is equally relevant in that they point out the existing visa issues which may impede the exercise of contact/custody either as a cause for abduction or as an issue emerging post abduction.[210] The ISS specifically mentioned difficulties for the taking parent caused by the lack of citizenship rights in the country of return. Lack of citizenship disqualifies the person from state benefits such as housing and financial services.[211]

These responses confirm the lack of a uniform practice in dealing with immigration issues. It also becomes evident that if authorities cooperate, -which does not happen on a systematic basis-, it is mostly to ensure a temporary residence permit for the taking parent for the duration of the custody proceedings.

The overview of available case law on immigration considerations within child abduction proceedings reveals a similar position of courts to that of Central Authorities as outlined in the responses to the 2010 Questionnaire. Domestic courts distinguish between the *impossibility to enter* the country of habitual residence and the *potential restrictions upon return* (for example unavailability of social support, impossibility to have a work visa, length of the tourist visa, etc). While the impossibility to enter may in certain exceptional circumstances justify a non-return order under Article 13(1)(b); it does not appear that domestic courts consider any other immigration restrictions upon return as capable of triggering the application of Article 13(1)(b). The reasoning of domestic courts is detailed below.

#### *5.6.2.1 Lack of relevant immigration permission to enter the state of habitual residence*

The approach of the national courts to this defence varied from placing little to no emphasis on the arguments related to the visa issue, to providing more reasoning. [212] It should be noted that no consistent approach to the issue was identified within a specific country.

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210 ISS response to HCCH questionnaire (Prel. Doc. No 1 of November 2010), available at <https://assets.hcch.net/docs/38e6c204-5e07-4e7c-8d65-3328716799b9.pdf>.

211 ISS response to HCCH questionnaire (Prel. Doc. No 1 of November 2010), available at <https://assets.hcch.net/docs/38e6c204-5e07-4e7c-8d65-3328716799b9.pdf>.

212 see for example 2012 QCCA 21, Cour D'Appel, Quebec; Cour de Cassation, Chambre Civile, purvoi 14-17493, 19 novembre 2014, or 2009 9 HLC, Ireland High Court.

For example, one case where such a defence was central was *Garcia Perez v. Polet* decided by the Court of Appeal of Manitoba, Canada in 2014.[213] The case concerned enforcement proceedings of a return order where the mother was objecting to the enforcement on the ground that she was the child's primary carer and given that she had overstayed her visa she could not return with the daughter to the United States. Her main argument was that a return of the child without her primary carer exposed the child to a permanent risk of psychological harm. As she lacked immigration permission to enter the United States, she was in an objective impossibility to accompany her child on return.[214] Another argument was that there was no certainty that she would ever be able to return to the United States, hence there was a risk of a permanent severance of the mother-daughter bond. Within the proceedings for the stay of execution the court looked at whether the mother's uncertain immigration status, coupled with the fact that she was the child's primary carer, could amount to a grave risk of harm under Article 13(b). The court accepted that the mother had always been the child's primary carer. It also accepted that the mother's visa application was pending, and that the outcome and the duration of the visa proceedings were uncertain. The court held however that the level of harm which the child would suffer from the separation did not reach the level required under Article 13 of the Convention. The Manitoba Court of Appeal, in line with existing Canadian case law did not consider that the mere change of the primary carer as a result of the mother's impossibility to return amounted to a grave risk of harm under Article 13 (b) HC. The court further found that some level of contact between the child and the father had existed and that from a financial point of view it would have been easier for the mother than for the father to visit the child. In reaching this conclusion, the Canadian Courts declined to interview the 8 (eight) year old child subject to proceedings on the ground that she was not of a sufficient age and maturity for her age to be considered.

A similar case was decided by the Swiss Federal Tribunal in 2009.[215] The case concerned the envisaged return to the United States of a 21-month-old child without her mother due to the latter lacking an entry visa. The mother had been the child's primary caretaker from before the abduction. The lower court decided not to return the child, accepting that the mother was not capable of returning to the United States, the decision being incumbent upon arrival to a customs inspector. Further, the same court found that there was no certainty that the mother would have been able to reside in the United States during the litigation of custody. However, the father's appeal was upheld and the Swiss Federal Tribunal ordered the return. The Swiss Federal Tribunal contacted the US counterpart directly and they received assurances that the ruling awarding sole custody to the

213 Garcia Perez v. Polet, AF 14-30-08222, 10 September 2014.
214 Garcia Perez v. Polet, AF 14-30-08222, 10 September 2014, para 22.
215 5A_105/2009 Swiss Federal Tribunal, 16 April 2009.

father could be changed subject to his consent. The US court also explained that the mother would not be imprisoned upon re-entering the US. Further, the Swiss court held that the mother was to accompany the child to the US, the latter obligation being discharged solely if the mother failed to obtain the appropriate authorization to enter the country. In a more recent case, the Federal Supreme Court refused to order the return on the ground that a 10-year entry ban had been issued against the mother who was also the child's primary carer.[216] In addition, in this case, a temporary restraining order was in force against the left-behind parent on the grounds of abuse against the child.

The same line of reasoning was adopted in France, where it was not considered that visa issues could be used to hinder return as there were other modalities of contact, during holidays or by electronic means of communication.[217]

South African family courts also dealt with immigration considerations in their judgments.[218] As with the approaches described above, South African courts did not accept that lack of immigration status which would result in the primary carer's impossibility to return to the country of origin could amount to a grave risk of harm for the child.[219] However, in one case the High Court of South Africa accepted that the primary carer put forth justifiable reasons for the impossibility to return.[220] In that specific case, in addition to immigration status there were allegations of domestic violence as well as a lack of appropriate accommodation upon return. Thus, in making the return order the court inserted specific conditions which either the left-behind parent or the British High Commission were expected to comply with. The British High Commission was expected to provide the primary carer with the appropriate travel documentation and grant her leave to remain for a minimum period of three months. The taking parent was also expected to promptly undertake all steps to file the necessary documentation for the travel.

In another case delivered by the Supreme Court of South Africa it appeared that the taking parent was not able to return to the United States as her green card had expired and should she exceptionally be able to return it would only be for a limited period of time and without the possibility of legal employment.[221] The Court did not accept the taking parent's submission that the return should only operate in the eventuality of her being granted permanent leave to remain as it was considered that this would enable her to take advantage of her conduct so as not to return.[222] However,

216 Federal Supreme Court 5A_437/2021, 8 September 2021, HC/E/CH 1523.
217 CA Poitiers, 6 May 2009, No de RG 09/00305, HC/E/FR 1134.
218 Case no. 6090/05; Case no 238/03.
219 Case no 6090/05, para 36.
220 Case no 6090/05.
221 Case no 238/03, para 55.
222 Case no 238/03, para 56.

the South African Supreme Court made the return order conditional on the taking parent having been granted leave to enter and remain in the United States at least until the final adjudication and determination of the custody. Another condition imposed was that the arrest warrant be withdrawn and that the mother was granted interim custody in the United States pending the custody proceedings.

In the United Kingdom, two approaches were apparent. On the one hand, in an older judgement Lord Justice Thorpe relied on the excellent cooperation between United States and British authorities and considered that the risk to not be able to enter for a taking parent was minimal. At the same time reliance was made on the undertakings of the father in relation to spousal support and accommodation for the mother and child upon return.[223] Under a more recent approach it appeared that the High Court justices suspended the proceedings to confirm that the taking parent may obtain a visa to travel and remain for an appreciable period of time in the United States.[224]

Different approaches between courts within the same jurisdiction continued. For example, in the United Kingdom, the High Court ordered the return.[225] The case juxtaposed allegations of domestic violence which the court considered that they could be addressed in the United States and it also relied on the fact that the left-behind parent promised to put some measures in place to alleviate the risk of domestic violence. The High Court equally did not take into account the evidence that the primary carer parent could not enter the United States due to a 10 year entry ban coupled with a small chance (25%) to obtain a humanitarian visa for attending the custody proceedings in the USA. Also, the mother's submissions that she had always been the primary carer were not considered.[226] The Court of Appeal reversed this judgement. The appellate court focused specifically on the separation between the children and their primary carer. Given the parent's immigration position the ensuing separation would last an indeterminate period of time. The Court of Appeal also emphasised that the actions of the primary carer should not be used to punish the children. Therefore, the lower court should have assessed in more detail the situation from the children's perspective and in the case at hand the children could have only returned with their mother. It is also important to note that this court limited the applicability of Article 13(b) until the mother obtained a visa and provided that she pursued her visa application. In other words, a lack of diligence on her part would result in a return order for the children. A similar approach was taken in Scotland where return was made conditional

223 [2001] EWCA Civ 2092.
224 [2017] EWHC 3654 (Fam), followed by [2018] EWHC 1639 (Fam).
225 RE W [2018] EWCA Civ 664.
226 Summary available at https://www.4pb.com/case-detail/re-w-2018-ewca-civ-664/, last accessed on 6 October 2023.

on obtaining an appropriate visa to enter and remain during the custody proceedings.[227]

On occasion, academic literature has highlighted judgments where it was considered that the lack of a visa for re-entry in a country to adjudicate custody proceedings amounted to an extreme example of procedural unfairness.[228]

#### 5.6.2.2 *Immigration restrictions affect the taking parent's access to legal employment or other state-related benefits (housing allowance, social benefits, etc)*

Migration for the purposes of family reunification is still the most common accepted ground for lawful residence worldwide.[229] Spousal separation leaves non-citizens in a precarious immigration position, from loss of the right to reside lawfully to lack of access to housing or other (social) benefits available for permanent residents or citizens.[230] Immigration restrictions have also been presented in child abduction proceedings as defences to return. For example, taking parents have argued that they do not have an independent residence right in the country of habitual residence, their immigration position being contingent on the willingness of a former spouse to sponsor them.[231] In other cases, taking parents submitted that the mere possibility of a tourist visa was not enough to enable a return as in such circumstances the impossibility to work or access social support would result in an intolerable risk for the children. [232] At times the uncertain immigration status affected both parents upon return.[233]

It appears that Hague Convention courts do not consider such immigration defences relevant to Hague Convention proceedings. In general the right to enter on a tourist visa is considered sufficient to not warrant further attention from the Child Abduction Courts.[234] In cases where the complaint is that lawful residence is dependent on the sponsorship by an (abusive) left-behind parent, courts rely on the undertakings of that parent

227 PW v. AL [2003] ScotCS 176.

228 Schuz 2014, p. 358 citing State Central Authority of Victoria v. Ardito, 1997.

229 According to OECD, International Migration Outlook 2023, referred to in <https://www.migrationdataportal.org/themes/family-migration>, last accessed on 11 June 2023.

230 This aspect was also confirmed by the Dutch Central Authority in their responses to the 2010 Questionnaire. For more details, please refer to the section above. HCCH questionnaire (Prel. Doc. No 1 of November 2010), available at <https://assets.hcch.net/docs/38e6c204-5e07-4e7c-8d65-3328716799b9.pdf>.

231 For example *Habimana v. Mukundwa*, 2019 ONSC 1781 or F. v. N., 2022 SCC 51.

232 [2014] EWHC 3799; [2018] IEHC 316; France, Court de Cassation, chambre civile, 14-17493, 19 November 2014.

233 2019 (Ra) No. 636 HC/E/JP 1527.

234 For example 2019 (Ra) No. 636 Appeal case against an order to return the child; HC/E/JP 1527; W. v. W. 2003 SCLR 478, HK/e/Uks 508; Similarly, in France the possibility to enter on a tourist visa, regardless of work or other financial possibilities did not warrant further reasoning – See Court de Cassation, chambre civile, 14-17493, 19 November 2014.

to continue to support the taking parent in their visa application(s) or reject such defences without any further assessment.[235] If there is an indication that the taking parent has missed an appointment with the relevant migration officer, such conduct was presented as evidence of bad will and used as a factor in justifying the return.[236] Requests of parents for evidence in determining their immigration position upon return are not always admitted.[237] In other cases the deterioration of the relationship with the child post abduction due to migration restrictions is considered to fall outside the scope of the analysis.[238]

One notable exception is a 2020 case, where the New Zealand Court of Appeal declined to order the return and took into consideration that the mother did not have access to financial support (including for medical care) through the Australian welfare system, given the type of visa which she held.[239] The court also assessed that it was questionable whether the mother had access to any legal aid for relocation proceedings. It should be noted however that in this case the father had been convicted for breaching family violence orders and bail conditions and the situation of the mother and the child had been particularly volatile. The immigration considerations mentioned above were supplementary to the other domestic violence allegations; they were not the central part of the court's reasoning. In this particular case, the court refused to take into account undertakings from the father due to his previous conduct.

#### *5.6.2.3 The relevance of the distinction primary carer/contact parent*

The courts do not always identify the residency arrangements which existed prior to the abduction. However, where available, it appears that the status of primary carer and the argument that residence status will lead to the

235 *Habimana v. Mukundwa*, 2019 ONSC 1781 In this case where the primary carer mother claimed financially and psychologically controlling behaviour from her ex-partner coupled with her own impossibility to enter on an independent visa, Ontario Superior Court of Justice accepted the left-behind parent's undertaking to fill in the necessary forms and agree to continue to sponsor his wife. Undertakings were also accepted in the case of F. v. N., 2022 SCC 51 which concerned a non-Hague Contracting state but was decided on the basis of the Hague Convention principles; CA Bruxelles (3e chambre), 11 Feb 2010; In a case decided by TPI Bruxelles, 2004, N. 03/3585/A The risk of expulsion post-separation was mitigated by the fact that the country where the child were to return had ratified the CRC and therefore the Brussels Court of First Instance was confident that the family courts would take into consideration the relocation request in another country, if it were in the best interests of the child.

236 FC 10701-04-20 *M.B.R. v. Y.R.*, HC/E/IL 1466 the court is reasoning "the Minor will not incur any harm by returning her to the United States. The harm is rooted in the Mother's refusal to return to the United States although she has an entry visa to the United States. The Mother had acted intentionally and in bad faith to prevent the possibility of her obtaining a work visa."

237 FC 10701-04-20 M.B.R. v. Y.R., HC/E/IL 1466.

238 AG Pankow/Weißensee -13 F 8440/19 – 31 January 2020, HC/E/DE 1473.

239 CA/743/2018 [2020] NZCA 209, 3 April 2020, HC/E/NZ 1451.

separation between the child and the primary care weighs heavier in the assessment. In the exceptional situations where immigration defences were allowed, the taking parent was also the primary carer of the child. It should be pointed out that these cases related almost exclusively to the situation where the primary carer was barred from entering the state of habitual residence and not where this person could enter on a tourist visa, albeit deprived of other rights available to citizens or permanent residents.

#### *5.6.2.4 The HCCH Guide to Good Practice*

Paragraph 68 of the Guide to Good Practice also addresses the incidence of immigration as a defence to return under Article 13(1)(b) defence. The Guide encourages the cooperation between Central Authorities in obtaining the immigration permissions. Further, it refers to the approach whereby domestic courts have been reluctant to allow the defence where the parent could return for a short period of time necessary for attending the custody proceedings. It can thus be inferred that the Guide considers that immigration considerations only become relevant if the parent is not able to enter the country of return. Further, the Guide places the responsibility on the taking parent by indicating that "the parent should not – through their inaction or delay in applying for the necessary immigration approvals – be allowed to create a situation that is potentially harmful to the child, and then rely on it to establish grave risk." No distinction is made between primary carer parents and carers who are not the primary carers.

### 5.6.3 Parental child abduction and (concurrent) asylum claims

On other occasions, the taking parent and/or the child subject to Hague Convention proceedings had applied for refugee status in the host state.[240] In the 2023 Hague Conference Questionnaire, 14 out of 21 respondent countries confirmed that they had dealt with parallel refugee applications.[241] Hague Convention courts had to decide on whether concurrent asylum claims gave rise to a conflict of laws, or alternatively, if not on the value to attach to asylum applications. An overview of available domestic law and literature on the topic reveal that no uniformity of approach exists in this area either. Key issues coming to the fore concerned conflict of laws, the

240 Cases where the asylum requests had been dismissed while the Hague Convention proceedings were still pending have not been included as those cases did not reveal any conflict of laws issues; the Hague courts could take decisions solely on the basis of the Hague Convention. For such a situation see for example Re F. (Children) (Abduction: Removal Outside Jurisdiction) [2008] EWCA Civ. 854, [2008] 2 F.L.R. 1649.

241 The exact text of the question reads:" Has your State faced any challenges, or have questions arisen, in processing international child abduction cases where there was a parallel refugee claim lodged by the taking parent." The entire questionnaire is available at: << https://www.hcch.net/en/publications-and-studies/details4/?pid=8519&dtid=33>>, last accessed on 5 May 2023.

stay of Hague Convention proceedings and/or the beneficiaries of protection. These issues shall be further elaborated upon below.[242]

#### *5.6.3.1 The relationship between The Hague Convention and the Refugee Convention*

Under international law, the 1951 Geneva Convention on the Determination of Refugee Status (the "Geneva Convention" or "Refugee Convention") forms the cornerstone of refugee protection. Article 33 of the Geneva Convention lays down the prohibition against refoulement which has also become customary international law. [243] As per Article 33 states are prohibited from returning individuals to territories where they would face a real risk of persecution on one of the grounds protected by the Refugee Convention.[244] In time, the protection afforded to refugees under the Convention has expanded to include the prohibition of return to places where someone would face a real risk of torture, cruel, inhuman and degrading treatment or punishment, arbitrary deprivation of life, flagrant denial of the right to a fair trial or the right to liberty and security of the person.[245]

An apparent conflict emerged between Article 12 of the Hague Convention whereby the child should be speedily returned to the country of habitual residence and Article 33 of the Refugee Convention prohibiting expulsion. This question was addressed directly by the Ontario Court of Appeal in its judgement of 2 June 2011. [246] The court held that no such conflict of laws existed. The reason was that in essence, the courts dealing with Hague Convention applications had the possibility to apply Article 13 or Article 20, and in applying these Articles they should take into account Article 33 of the Refugee Convention. A refugee determination gives rise to a rebuttable presumption that a risk of persecution exists if the child is returned to the country of habitual residence.[247]

Similarly, in the United States, the Fifth Circuit Court ruled that a grant of asylum did not take precedence over the relief under the Hague Convention.[248] Instead, the grant of asylum was to be considered new evidence,

242 It is important to note that not all the cases concerned countries of habitual residence which were contracting states to the Hague Convention. Especially the United Kingdom cases have been brought by left-behind parents not residing in states parties to the Abduction Convention. However, in the United Kingdom by exercising wardship jurisdiction the domestic courts are using similar principles to the Hague Convention when it comes to non-contracting states (See Mol/Kruger 2018). Moreover, it can be presumed that courts will be more reluctant to scrutinise asylum based defences in Hague cases compared to non-Hague cases.

243 McAdam 2017, p. 4.

244 McAdam 2017, p. 4.

245 J McAdam 2017, pp. 3-4.

246 A.M.R.I. v. K.E.R., 2011 ONCA 41.

247 A.M.R.I. v. K.E.R., 2011 ONCA 417, para 87, and more recently, *Sabeahat v. Sabihat*, 2020 ONSC 2784, para 93.

248 The United States Court of Appeals for the Fifth Circuit, Sanchez, No 12-50783, 1 August 2014.

thus the Hague Convention courts were to assess how Article 13 HC or 20 HC exceptions apply in light of such 'new evidence'.

On the other hand, the England and Wales High Court (Family Division) ruled that "the grant of refugee status of a child is an *absolute* bar to any order by the Family Court seeking to effect the return of a child to an alternative jurisdiction" *[emphasis added].* [249] This represented a departure from a previous approach of the courts where it had been held that the grant of asylum in favour of the child was not a reason to set aside a return order under the Hague Convention.[250] The same position was affirmed recently by the UK Supreme Court where the Court confirmed that the prohibition against refoulement applies to return order under the Hague Convention.[251]

German courts have considered that asylum claims are different from return orders and they have refrained from taking into account the findings of the asylum courts in the child abduction applications.[252] In France, a case was identified where the child abduction courts ordered the return while the asylum claim of the parent was still pending.[253] The family court reasoned that the pending asylum claim was evidence in support of her precarious status in France, thus another reason in support of return.[254] More recently, the French Central Authority has noted that a pending asylum request was taken into account for the purposes of Article 13 (2).[255] This approach is thus similar to that of Canadian courts: asylum applications are used as evidence but fall short from amounting to an obstacle to return.

#### *5.6.3.2 The impact of pending asylum claims on Hague Convention proceedings*

When the asylum application is pending, the question was whether child abduction proceedings should be stayed until the determination of the refugee status. This question has arisen when a taking parent and/or a child have lodged an asylum application which was pending when the left-behind parent filed the return petition.[256] In other cases, the Hague Con-

249 [F and M and A and the Secretary of State for the Home Department Joint Counsel for the Welfare of Immigrants, [2017] EWHC 949 (Fam), para 44.

250 *Re H* (A Child) [2016] EWCA Civ 988.

251 *G v. G* [2021] UKSC 9, para 129. In this case, some of the intervenors had argued that a return order under the Hague Convention is different in nature to the prohibition against refoulement, and for this should result in the Court finding that there is no conflict of laws.

252 As per the response to the 2023 HCCH Questionnaire, available at <https://assets.hcch.net/docs/e8143069-376a-4e5c-a7e2-353a4e080e28.pdf>, last accessed on 5 May 2023.

253 Cour d'appel Versailles, 2e chambre, 1re section, 24 November 2016, no 16/05302.

254 Cour d'appel Versailles, 2e chambre, 1re section, 24 November 2016, no 16/05302.

255 As per the response to the 2023 HCCH Questionnaire, available at: <https://assets.hcch.net/docs/5175d97b-45fb-4d1b-b8fb-cd719bfded8e.pdf>.

256 In the case of F and M and A and the Secretary of State for the Home Department Joint Counsel for the Welfare of Immigrants, [2017] EWHC 949 (Fam), the taking parent filed the asylum applications on 15 September 2014. The return proceedings under the Hague Convention had commenced on 10 March 2015. Her son, A filed the asylum request on 26 June 2015.

vention application came before courts when an appeal against an asylum application is pending.[257] Should then the courts vested with the Hague Convention application await the final outcome of the asylum request? Is it then relevant if an applicant was denied asylum and is appealing such a decision or if the asylum was granted and it is subject to appeal by the immigration authority, or another party entitled under domestic law to file such an appeal?

Available case law suggests that domestic courts tend to overlook this question.[258] What is instead evident is that family courts on a recurrent basis have stressed that the purpose of the Hague Convention is to have children returned speedily to their country of habitual residence.[259] In a case where the return was ordered despite the mother's pending asylum claim, Justice Thorpe expressly mentioned the swiftness of proceedings in the family courts as opposed to the implicitly less- swift proceedings on the immigration side.[260] Also, the family courts put forward the objective of swift return under the Hague Convention as a reason for not requesting the left-behind parent to seek the annulment of the refugee status prior to ruling on a Hague Convention application.[261] The UK Supreme Court has recently examined this question into more detail.[262] This court has analysed various provisions of domestic and EU law and distinguished between situations when asylum applications are manifestly unfounded (and identified as such by the Secretary of State) and situations which were awaiting a decision from the Secretary of State. In the latter situation, ordering a return would deprive the child of an effective remedy in the asylum application.[263] However, while the Hague Convention courts have an obligation not to implement a return order, they do not have to suspend the proceedings; such assessment shall be carried out on a case-by-case basis, following some criteria established by the UK Supreme Court.[264]

257 This was for example the case in Re S (Children) (Abduction: Asylum Appeal) [2002] EWCA Civ 843.

258 For example, Cour d'appel Versailles, 2e chambre, 1re section, 24 November 2016, no 16/05302. One exception is the case of Sanchez where the US Circuit Court mentioned that the Office of Refugee Resettlement was expected to answer a question on whether a procedure in the immigration court preempts or stays the actions of the Family Court. The answer however is not apparent in the judgement –one possible explanation being that at the time of rendering the aforementioned court decision the children had been granted asylum in the United States.

259 Among many other authorities Mol/Kruger 2018, L v. R, 2022 ONCA 582 HC/E/CA 1534; R v. G [2022] EWHC 655 (Fam) HC/E/UKe 1561.

260 Re S (Children) (Abduction: Asylum Appeal) [2002] EWCA Civ 843.

261 A.M.R.I. v. K.E.R., 2011 ONCA 417, paras 84 and 85.

262 G v. G [2021] UKSC 9.

263 G v. G [2021] UKSC 9, para 152.

264 G v. G [2021] UKSC 9, paras 170-172.

#### 5.6.3.3 *Persons subject to return*

In the United Kingdom, a differentiated approach was taken depending on who has requested the asylum. The UK courts distinguished between situations where only the taking parent had filed the application listing the children as dependants and situations where the children were asylum seekers in their own right.[265] In the former case, the Appellate Court of England and Wales ordered the return despite the fact that the taking parent's appeal against a negative asylum decision was pending at the time of the judgement in the Hague Convention proceedings. In that case, the Appellate Court accepted the father's undertakings to provide adequate support and protection upon return. The mother who filed the asylum request had argued that she had been subjected to domestic abuse and marital rape in the country of origin. In ordering the return, the court specifically referred to the fact that the children had not been themselves asylum applicants or appellants.[266]

Where the children were themselves asylum seekers the approach in the United Kingdom was different. As stated above, the approach in 2017 of the High Court of Justice was that "the grant of refugee status of a child [...] is an absolute bar to any order by the Family Court seeking to effect the return of a child to an alternative jurisdiction".[267] A more recent approach is to look less strictly at whether the children had filed applications in their own name; being named dependants in an asylum claim resulted in the application of the non-refoulement rules to Hague Convention courts.[268]

On the other hand, in the cases decided by the United States' courts and Canadian Courts the asylum grant did not preclude a return order under the Hague Convention. The United States Fifth Circuit Court ruled that it is not necessary to revoke the asylum grant before enforcing a return order under The Hague Convention. The court considered that the discretionary grant of asylum does not confer a right to remain in the United States despite Hague Convention return orders. In the court's reasoning "The asylum grant does not supersede the enforceability of a district court's order that the children should be returned to their mother, as that order does not affect the responsibilities of either the Attorney General or Secretary of Homeland and Security under the INA [n.a. Immigration and Nationality Act]"[269] Instead, judges in the family courts were to take into account the asylum grant when deciding whether any of the exceptions listed under the Hague Convention applied.

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265 See for eg Re H (child) [2016] EWCA Civ 988 as opposed to RE S (Children) (Abduction: Asylum Appeal) [2002] EWCA Civ 843.

266 RE S (Children) (Abduction: Asylum Appeal) [2002] EWCA Civ 843, para 27.

267 F and M and A and the Secretary of State for the Home Department Joint Counsel for the Welfare of Immigrants, [2017] EWHC 949 (Fam), para 44.

268 G v. G [2021] UKSC 9, paras 116-134.

269 Sanchez, No 12-50783, 1 August 2014, para 20.

A similar approach, albeit with a stronger emphasis on the weight to be accorded to the refugee status, was adopted in Canada. On this basis the court ruled that a child's refugee status represents a rebuttable presumption that the Article 13 (b) exception was engaged.[270] Thus, pursuant to this judgement, Hague Convention (family) courts in Canada are able to disregard a refugee status and nevertheless order the return. The Ontario Court of Appeal expressly ruled that it was not necessary for the left-behind parent to request the rescission of the refugee status prior to proceeding under the Hague Convention.[271]

#### *5.6.3.4 Procedural fairness*

The domestic judges dealing with the overlap between the Hague Convention and asylum requests were also faced with several issues of procedural fairness of the parties, especially the position of the left-behind parent in the immigration courts. For example, when deciding that the grant of the refugee status for a child was an absolute bar for the return the United Kingdom, the High Court of Justice took into account that the left-behind parent had the possibility to challenge in the immigration courts any potential misrepresentation of the taking parent/child which resulted in the grant of asylum.[272] This possibility is to be contrasted to the situation in Canada where a left-behind parent could not apply to rescind an order granting a child refugee status; only the Minister of Citizenship and Immigration could do that and his power was discretionary.[273] This also formed part of the considerations of the United States Court where it was stated that the left-behind parent did not have the possibility to participate in the asylum claim.[274] On a related note, it has been highlighted that confidentiality is essential to asylum proceedings whereas co-operation and transmittal of information is at the core of the Hague Convention.[275]

Other procedural considerations which the courts took into account were related to evidence and the difference in the standards of proof between Hague Convention Proceedings and asylum proceedings. In the United States, the Circuit Court mentioned that the evidentiary burdens under the asylum and Hague schemes were different, the former using the 'preponderance of evidence' standard while the latter using the 'clear and convincing' evidence standard.

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270 2011 ONCA 417, para 75.

271 2011 ONCA 417, paras 84 and 85.

272 F and M and A and the Secretary of State for the Home Department Joint Counsel for the Welfare of Immigrants, [2017] EWHC 949 (Fam), para 63; F and M [2018] EWHC 1639 (Fam), para 51.

273 2011 ONCA 417, para 86.

274 Sanchez, No 12-50783, 1 August 2014.

275 See also the responses to the 2023 Questionnaire of Switzerland, France, available at <<https://www.hcch.net/en/publications-and-studies/details4/?pid=8520&dtid=33>>, last accessed on 5 May 2023.

Following a recent case in the United Kingdom, case management guidance was issued on processing child abduction proceedings with concurrent immigration claims.[276] In addition, in this jurisdiction, the participation of the Secretary of State -the authority responsible for deciding on asylum applications- to child abduction proceedings was discussed.[277]

The case law above is illustrative for some of the issues domestic courts are facing when dealing with Hague Convention applications where asylum requests are pending or have been granted to either the taking parent or to the children. The cases analysed indicate that for domestic courts the fact the taking parent was granted asylum is not in itself a reason not to enforce a Hague Convention application. So far only in the United Kingdom have the courts considered the grant of refugee status as an absolute bar to ordering the return of the child. It should be perhaps noted that the case in question envisaged a return to Saudi Arabia which is not a Hague Convention contracting state. Nevertheless, the wording of the High Court of Justice does not seem to indicate that the reasoning was tailored to the fact that the case concerned a non-Convention country. Furthermore, the UK Court of Appeal clearly distinguished between situations where the child himself had been granted refugee status and those where the taking parent has been granted status and the child(ren) received protection as dependants, i.e. derived from that of the parent. For the other jurisdictions, Canadian and American courts considered that Hague Convention courts can take the asylum grant into consideration when deciding to apply Article 13 or Article 20 of the Hague Convention. As discussed in Chapter IV above, the decision on whether to apply Articles 12 or 20 of the Hague Convention is within the discretion of the family courts. Therefore, this view implies that an authority vested with a Hague Convention application could disregard an asylum grant altogether, being a matter completely within its discretion to decide on the return pursuant to the Hague Convention. This view also indicates that family courts may re-evaluate the findings of immigration authorities and decide if a child is to be nevertheless returned.

It appeared that among the reasons for favouring one approach over the other, courts looked in particular to the following factors (i) whether the left-behind parent participated in or could challenge the outcome of the asylum application; (ii) the time needed for resolution of the asylum application as opposed to the necessary swiftness required under the Hague Convention proceedings. In the United Kingdom the possibility of a left-behind parent to challenge potential misrepresentations made while applying for asylum was put forward as a reason for seeing the grant of asylum as an absolute bar in ordering the return under the Hague Convention. Conversely, the Ontario Court of Appeal expressly mentioned that this

276 United Kingdom response to 2023 Questionnaire, available at <https://assets.hcch.net/docs/85bfde82-f290-4656-b223-864ccf96b5d9.pdf>> last accessed on 5 May 2023.

277 G v. G [2021] UKSC 9, paras 116-134, para 174.

was not an open avenue under Canadian law, thus any misrepresentation under the asylum procedure could eventually only be addressed within the Hague Convention case. This was not mentioned in the United States case; however the Circuit Court did rely on the fact that the left-behind parent did not have the possibility to participate in the asylum procedure whereas such possibility was afforded within the family dimension.

## 5.7 Conclusions

This Chapter has focused on the exceptions to the return of the child which have given rise to controversy in the application of the Child Abduction Convention. In order to contextualise these exceptions, three separate subsections have incorporated wider discussions around the same topics. Thus, Section 5.2 included an overview of the emergence of domestic violence as a human rights concern in feminist scholarship followed by a discussion on domestic violence from the perspective of children's rights. Second, Section 5.4.1 addresses the topic of primary carer abductions in the context of the change in the notion of custody across the most relevant jurisdictions for the purposes of the Child Abduction Convention. Third, Section 5.5 introduced existing discussions around the intersection between immigration and family law on the one hand and the relationship between domestic violence and immigration on the other hand.

This Chapter also includes an overview of existing approaches and domestic child abduction case law related to these exceptions. It should be noted that while the topics of domestic violence and primary carer abductions have received (substantial) attention in scholarship, the same does not apply to immigration considerations. In this dissertation it is shown that immigration considerations as they have been presented in child abduction applications can be indicative of domestic violence, raise issues of parent/child separation or are indicative of power imbalances in the country of habitual residence. So far, there is no harmonised approach to such considerations, nor is there any guidance for domestic courts on how to resolve immigration-based exceptions to return. The case law analysis shows that domestic courts have approached immigration considerations as distinct from domestic violence and have rarely considered such situations as amounting to a grave risk of harm to the child. The commitment of the Child Abduction Convention to the best interests of children in general justified leaving most immigration considerations to the legal system of the habitual residence. Even when authorities in the same country as the child abduction courts have decided that the taking parent and/or the child are refugees, and thus face a serious fear of persecution in the country of habitual residence, courts deciding on child abduction applications override the assessment of the risk of persecution in the name of the ultimate goal of protecting the child from harm. Yet, this is a general policy consideration, and it does not amount to an assessment of the situation of that individual child.

# 6 Preliminary Conclusions

*A Child Rights-Based Approach to Parental Child Abduction Cases with Immigration Components*

With the adoption of the CRC in 1989, children have been recognized as rights holders on the international arena. The CRC has prompted debates on the exact meaning of children as rights holders, specifically as it is widely accepted that the rights of children have specific characteristics derived from their dependency on adults.[1] Proponents of children's rights have seen the Convention as marking a shift between what adults think children need to what children actually need, while recognizing that these needs are sometimes inescapable from those of their caregivers.[2] Overall, in this field an adequate balance between protection and autonomy needs to be struck.

A rights-based approach to children's rights should give due account to the specific nature of their rights. Such an approach is rooted in the international human rights standards driven primarily by the CRC.[3] Tobin's rights-based model proposes that judges consider (i) the wishes of the child; (ii) the relevance of other rights under the CRC; (iii) the particular circumstances of the child; and (d) any available empirical evidence which may be of relevance.[4] Brief references to the rights of children are not sufficient to meet such an approach.[5] Nor are truncated references to some rights of children, or rhetorical affirmations pertaining to – for example- society's interest in protecting children.[6] Last but not least, judges should determine the actual scope and nature of the rights in question and balance them against any competing considerations.[7] More recently, Krutzinna has proposed a similar framework for assessing the child's best interests in judicial decision-making.[8] As with Tobin's rights-based approach, Krutzinna stresses the importance of transparent decision-making which explains and justifies a decision, and avoids misrepresentation of children's interests. This dissertation follows these understandings of a rights-based approach to children's rights as it seems that this has equally been the approach of the CRC Committee.[9]

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1 Smolin 2003, p. 972, Woodhouse 2009, for further references see Chapter 2 of this dissertation.
2 Bennett Woodhouse 2010, p. 836.
3 Lundy/McEvoy 2012, p. 77; for further references see Chapter 2 of this dissertation.
4 Tobin 2009, p. 592.
5 Fortin 2006, p. 301.
6 Tobin 2006, pp 598-600.
7 Tobin 2006, p 601.
8 Krutzinna 2022.
9 For a discussion, see Section 3.6 of this dissertation.

The Child Abduction Convention is a private international law instrument under which the child is to return to the country of habitual residence where the attribution of custody shall be decided. The Convention has been drafted with the aim of protecting the best interests of children in general by securing their return to the place they are most familiar with. However, developments of the past 40 years since the adoption of the Convention indicate significant changes in the legal and sociological contexts surrounding child abduction. The Convention remains an important instrument for securing the rights of children in general. However discussions concerning the place of individual children's rights within abduction proceedings continue. Eekelaar has argued that the Convention is an instrument only affecting children indirectly, being essentially about the *best place to make a decision.*[10] Hence he argues that the courts are not bound to undertake a detailed investigation into the child's interests.[11] Overall, there is agreement that return proceedings under the Convention should not amount to an in-depth evaluation of the relevant children's rights. This is also the view taken in this dissertation.

Be that as it may, it is submitted here that the children's rights-based model is compatible with the mechanism of the Child Abduction Convention. Moreover, such an application is mandated by the principle of harmonious interpretation of international law of the VCLT. A child rights-based approach is distinct from a merits-based approach, the former entailing primarily that courts deciding on child abduction cases indicate the rights of children which are at stake, how these rights have been taken into account in the proceedings, the specific circumstances of the child as well as their reasoning, i.e. how children's rights have been balanced against competing interests. The CRC Committee in its procedural approach to the best interests of the child has proposed a similar approach.[12] The views suggesting sacrificing the rights of individual children in the name of children in general are not considered here compatible with the CRC.

Further, parental child abduction proceedings take place in the aftermath or during parental separation. Substantively, a rights-based approach considers all relevant rights of the child as laid down in the CRC. In practice, courts should assess on a case-by-case basis such rights. In this dissertation it is proposed that all child abduction cases entail as a minimum the evaluation of three rights: the best interests of the child, the right to maintain contact with both parents and the right to be heard. It is important to note that these rights are interdependent, and it has been considered that, in view of the special position of children, it is important to stress that children's views should inform the interpretation of their best interests. Furthermore, so as to ensure that the balance tilts in favour of autonomy and to avoid paternalistic attitudes towards children, the CRC Committee

10 Eekelaar 2015, p. 12.
11 Eekelaar 2015, p. 12.
12 GC 14, para 6(3).

and commentators have argued that children should to a certain extent be capable of influencing outcomes in cases affecting them.[13]

Returning to child abduction proceedings, Chapter 4 has proposed that a rights-based approach mandates that all children are heard in proceedings and that the hearing is not limited to the narrow grounds of refusing the return set out under Article 13(2) of the Abduction Convention. Thus, children's views could play a role in determining the habitual residence, or in the determination of a grave risk of harm. Also, children's views are important in establishing the relationship of care between the child and both parents involved in the proceedings. Moreover, it has been proposed that the notion of 'harm' of the Convention is assessed from the perspective of the child, in that a level of harm which may not be grave for an adult, may reach that level when considering the special position of the child, their age and other circumstances.

Chapter 5 of this dissertation has introduced new discussions which have been at the forefront of debates surrounding child abduction in recent years. It has been shown that contrary to the original assumptions, primary carers and not contact parents are abducting their children. These parents have sometimes argued that abduction was necessary to protect themselves and the children from an abusive left-behind parent.

These debates in the child abduction field are paralleled with other broader discussions on domestic violence and women's rights or between father's movements and mother's movements in relation to post separation parenting. Both movements have focused on the child's right to be free from violence. Fathers' interests' groups have argued that the child will be subject to harm if denied contact with one parent. Under their influence, the concept of Parental Alienation Syndrome has emerged in many family law jurisdictions across the Global North.[14] In this view, parental alienation represents a significant form of harm to the child's well-being and the abuser is the alienating parent.[15] Conversely, women's rights groups have proposed that domestic violence, even if perpetrated against the parent, is a form of violence against children.[16] However, they have been reluctant to accept that women as well can be violent towards children.

Children's rights risk being obscured amid the more powerful advocacy mentioned above. From a child rights perspective, it is accepted that there may be circumstances when children refuse contact with a parent and their views should be given adequate due weight.[17] In other words children have the right to refuse contact with a parent; and such refusal is not always the result of the influence of the other parent. Under a children's rights approach the focus is the child. This means that mothers – irrespective of

13 See also discussion in Chapter 3 of this dissertation.
14 For a discussion, see Chapter 3 above.
15 Kruk 2018, p. 145.
16 For a discussion, see Chapter 5 above.
17 Daly 2017, pp. 340-344.

their own position in relation to the other parent -, may have maltreated or neglected children.[18] The CRC Committee and children's rights scholars accept that child exposure to domestic violence is a form of violence against children prohibited under Article 19 of the CRC. Moreover, recent research has indicated that children can equally be victims of coercive controlling behaviours by one of their parents.[19]

Amidst these debates, in some jurisdictions, domestic custody laws have been reshaped to prioritise the child's right to protection from harm over a continuing relationship with both parents.[20] Pursuant to these legislations the right of the child to have contact with both parents prevails only where considerations about the child's safety are absent.[21]

The debates mentioned above have also been mirrored to a certain extent in the child abduction field. The right of the child to be free from violence is addressed here under Article 13(1)(b) of the Hague Convention. Initially, it has been suggested that harm to a parent does not amount to a grave risk of harm to the child. More recently some scholars and studies accept that a child may be subject to a grave risk of harm due to violence against the taking parent. In addition, the child may be subject to harm when the primary carer parent is in an objective impossibility to return to the country of habitual residence. The assessment of the risk of harm to the child in light of the circumstances of the taking parent is more aligned to the view of children as holders of rights but who are inextricably linked with their caregivers.

It is submitted here that whenever there is an arguable allegation by a taking parent that they are in an objective impossibility to return, a child rights-based approach entails a *prima facie* evaluation of the relationship of care. The closer the bond, the closer should the courts assess and identify the relevant rights of children at stake. Moreover, to the extent possible, such evaluation should be guided by the child's views obtained in a manner consistent with the requirements set out under General Comment No. 12.

Further, both in the context of primary carer abductions and domestic violence, practice has moved towards ordering the child's return even if a grave risk of harm exists, provided that adequate measures of protection exist in the state of habitual residence. In other words, to the extent the system in that country has the capacity to protect the child (and parent) courts are encouraged to order the return of the child. However, no guidelines or other instructions have been laid down to delineate how such evaluation should be made.[22] Moreover, there is no international oversight mechanism to assess the concrete outcomes for children after their return.

18 Houston 2017.
19 For a discussion, see Chapter 5 above.
20 Weisberg 2016, p. 260, see also the discussion in Chapter 5 above.
21 Weisberg 2016, p. 260.
22 Guide to Good Practice Article 13(1)(b) contains some references in this regard.

Chapter 5 of this dissertation has analysed immigration considerations against the context mentioned above. The immigration considerations have been identified following a review of national child abduction case law made available on the website of the HCCH as well as on the basis of academic literature in the field. The focus was on immigration considerations brought by a taking parent which may result in a separation of the child from that parent.[23] This dissertation argues that immigration considerations are not isolated exceptions to the return of the child. Rather, and in a similar way to how domestic violence and primary carer abductions have emerged, immigration defences are intimately linked with the change in the legal and sociological landscape surrounding child abduction. Chapter 5 has shown that within national contexts immigration laws can enhance power imbalances between individuals. In turn it has been shown that power imbalances are enabling factors for domestic violence. Also, national research of countries in the Global North has demonstrated how immigration laws create power imbalances in family law litigation. Thus, seen from a systemic perspective, immigration exceptions brought within the child abduction perspective (i) may be indicative of domestic violence, (ii) they may reveal an objective impossibility of the parent to return and/or (iii) they may indicate that the system in the country of habitual residence is not capable to protect the child upon return. It is for domestic courts to assess on a case-by-case basis whether any of the circumstances mentioned under points (i) to (iii) above are met.

As a framework for assessment, this dissertation proposes that domestic courts follow '*the assessment of allegation approach*' which has been considered the most suitable path to examining allegations of domestic violence as well.[24]

Immigration defences can amount to an objective impossibility of the parent to return to the country of habitual residence. They are sometimes indicative of domestic violence. From the perspective of children's rights, it is important for child abduction courts to determine *prima facie* the strength of the parent child relationship. It is in principle assumed that a strong bond exists between primary carer parents and their children. The stronger the parent child bond, the closer should domestic courts assess the immigration situation of the parent upon return. The underlying reason is that, when looking at the immigration context, the immigration status of a parent can result in a grave risk of harm to the child due to the parent child separation.

Further, the analysis of existing immigration defences identified in Section 5.6 on the basis of the case law published on the website of the HCCH,

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23 For example, immigration considerations which have been raised in the context of the settlement exception (Article 12(2)) have not been considered. In these types of cases the parent and/or the child did not have residence status in the country of refuge. Immigration thus did not have the potential of separating the child from the taking parent in the event of a return order.

24 Section 5.7.

has shown that they are of various types. First, there are situations when the parent has received refugee status or the proceedings on such status are pending in the country of refuge. It is proposed that whenever a parent has received refugee status, such a parent should be considered to be in an objective impossibility to return to the country of habitual residence. In addition, given the nature of refugee protection, it is considered that the grant of asylum status represents evidence that the system in the country of habitual residence is not capable of protecting the parent and the child upon return. When asylum status has been granted on account of domestic violence, it is proposed that this amounts to evidence of the impossibility of the system to protect and domestic courts should refrain from seeking undertakings, mirror others or any other measures of protection in the state of habitual residence. It is for domestic courts to decide whether the child should nevertheless return to the country of habitual residence; that decision should be taken on the basis of the strength of the bond between the child and the taking parent. In other words, ordering the return of a child when their primary carer is in an objective impossibility to return, would most likely amount to a grave risk of harm to the child.

Other questions on the interaction between the Refugee Convention, non-refoulement and the Hague Convention, (such as the suspensive effect, burden of proof, procedural guarantees), are to be answered on a case-by-case basis, depending on the legal system in each country and the status of these Conventions under national law. Part III of this dissertation analyses these questions from the perspective of the European supranational Courts, whose jurisdiction extends across the European Union and – with respect to the ECtHR- across the Council of Europe State Parties.

Next, the domestic case law analysed in Section 5.6 showed that immigration is raised by taking parents who argue that (i) they cannot enter the country of habitual residence; (ii) they cannot obtain a legal residence status there or (iii) due to immigration restrictions they would not have other means of subsistence in the country of habitual residence.

Whenever the taking parent cannot enter the country of habitual residence, it is proposed that this amounts to an objective impossibility to return which in turn poses a grave risk to the child if the parent is the child's primary carer. It is further important to determine which measures could be considered suitable for finding that the system in the country of habitual residence is able to protect the child and the parent. Here, the intersection between immigration considerations and domestic violence becomes important. For example, in some instances courts have accepted that a tourist visa for that parent is enough to show that a parent is not in an objective impossibility to return. Here, it is submitted that such finding is acceptable only if there are no arguable allegations of domestic violence. Should that be the case, sending a primary carer parent and a child back to a country where they are not able to independently sustain themselves amounts to a grave risk of harm to the child, due to the power imbalances created by a dependency on an abusive parent. The same should be the case for situations

when the courts rely on the left-behind parent to provide accommodation or other forms of support to the taking parent and to the child. These types of measures could only be acceptable where there is no arguable allegation of domestic violence in the case. Relatedly, immigration can be an important factor when assessing the *arguability* of allegations. Immigration restrictions as well as a lack of a possibility to obtain independent employment in the country of habitual residence are objective factors which coupled with other elements in the case file may indicate the existence of coercive control.

It is here argued that whenever arguable allegations of domestic violence have been made, immigration restrictions in the country of habitual residence should justify a closer scrutiny on the part of the child abduction courts of the capacity of the system in the country of habitual residence to protect the child and the parent upon return. Courts should verify that the parent has an *effective* possibility to obtain a legal residence status coupled with a right to work in that state which would ensure that the parent is not dependent financially or otherwise on the other parent. Conversely, where there are no arguable allegations of domestic violence, assurances from the other parent or other forms of protection in the country of habitual residence may equally be acceptable. In other words, adequate protection measures in the state of habitual residence whenever arguable allegations of domestic violence have been made should entail a minimum level of protection for that parent and child in that respective state which does not reinforce dependency on a potentially abusive parent.

Finally, and also as discussed herein, in some of the situations mentioned above courts can consider that return is not the best remedy for the child. For states having ratified the Child Protection Convention, this means that the other goals of the Child Abduction Convention, namely the prevention of forum shopping, are met as custody litigation remains within the competence of the courts of the child's habitual residence, while the child does not have to change residence.

Consequently, the Child Abduction Convention should not be considered as an isolated international instrument. Human rights violations stemming from other branches of law may and should play a role in child abduction applications. Similarly, obstacles to return affecting a taking parent can be important when adopting a child rights-based approach to the return mechanism. The relevance of obstacles to return will increase whenever the taking parent is also the child's primary carer.

Finally, this dissertation argues that the Child Abduction Convention can only function optimally where there is a minimum level of fundamental rights protection in the country of habitual residence. Such protection should be effective and not only theoretical and illusory. Immigration laws put into question the existence of such a minimum level of protection; however, child abduction courts can and should take immigration into account for ensuring an effective protection of children's rights caught in the middle of cross border conflicts.

# Part III
# The European Supranational Framework

# 7 The Court of Justice of The European Union

## 7.1 Introduction

This chapter focuses on the second sub-research question. It addresses the contribution of the CJEU to the field of child abduction and it inquires whether this Court has adopted a child rights-based analysis to child abduction cases. The inquiry takes into account the specific role of the CJEU within the EU architecture, including the nature and scope of its judgments.

The CJEU functions within a supranational structure, therefore its child abduction case law can be understood subject to a prior incursion into the competences and nature of this Court as well as into the legal system of the EU. Sections 7.2. and 7.3 respectively address these topics. Section 7.4 focuses on the child abduction case law of the CJEU. Chapter 3 identified three core rights of children as key elements to post separation parenting disputes. Chapter 5, brought in new dilemmas specifically for the field of child abduction: (i) primary carer abductions; (ii) domestic violence and child abductions and (iii) immigration considerations. The same chapter showed that these three phenomena are to a certain extent interrelated. Moreover, as explained in Chapter 3, the CRC Committee requires judges to assess all the rights of children relevant to a concrete dispute. In this light, in addition to the three core rights of children, sections 7.4.3.2 and 7.4.3.3 delve into the topics of primary carer abductions and issues of violence against children. Section 7.5 offers some reflections on the balancing between comity and individual rights in the specific context of the CJEU.

## 7.2 General considerations: competences, constitutionality, human and children's rights

The competence of the CJEU on matters related to child abduction and children's rights is intimately linked with the Union legal acts in the same field. The paragraphs below elaborate first on the competences of the EU, to the extent they are relevant for children's rights in the child abduction context. Then a brief incursion into the engagement of the CJEU with human rights in general and children's rights in particular offers an overview of this Court's legal mandate in this field.

### 7.2.1 Human rights and private international family law within the EU

At present, the Union can only legislate to the extent Member States have enabled it (the principle of conferral, Article 5(2) TEU). Under the EU Treaties, the Union's competence can be exclusive or shared with the Member States. Private international family law falls under the area of freedom, security and justice (Chapter 3, Title V TFEU). The EU competence in this area is shared with the Member States (Article 4(2)(j) TFEU). The Union's competence is further limited by the principles of subsidiarity (Article 5(3) TEU) and proportionality (Article 5(4) TEU). The principle of subsidiarity ensures that the Union only acts to the extent the proposed measure cannot be sufficiently achieved by the Member States. Proportionality means that the Union's actions cannot exceed what is necessary to achieve its objectives under the Treaties.

With respect to human rights protection, the revised Article 6 TEU provides that the Charter of Fundamental Rights of the European Union (hereinafter the "EU Charter" or the "Charter")[1] is binding and shall have the same value as the Treaties. Article 6 TEU lists three formal sources of human rights: the EU Charter; the ECHR as a 'special source of inspiration' for EU human rights principles; and general principles of EU law – the body of case law articulated throughout the years by the CJEU drawing on various sources, including the case law of the ECtHR.[2]

Article 6 TEU provides that the Charter shall have the same force as the Treaties. It follows that secondary EU legislation may be tested for its validity against the provisions of the Charter. Also, elevating the Charter to the same status as the Treaties entails that conflicts between competing (Charter) human rights and Treaties' freedoms may be dealt with by the CJEU in the same manner, i.e. by balancing the competing interests at stake.[3]

Further, Article 6(1) TEU and 51(2) of the Charter provide that this instrument does not extend the competences of the Union, nor does it modify or establish a new power or task for the Union. It is also important to note that the Charter provisions are addressed to the EU institutions and to Member States only when they are implementing European Union law.[4] Substantially, the Charter mostly represents a codification of fundamental rights which had already been affirmed in EU law.[5] In addition, some new rights, such as the right to the protection of personal data or the right to a high level of environmental protection have been included.[6] The novelty is that these rights,

1 2000/C 364/01, OJ C/364/1, 18 December 2000.
2 Craig/De Búrca 2011, p. 362.
3 Franklin 2010, p. 137.
4 Article 51 (1) EU Charter; See also CJEU 26 February 2013 C-617/10, ECLI:EU:C:2013:105 (Åklagaren/Hans Åkerberg Fransson) where the CJEU found that states had acted in the interpretation of EU law even where they were not directly transposing EU law but where there was a direct link between national legislation and EU legislation.
5 Groussot/Pech 2010.
6 Groussot/Pech 2010, p. 5.

albeit recognized in various EU law instruments, had not been regarded as fundamental rights until the Charter.[7] Of particular relevance for child abduction cases are the right for respect for private and family life (Article 7 Charter) and the rights of the child (Article 24 Charter). Under Article 24(2) of the Charter, the child's best interests are a primary consideration in all actions relating to children. Further, children have the right to express their views freely and to have their views taken into consideration in accordance with their age and maturity (Article 24 (1) Charter). Finally, pursuant to Article 24(3) of the Charter, children have the right to maintain regular contact with both their parents, unless it is contrary to their interests.

The substance of the Union's competence in international family law matters is now laid down in Article 81 TFEU under the heading 'Judicial cooperation in civil matters.' Thus, the Union may act only to the extent a matter is 'civil', concerns 'judicial cooperation' and has 'cross border implications.'

By adopting the 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 (the "Brussels II *bis* (Regulation)),[8] the Union established common rules on jurisdiction, recognition and enforcement of judgements in matters of parental responsibility. The Brussels II *bis* Regulation has been replaced by Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) (the "Brussels II *ter* (Regulation)"),[9] now in force.

The enactment of these Regulations triggered the applicability of the EU Charter and the corresponding obligations of Member States and EU institutions to respect the EU Charter when implementing the EU Regulations.

Externally, Article 3(2) TFEU provides that "the Union shall […] have exclusive competence for the conclusion of an international agreement when […] is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope."

The Commission considers – based on the CJEU Lugano judgement – that the Union has exclusive external competence in these areas.[10]

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7 Groussot/Pech 2010, p. 5.

8 Published in the Official Journal of the European Union of L 338 of 23 December 2003, pp. P. 0001 – 0029.

9 Published in the Official Journal of the European Union of 2 July 2019, L 178, pp. 1-115.

10 Explanatory Memorandum, Proposal for a Council Regulation of […] establishing a procedure for the negotiation and conclusion of bilateral agreements between Member States and third countries concerning sectoral matters and covering jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, parental responsibility and maintenance obligations, and applicable law in matters relating to maintenance obligations, /* COM/2008/0894 final – CNS 2008/0266 */, Brussels, 19 December 2008.

Therefore, only the Union, and not the Member States, may conclude international agreements covering the subject matter of cross border parental responsibilities and child abduction. Nevertheless, by way of exception to the rules on external competence, the Council adopted in 2009 a Regulation authorising Member States to conclude agreements with third states on the subject matter of the Brussels II *bis* Regulation.[11] Therefore as of 2009, the Member States' capacity to enter into agreements with third states is conditioned on the Commission's authorization to start negotiations and enter into the envisaged agreement (Articles 3 and 8 of the 2009 Council Regulation).

### 7.2.2 The Court of Justice of the European Union: competences, nature and human rights

After the Lisbon Treaty the term 'Court of Justice of the European Union' includes the Court of Justice (the "CJEU") and the General Court.[12] The main decision-making forum is the CJEU; its jurisdiction is detailed in the Treaties, specifically under Article 19 TEU and Articles 251-258 TFEU.[13] The competences of the CJEU depend on the type of action it adjudicates. As the CJEU functions within the EU – a system which has quasi-state institutional structure and rule-making powers – it can decide on the division of powers between the EU and its Member States.[14] Broadly speaking the CJEU may only annul acts of the EU institutions and does not have the power to annul domestic legislation.[15] Even if the CJEU cannot invalidate acts of the Member States, it has established itself as the final arbiter concerning the interpretation of EU law.[16] The main tasks of the CJEU, in its own interpretation, have been to guarantee the primacy, unity and effectiveness of EU law.[17] To-date the European Court of Justice -the predecessor of the CJEU – has developed important doctrines with a constitutional character such as

11 Council Regulation (EC) No 664/2009 of 7 July 2009 establishing a procedure for the negotiation and conclusion of agreements between Member States and third countries concerning jurisdiction, recognition and enforcement of judgments and decisions in matrimonial matters, matters of parental responsibility and matters relating to maintenance obligations, and the law applicable to matters relating to maintenance obligations, OJ L200/46, 31 July 2009.

12 Craig/De Búrca 2011, p. 58; for the most recent terminology and composition: << https://curia.europa.eu/jcms/jcms/Jo2_7024/en/#jurisprudences>>, last accessed on 10 June 2024.

13 Craig/De Búrca 2011, p. 59.

14 Hurrelmann/Manolov 2013.

15 Sweet 2009, p. 645.

16 See, *inter alia* ECJ 9 March 1978, C-106/77, [1978] ECR I 0629 (Simmenthal); the CJEU has repeatedly stressed that the courts of the Member States have to disapply national provisions which are contrary to the EU law.

17 CJEU 26 February 2013, C-399/11, ECLI:EU:C:2013:107 (Stefano Melloni v. Ministerio Fiscal), para 60.

supremacy, direct effect or state liability for damages.[18] Scholars view the EU as a complex legal order with no clear hierarchical relationship between EU institutions and national authorities, although the Court regards itself as being on the apex of the EU hierarchy.[19]

The CJEU's role of ensuring that the Treaties are observed by the Member States and the institutions has been considered a constitutional role.[20] Sweet, for example, identified several features which attest to the CJEU's constitutional character. First, the CJEU establishes rights, which are subject to a mechanism of judicial enforcement. Second, its jurisdiction is compulsory and third, the CJEU's means of adjudication are similar to those of national constitutional courts.[21]

At the same time the 'constitutionalising' process of the CJEU has been subject to intense criticism especially due to the fact that the CJEU was not a 'classical constitutional court', i.e. it is not a Supreme Court in a unified system.[22] There are ongoing discussions with the national courts concerning the relationship between the national (constitutional) courts and the CJEU.[23] Furthermore, the development of the constitutional doctrines by the CJEU and its role on the European arena has been constantly shaped by the dialogue with national courts.[24]

In the light of the above it can be seen that the CJEU's position cannot be easily regarded either as that of an international court or a constitutional court. Therefore, the CJEU is arguably a *sui generis* court, which does not fit into traditional patterns.

Over time, the nature of the CJEU has developed alongside the EU. While the EU was initially established to serve economic purposes, it had later on become clear that a more profound path of integration was needed. The CJEU itself in its initial judgments developed principles to serve the achievement of the economic integration goal.[25] Gradually, new principles and values were added, including the respect for fundamental rights.[26] The CJEU's role was seminal in ensuring the effective interpretation of EU law.[27] Scholars stressed that the CJEU's role should be seen from a dynamic rather than static perspective.[28]

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18 Craig/De Búrca 2011, p. 63.

19 Gerards 2011, p. 80; See also ECJ 9 March 1978, C-106/77, [1978] ECR I 0629 (Simmenthal), para 17 and more recently CJEU 26 February 2013 C-617/10, ECLI:EU:C:2013:105 (Åklagaren/Hans Åkerberg Fransson), para 45.

20 Tridimas 2011, p. 737.

21 Sweet 2009, p. 645.

22 Sweet 2010.

23 Sweet 2010.

24 Sweet 2010.

25 For example, ECJ 5 February 1963, C-26/62, ECLI:EU:C:1963:1 (Van Gend en Loos); ECJ judgement of 15 July 1964 Case 6/64, ECLI:EU:C:1964:66 (Costa v. Enel); ECJ 5 March 1996, Joined Cases C-46/93 and 48/93, ECLI:EU:C:1996:79 (Brasserie du Pêcheur SA).

26 Senden 2011, p. 27.

27 Craig/De Búrca 2011, p. 63.

28 Craig/De Búrca 2011, p. 64.

The CJEU's engagement with human rights has a long history. Human rights were not originally included in the EU founding treaties; however already since 1969, the CJEU recognised general principles of EU law, including protection for human rights.[29] The development of fundamental rights continued throughout the years, yet it was the Treaty of Lisbon which brought important changes in this field.[30]

The CJEU's human rights case law has been primarily developed through the preliminary reference procedure under Article 267 TFEU.[31] This means that the judgments of the CJEU are open-ended leaving a certain margin of implementation to domestic courts.[32]

On the CJEU's engagement with children's rights, Stalford had noted in 2014 this Court's modest contribution in this regard.[33] She attributed this to the detached and abstract formulation of EU laws relevant to children.[34] Since then, the case law of the CJEU has referred back to Article 24 of the Charter (rights of the child) primarily in (i) proceedings brought under the Brussels II *bis* Regulation and in (ii) cases concerning the free movement of persons.[35] The freedom of movement cases can be further subdivided into (i) family reunification, migration and citizenship and (ii) cases resembling child custody disputes. This Chapter analyses the approach of the Court of Justice to children's rights in the proceedings brought under the Brussels II *bis* Regulation which relate to child abduction. Also, Chapter 10 looks into the approach of the CJEU to the rights of children in cases resembling child custody disputes as these cases expose cases pre-abduction, as explained therein.

## 7.3 Child abduction in the European Union: The Brussels II *ter* Regulation

### 7.3.1 Overview

Within the European Union, the Hague Convention is complemented by the Brussels II *ter* Regulation.[36] Brussels II *ter* is the outcome of a three-year long negotiation process, whereby its predecessor, Brussels II *bis* (Regulation),

29 ECJ 12 November 1969, C-29/69, ECR 419 (Stauder v. City of Ulm).
30 At legislative level, prior to the Treaty of Lisbon, provisions concerning the EU's commitment to respect for fundamental rights were included in the Treaty of Maastricht (Article F(2)) and in the Treaty of Amsterdam (Article 6). Also, the CJEU continued its line of case law on general principles of law.
31 Greer, Gerards, Slowe 2018, p. 298.
32 Greer, Gerards, Slowe 2018, p. 298.
33 Stalford 2014, p. 218.
34 Stalford 2014, p. 219.
35 Lonardo 2022, pp.601, 603.
36 Published in the Official Journal of the European Union of 2 July 2019, L 178, pp. 1-115.

was replaced through a unanimous vote in the Council.[37] Under Article 105 Brussels II *ter*, and in so far as child abduction is concerned, the Regulation applies between all Member States with the exception of Denmark, as of 1 August 2022.[38]

Within the European Union, this Regulation contours the CJEU's competence to act in child abduction cases. Also, the enactment of the Regulation triggers the applicability of the EU Charter and the corresponding obligation of Member States and EU institutions to respect the EU Charter when implementing the Brussels II *ter* Regulation. An overview of child abduction under the Brussels II *ter* is thus a prerequisite for a better understanding of the case law of the CJEU in this field and its approach to the rights of children.

Article 96 of the Regulation clarifies that its provisions complement those of the Child Abduction Convention. Indeed, it has been considered that with the Recast of the Brussels II *bis*, the EU has reinforced the relationship of complementarity between the two instruments.[39]

Given that EU law leaves the Hague Convention mechanism largely intact, the overview below only underscores the different elements of the former in relation to the latter instrument. Further, it is important to reiterate that Brussels II *ter* is not restricted to child abduction, rather it covers all civil matters concerning on the one hand divorce, legal separation and marriage annulment and on the other hand the attribution, exercise, delegation, restriction or termination of parental responsibility.[40] Chapter III of this instrument is specifically dedicated to child abduction; however other Chapters (in particular Chapter IV on Recognition and Enforcement and Chapter VI on General Provisions) are equally applicable to intra-EU child abduction cases. Within the EU framework, child abduction is therefore integrated within the wider scope of custody and parental responsibilities. This is a significant difference with important practical consequences compared to the Hague Conference's jurisdictional reach. In the latter situation, not all States Parties to the Hague Convention are at the same time parties to the 1996 Child Protection Convention and/or the Maintenance Convention.

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37 Musseva 2020, p. 130. The voting process is regulated by Article 81(3) of the TFEU requiring a special legislative procedure. The special legislative procedure entails an unanimous vote in the Council after consultations with the European Parliament.

38 According to Recital 96 Brussels II *ter*. In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the TEU and to the *TFEU (*OJ C 326, 26.10.2012, p. 299–303*),* Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application.

39 Biagioni 2023, pp. 1081, 1089. The author comments on the change of terminology of Article 96 Brussels II *ter*, compared to Article 60 of the Brussels II *bis* Regulation which mentioned that the Regulation was to take precedence over the Hague Convention, as opposed to the instrument now in force which uses the word 'complements.'

40 Article (1)(a) and (b) of Brussels II *ter* Regulation.

The scope of Chapter III of Brussels II *ter* Regulation is identical to that of the Hague Convention: it applies to wrongful removals or retentions. The Regulation clarifies that custody includes in particular the right to determine the child's place of residence.[41] As shown in this dissertation, even if the Hague Convention does not define custody, domestic practice has gradually developed in this direction: it is now widely accepted that custody rights exist in favour of a parent who can veto a child's relocation. The Regulation incorporates this definition of custody rights in its text, bringing uniformity across the EU and eliminating therefore any possible confusions.[42]

Brussels II *ter* Regulation also reinforces the requirement for expeditious proceedings laying down a term of six weeks per degree of jurisdiction for delivering a decision and for completing the enforcement of the child's return.[43] Expeditiousness is prioritised even when protective measures are considered; Article 27(5) of Brussels II *ter* Regulation clarifies that such measures (aimed at alleviating concerns over a grave risk to the child) may only be taken provided that they do not delay the return proceedings. Further, one novelty of the Brussels II *ter* is Article 27(6) which allows for a decision ordering the return of the child to be declared provisionally enforceable notwithstanding an appeal and provided that the return of the child is required by the best interests of the child.

Alternative dispute resolution solutions should equally be considered; an aspect which does not feature in the Hague Convention.[44]

Further, the Regulation has added important elements to the return mechanism by (i) tightening the possibilities to refuse the return of the child, (ii) enabling a smoother enforcement procedure and last but not least (iii) enhancing -in certain respects- the rights of children.

Concerning the return mechanism, it has been shown that the Hague Convention prioritises the return of the child, unless domestic authorities find that one of the exceptions to return is applicable. The Brussels II *ter* follows the same principle, however it mandates in Article 27(1) that competent authorities hear the left-behind parent before they refuse the child's return. The same Article requires that when considering the application of Article 13(1) of the Hague Convention, the competent domestic courts first assess whether adequate arrangements have been made to secure the protection of the child upon return. Such a provision represents a codification

41 Article 2(2)(9) of the Brussels II *ter* Regulation.

42 McEleavy has in the past identified a difficulty with this clause, however he considers that for the avoidance of conflicts with the Regulation, Member States should adopt the definition set in the Regulation. See McEleavy 2005, p. 29.

43 Article 24 of the Brussels II *ter* Regulation. Article 28 sets out the six-week term for enforcement, failure to comply entails a right on the left-behind person to request a statement of reasons for the delay. The length of the proceedings has also been one of the aspects advanced by the Commission among the reasons for revisiting the Brussels II *bis* Regulation. In this sense see also Kruger e.a. 2022, p. 172.

44 Article 25 of the Convention.

of the practice of undertakings or mirror orders which is also encouraged by the Hague Conference.[45] The term 'adequate arrangements' is not further defined, leaving thus a margin of discretion to courts concerning the type of arrangements that may be considered adequate in a given situation.

One key point of contention of the Brussels II *bis* Regulation which was extensively discussed during the negotiations for its recast was the so-called overriding mechanism.[46] Article 11(8) of the Brussels II *bis* Regulation ensured that even in the case of a non-return order under Article 13 of the Hague Convention, the authorities of the country of habitual residence could nevertheless issue a certificate of enforcement and request the return of the child.[47] Article 42 of the Brussels II *bis* Regulation provided that the issuance of such a certificate was subject to certain conditions: the child and the parties must have been given the opportunity to be heard; and the issuing court should have taken into account the reasons for and evidence underlying the order issued pursuant to Article 13 of the Hague Convention. The Regulation left no possibility for opposing the Article 42 certificate in the country of refuge, even if the aforementioned conditions had not been complied with.

The Brussels II *ter* has partially maintained this mechanism; it has however integrated it in the wider context of custody litigation.[48] Under Article 29(6) of the Brussels II *ter*, any refusal to return of the child pursuant to Article 13(1)(b) of 13(2) of the Hague Convention can be overridden by a decision on the substance on the rights of custody given in the state of habitual residence. For the purposes of Article 42 Brussels II *ter* the decision on the substance of the custody rights requiring the return of the child is a *privileged* decision. This in turn enables the issuing of an enforcement certificate as per Article 47 of Brussels II *ter*. The Regulation thus allows the courts of habitual residence to retain jurisdiction on the merits of the custody dispute even after a non-return order in child abduction proceedings. After adjudicating the merits -provided that they have taken into account the judgement in the child abduction proceedings- the child shall nevertheless return to the country of habitual residence.[49] A joint reading of the Hague Convention and the 1996 Child Protection Convention would have a similar effect, provided that countries have ratified both instruments.[50] From the perspective of efficiency, the added value of the Brussels II *ter* Regulation, is the removal of exequatur and other formalities for the enforcement of the certificate.[51] As with the Brussels II *bis*, Article 47(3) of Brussels II *ter* mandates that before issuing this certificate the courts shall give the child

45 For a discussion, see Chapter 4 above.
46 Musseva 2020.
47 Beaumont/Holliday 2016, 211-260.
48 In this sense see Kruger et al 2022, p. 177.
49 Kruger et al 2022, pp. 177-178; Biagioni 2023, p. 1086
50 This has also been discussed in Chapter 4 of this dissertation.
51 Musseva 2020, p. 138.

and the parties the opportunity to be heard; it sets restrictions on when a default of appearance can be overlooked and includes an obligation to take into account the reasons of the non-return order issued by the country of refuge. Nevertheless, this certificate is only subject to withdrawal by the same court, either of its own motion or upon an application.[52] The Regulation draws thus a distinction between a certificate requesting the return of the child and other parental responsibility cases which may be opposed on wider (human rights) grounds. For example, under Article 41 Brussels II *ter*, the enforcement of a decision in matters of parental responsibility shall be refused if one of the grounds mentioned in Article 39 exists. These grounds are typical for private international law in general and they include public policy, the best interests of the child or irreconcilable judgments.[53] As discussed above, such possibilities for refusal do not exist if Article 47 of the Brussels II *ter* becomes applicable.

### 7.3.2 The approach of Brussels II *ter* to the rights of children

Compared to its predecessor, Brussels II *bis*, and the Hague Convention, Brussels II *ter* Regulation includes more extensive references to the rights of children. For example, the best interests of the child is mentioned no less than 11 times in the Recitals of the Regulation.[54] Recital 19 highlights that this concept shall be interpreted in light of Article 24 of the EU Charter and the CRC. This aligns the Regulation with substantive children's rights, and it is in line with previous suggestions for enhancing the rights of children.[55] Further, the Regulation creates a presumption that the best interests of the child require that jurisdiction is determined in accordance with the criterion of proximity (Recital 20). The best interests of the child is the justification for vesting jurisdiction on matters of parental responsibilities with the courts of habitual residence and reducing to a minimum the possibilities to oppose enforcement or recognition of judgments.[56] The best interests of the child is also a ground for the exceptions to the rule of proximity in vesting jurisdiction. Under the Regulation, it is possible to transfer the jurisdiction from the court of habitual residence to a court best placed to adjudicate the merits provided that the best interests of the child are observed.[57] With respect to child abduction proceedings, alternative dispute resolution may not be used if they are contrary to the best interests of the child.[58] In other words,

52 Article 48(2) of the Regulation.
53 The grounds for non-recognition of parental responsibility judgments mentioned in Article 39 of the Regulation are wider; the most relevant for the perspective of human rights have been included above.
54 Recitals 19, 20, 23, 27, 30, 39, 47, 48, 55, 57, and 84 refer to the best interests of the child.
55 Kruger e.a. 2016, p. 155.
56 See for example Recitals 47 and 55.
57 See for example Recital 27, and Article 12 of the Regulation.
58 Article 25.

the best interests of the child is used both as an underlying premise of the Regulation as well as a justification for its exceptions.

The Brussels II *ter* Regulation further links the best interests of the child with the right to have contact with both parents and the right to be heard. Under Article 27(2) "The court may, at any stage of the proceedings, […], examine whether contact between the child and the person seeking the return of the child should be ensured, taking into account the best interests of the child."

The right to be heard is extensively dealt with in the Brussels II *ter* Regulation. Recital 39 lays down that proceedings for return of the child shall as a basic principle provide a child who is capable of forming their views with "a genuine and effective opportunity to express his or her views and when assessing the best interests of the child, due weight should be given to those views." Further, as with the best interests of the child, Recital 39 draws a link between the Regulation, Article 24 of the Charter and Article 12 of the CRC highlighting the importance of the right to express their view in the framework of the Regulation. Yet, the Regulation refrains from laying down rules on *how* the hearing is conducted; instead it provides expressly that domestic authorities retain discretion on who hears the child and how the child is heard. It is also expressly mentioned that hearing the child is a right and not an obligation, and that it should be assessed in light of the best interests of the child. In addition to the Recitals, the right to be heard has received dedicated attention in Article 21 of the Regulation according to which:

> "1. […], the courts of the Member States shall, in accordance with national law and procedure, provide the child who is capable of forming his or her own views with a genuine and effective opportunity to express his or her views, either directly, or through a representative or an appropriate body.
>
> 2. Where the court, in accordance with national law and procedure, gives a child an opportunity to express his or her views in accordance with this Article, the court shall give due weight to the views of the child in accordance with his or her age and maturity."

Thus, children must be given the opportunity to express their views in all parental responsibility proceedings, including child abduction. The Regulation underlines that children must not only be given an opportunity to express their views, but that this opportunity must be *effective*. For child abduction however, the objection of a child to return may be overridden by a subsequent decision on custody rendered in the state of habitual residence.[59] Nevertheless, even in such cases, Article 47(3)(b) of the Brussels II *ter* Regulation requires that a certificate ordering the child's return may only be issued after that child has been given the opportunity to express his or

59 Article 29 (6) of the Regulation.

her views. More broadly, the Regulation allows for the non-recognition of parental responsibility judgments if the child has not been given the opportunity to be heard; yet such ground of non-recognition does not apply to the certificate provided for under Article 47 and which is relevant in the case of child abduction.

Further, with respect to the right of the child to be protected from violence, the Regulation includes some provisions which may facilitate the protection of children. Recital 46 encourages cross border cooperation between the relevant authorities in taking measures for protecting the child from a grave risk of harm; however these measures should not delay the return proceedings under the Hague Convention. Recital 69 and Article 56(4) of the Regulation provide that in exceptional circumstances enforcement can be suspended if it exposes the child to a grave risk of physical or psychological harm. However, authorities are at the same time encouraged to take all necessary measures to overcome impediments to enforcement generated by the child's objection voiced after the rendering of the decision. Under Article 56(6), if the grave risk to the child is of a lasting nature the authorities may refuse the enforcement of the judgement.

Overall, the Brussels II *ter* Regulation has generally been welcomed by commentators as remedying some of the shortcomings of the Brussels II *bis* Regulation.[60] Specifically concerning child abduction and children's rights, commentators had highlighted the rigidity of the second chance procedure, the lack of a general provision on hearing children and the failure to harmonise domestic rules on procedures for hearing children.[61] Some of these shortcomings have been remedied in the text of the new instrument. In particular, the Regulation has introduced a provision on hearing children which applies to all parental responsibility proceedings.[62] Also, while not eliminating the second chance proceedings entirely, these proceedings have been integrated into the custody adjudication. This could arguably diminish cross border litigation which is damaging for all parties and in particular for the children involved.[63]

However, it has also been highlighted that the Regulation's approach not to lay down rules concerning hearing of children may lead to difficulties in the recognition and circulation of judgments between Member States – a shortcoming that has been documented and criticised in relation to Brussels II *bis* Regulation.[64]

60 Corneloup/Kruger 2020, pp. 215-245; Ubertazzi 2017, p. 568.
61 Beaumont e.a. 2016; Ubertazzi 2017.
62 Article 21 Brussels II *ter* Regulation.
63 In this sense see Corneloup/Kruger 2020, pp.9-10.
64 Ubertazzi 2017, p. 599, and Beaumont e.a. 2016.

## 7.4 Child abduction before the CJEU

### 7.4.1 Overview of cases and selection methods

The CJEU's case law has been selected from this Court's online database, where all the judgments are published.[65] First, all judgments, decisions, views and orders were searched using the search term 'Council Regulation (EC) No 2201/2003 of 27 November 2003'. Second, the same documents were searched using the search term 'Council Regulation (EU) 2019/1111 of 25 June 2019'. This search yielded 12 documents.

All judgments were checked for their relevance for the present dissertation. After reviewing the results, it was found that between 2003 to 14 June 2024 -the cut-off date of this dissertation, the CJEU has delivered 19 preliminary rulings on the interpretation of various provisions of the Brussels II *bis* Regulation related to child abduction. As it has only recently entered into force, no judgments have yet been delivered on the interpretation of the Brussels II *ter* Regulation; yet considering that the latter instrument builds on the former it is to be expected that the CJEU's approach shall be similar. It is therefore important to outline the relevant principles which can be distilled from the CJEU's case law.

The CJEU's child abduction case law is analysed in section 7.4.2 below along the main themes which could be identified from its judgments. This case law overview will enable in turn a more in-depth analysis of the way the CJEU has considered the rights of children in its decision-making process (Section 7.4.3). Chapter 5 has discussed the new social paradigms in which child abductions operate. This Chapter was drafted against the background of primary carer abductions and domestic violence issues. In this light, Section 7.4.3.2 includes the Court's perspective on the topic of primary carer abductions whereas Section 7.4.3.3 addresses this Court's approach to child abduction cases raising issues of violence against children.

### 7.4.2 Themes in the CJEU's child abduction case law

Most of the cases concerned the interpretation and application of various provisions of Brussels II *bis* Regulation. Important concepts on which the CJEU had the opportunity to decide were the notion of civil matters,[66] habitual residence or rights of custody.[67] Questions submitted to the CJEU also revolved around the enforcement of the return certificate issued under

65 <https://curia.europa.eu/juris/recherche>.

66 CJEU 19 September 2018, C-325/18 and C-375/18 PPU, ECLI:EU:C:2018:739 (Hampshire County Council/C.E. N.E.), CJEU 2 August 2021 C-262/21 PPU, ECLI:EU:C:2021:640 (A./B.).

67 CJEU 22 December 2010, C-497/10 PPU, ECLI:EU:C:2010:829 (Mercredi/Chaffe) (habitual residence); CJEU 5 October 2010, C-400/10 PPU, ECLI:EU:C:2010:582 (J.McB./L.E) (rights of custody).

Article 42 Brussels II *bis* after a substantial change in circumstances[68] or where it was arguably issued in violation of the child's right to be heard.[69] Also, in some cases the CJEU indirectly ruled on the relationship between child abduction, discrimination and criminal proceedings[70] or on the relationship between child abduction and immigration law.[71] The CJEU's approach and its general contribution in this field is elaborated upon in the following paragraphs.

On the material scope of the Brussels II *bis* Regulation, it is to be reiterated that Article 1(1)(b) applied to 'civil matters'. The CJEU has adopted a broad interpretation of this notion finding that it covers residential care even if it may formally fall under public law pursuant to the national legislation.[72] The same wide interpretation was extended to wrongful removals; the CJEU ruled that wardship jurisdiction which entailed the transfer of the right to an administrative authority under English law amounted to 'civil matters' and was hence covered by the Brussels II *bis* Regulation.[73] For the CJEU, 'parental responsibilities' is an autonomous notion meaning that the focus shall be on the scope of the application rather than on the formal definition given in national law.[74] Also, proceedings seeking the return of children under the Hague Convention are to be considered 'civil matters' resulting in the Regulation being applicable.[75]

Further, the CJEU has brought an important contribution to the understanding of the term habitual residence. Already in 2009 the CJEU had ruled that habitual residence is to be determined on the basis of the place which reflects some degree of integration of the child in a social and family environment.[76] In order to establish the habitual residence, presence is an important factor and it should be shown that the presence "is not in any way temporary or intermittent and that the residence of the child reflects some degree of integration in a social and family environment".[77] The CJEU expressly listed several factors to be taken into account when establishing habitual residence.[78] These are

> "[…] the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality,

68 CJEU 1 July 2010, C-211/10, ECLI:EU:C:2010:400 (Povse/Alpago).
69 CJEU 22 December 2010, C-491/10 PPU, ECLI:EU:C:2010:828 (Aguirre Zarraga/Pelz).
70 CJEU 19 November 2020, C-454/19, ECLI:EU:C:2020:947 (Z.W.).
71 CJEU 2 August 2021 C-262/21 PPU, ECLI:EU:C:2021:640 (A./B.).
72 ECJ 27 November 2007, C-435/06, ECLI:EU:C:2007:714 (C.).
73 CJEU 19 September 2018, C-325/18 and C-375/18 PPU, ECLI:EU:C:2018:739 (Hampshire County Council/C.E. N.E.), para 61.
74 CJEU 21 October 2015, C-215/15, ECLI:EU:C:2015:710 (Gogova/Iliev), para 28.
75 CJEU 2 August 2021 C-262/21 PPU, ECLI:EU:C:2021:640 (A./B.), para 43.
76 ECJ 2 April 2009, C-523/07, ECLI:EU:C:2009:225 (A.), para 44.
77 ECJ 2 April 2009, C-523/07, ECLI:EU:C:2009:225 (A.), para 38.
78 ECJ 2 April 2009, C-523/07, ECLI:EU:C:2009:225 (A.), paras 38-42.

> the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child must be taken into consideration
>
> […] the parent's intention to settle permanently with the child in another Member State […] may constitute and indicator of the transfer of habitual residence. Another indicator may be constituted by lodging an application for social housing with the relevant services of that State
>
> By contrast, the fact that the children are staying in a Member State where, for a short period, they carry on a peripatetic life, is […] an indicator that they do not habitually reside in that State"[79]

Two subsequent cases of *Mercredi v. Chaffe*[80] and *C v. M*[81] respectively, elaborated on the link between habitual residence, lawful moves and wrongful removals.

The case of *Mercredi v. Chaffe* concerned the move of a child from England to the island of Reunion when she was only two months old.[82] The father and mother had separated and the mother moved to another country without informing the father. As the father did not have rights of custody, the movement was lawful within the meaning of the Regulation. The question was therefore which court (either English or French) had jurisdiction to rule on parental responsibility, custody and access rights. Pursuant to Article 8(1) of the Regulation the jurisdiction belongs to the courts where the child is habitually resident at the moment such court is seized. The father had seized the British courts a few days after the mother's move with the baby. Therefore, the answer to the question depended on the assessment of the baby's habitual residence.

In addition to the factors mentioned in the *A* case, the CJEU added 'age' as a particularly important element for assessing the child's habitual residence in the present case. [83] The family environment of young children is determined by the person with whom they live. In cases of infants especially, the CJEU held that their environment depends on the environment of the person who is looking after them. In these cases the relevant factors were considered to be: the reasons for the move by the child's mother to another Member State, the languages known to the mother, her geographic and family origins may become relevant, the family and social connections which the mother and child have with that Member State.

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79 ECJ 2 April 2009, C-523/07, ECLI:EU:C:2009:225 (A.), paras 39, 40.
80 CJEU 22 December 2010, C-497/10 PPU, ECLI:EU:C:2010:829 (Mercredi/Chaffe).
81 CJEU 9 October 2014, C-376/14, ECLI:EU:C:2014:2268 (C./M.).
82 CJEU 22 December 2010, C-497/10 PPU, ECLI:EU:C:2010:829 (Mercredi/Chaffe).
83 CJEU 22 December 2010, C-497/10 PPU, ECLI:EU:C:2010:829 (Mercredi/Chaffe), paras 52-54.

The View of Advocate General Cruz Villalon may also provide useful insight into the possible interpretations of habitual residence.[84] Even if he mentioned 'age' as an important factor in assessing the social environment, he also looked at whether the habitual residence could be changed in one day in cases of lawful movements. He pointed out that such an interpretation could arise on the basis or Article 9 of the Regulation.[85] However, in his view allowing flexibility to domestic courts in assessing the habitual residence was of essence. In that vein he did not deem it desirable to include fixed time limits as this would undermine the courts' possibilities to take into account all the relevant factors when establishing the habitual residence.

The question of habitual residence was also brought to the CJEU in a preliminary question brought by the Irish Supreme Court.[86] The case concerned a relocation from France to Ireland pursuant to a provisional judgement of the French courts. After the move, the French courts overturned the initial judgement and ordered that the child lived with the father and awarded the mother access rights. On this basis, the father filed for the return of the child under the Hague Convention. While it was clear that the initial move of the child was lawful, it was not clear whether the retention in Ireland was wrongful within the meaning of Article 2(11) and 11(1) of the Regulation. The assessment on whether the retention was wrongful or not hinged on the habitual residence of the child, i.e. the question being whether the habitual residence of the child had changed from France to Ireland.[87]

In addition to the criteria laid down in *Mercredi,* the CJEU emphasised that courts should weigh in the provisional nature of the measure authorising the departure as well as the fact that a young child resided in a country for about eight months before the stay became unlawful.[88] The fact that the time after the stay becomes unlawful should not be taken into account.

The CJEU did not clarify the concept of habitual residence in the present case. It did not rule out that a child may have acquired habitual residence in Ireland even though the mother knowingly changed residence pursuant to a provisional judgement. Indeed, following the preliminary reference procedure, the Irish courts had ruled that the child did acquire habitual residence in Ireland, therefore dismissing the father's return order.[89]

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84 CJEU 6 December 2010, C-497/10 PPU, ECLI:EU:C:2010:738 (Mercredi/Chaffe), View AG Cruz Villalon.

85 CJEU 6 December 2010, C-497/10 PPU, ECLI:EU:C:2010:738 (Mercredi/Chaffe), View AG Cruz Villalon, para 77.

86 CJEU 9 October 2014, C-376/14, ECLI:EU:C:2014:2268 (C./M.).

87 Under Article former Article 11 (1) of the Brussels II *bis* Regulation, a child is to be returned to the country of habitual residence immediately before the wrongful removal. Therefore, if the habitual residence would have been Ireland in this case, there was no need for a return order.

88 CJEU 9 October 2014, C-376/14, ECLI:EU:C:2014:2268 (C./M.), para 56.

89 C v. G, SC 419/03; see also the commentary on the case Beaumont/Holliday 2015, pp. 37-56.

Consequently, within the EU habitual residence is determined taking into consideration factors such as integration of the child into the environment, school attendance, family, activities as well as the age of the child. The younger the child the less the focus will be on the child's integration and more on the parent's social environment. Conversely, with older children, courts need to look more at their own integration rather than at the parent's intention.

However, the CJEU has expressly ruled out that habitual residence can be established if the child has never lived in the jurisdiction concerned, even if this was the result of a parent's fraudulent behaviour.[90]

The notion of 'rights of custody' has been submitted on one occasion to the attention of the CJEU.[91] The case concerned a situation where the father of children born outside of marriage could only obtain custody over the children subject to an application in court. As with parental responsibilities, the CJEU stated that 'rights of custody' is an autonomous concept within the EU. However, the Regulation leaves the attribution of rights to custody to national law provided that national law does not breach the EU Charter of Fundamental Rights. In the instant case the fact unmarried fathers needed to either apply in court or seek the other parent's agreement, did not amount to a violation of either Article 7 of the Charter or Article 24.

Further, in a recent case the CJEU has arguably added a new criterion to the determination of 'wrongful removal'. The case concerned the removal of a child by his mother from Sweden to Finland pursuant to a decision adopted in the application of the Dublin III Regulation.[92] The judgement did not focus on the criteria of the Hague Convention; rather the Court found that a transfer decision which was binding on the mother and the child did not amount to a wrongful removal. Such proceedings are thus outside the scope of application of the Hague Convention or Brussels II *bis* Regulation.

In a different case, the CJEU has used the freedom of movement rules of Article 21 TFEU to find that criminal laws whereby national child abduction is less severely punished than international (inter-EU) abduction amounted to an unjustified restriction on EU citizens' freedom of movement.[93] In yet other cases, the CJEU has clarified that it is exceptionally possible for the courts of the country of habitual residence to transfer jurisdiction to the courts where the children had been abducted to if it found that the latter courts were better placed to adjudicate the case.[94]

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90 CJEU 17 October 2018, C-393/18 PPU, ECLI:EU:C:2018:835 (U.D. v. X.B.); CJEU 8 June 2017, C-111/17 PPU, ECLI:EU:C:2017:436 (O.L./P.Q.).

91 CJEU 5 October 2010, C-400/10 PPU, ECLI:EU:C:2010:582 (J.McB./L.E).

92 CJEU 2 August 2021 C-262/21 PPU, ECLI:EU:C:2021:640 (A./B.), para 2.

93 CJEU 19 November 2020, C-454/19, ECLI:EU:C:2020:947 (Z.W.).

94 CJEU 13 July 2023, C-87/22, ECLI:EU:C:2023:571 (TT/AK).

It is important to note that the most controversial preliminary references concerned the so-called second chance proceedings.[95] These cases have also exposed the approach of the CJEU to the individual rights of children and shall be addressed in the dedicated sections below.

### 7.4.3 Children's rights in the CJEU's parental abduction case law

An overview of the case law indicates that this Court has principally referred back to the Brussels II *bis* Regulation whenever questions regarding the rights of children arose. This has enabled the Court to provide guidance to Member States for enhancing the uniform application of the Regulation, to the detriment of an individualised approach to the rights of children.

#### *7.4.3.1 The best interests of the child*

The best interests of the child has been raised in many of the preliminary references submitted to the CJEU. Already from the beginning, the CJEU emphasised that securing the best interests of the child represents the overarching aim of the Regulation which in turn must be interpreted in light of Article 24 of the EU Charter.[96] In practice, the CJEU has relied on the best interests of the child when ruling on (1) the interpretation of habitual residence,[97] (2) the transfer or retention of jurisdiction after a wrongful removal,[98] (3) the relationship between the Regulation with other EU or international law,[99] suspension of enforcement,[100] and on the enforceability of the Article 42(2) certificate.[101]

For example, in cases focusing on the determination of habitual residence, the best interests of the child was understood in the sense of Recital 12 of the Brussels II *bis* Regulation, linking the best interests of the child with the criterion of proximity for the determination of habitual residence.[102] On

95 CJEU 1 July 2010, C-211/10, ECLI:EU:C:2010:400 (Povse/Alpago); CJEU 22 December 2010, C-491/10 PPU, ECLI:EU:C:2010:828 (Aguirre Zarraga/Pelz); CJEU 9 January 2015, C-498/14 PPU, ECLI:EU:C:2015:3 (Bradbrooke/Aleksandrowicz). These cases are qualified as controversial in light of the debates they have generated in scholarship and on the basis of the emerging discussions for a recast of the Brussels II bis Regulation.

96 ECJ 11 July 2008, C-195/08 PPU, ECLI:EU:C:2008:406 (Rinau), para 51.

97 CJEU 9 October 2014, C-376/14, ECLI:EU:C:2014:2268 (C./M.);CJEU 22 December 2010, C-497/10 PPU, ECLI:EU:C:2010:829 (Mercredi/Chaffe); CJEU 8 June 2017, C-111/17 PPU, ECLI:EU:C:2017:436 (O.L./P.Q.); CJEU 17 October 2018, C-393/18 PPU, ECLI:EU:C:2018:835 (U.D. v. X.B.).

98 CJEU 24 March 2021, C-603/20 PPU, ECLI:EU:C:2021:231 (SS/MCP); CJEU 13 July 2023, C-87/22, ECLI:EU:C:2023:571 (TT/AK).

99 CJEU, 12 May 2022, C-644/20, ECLI:EU:C:2022:371 (W.J/L.J and J.J.).

100 CJEU 16 February 2023, C-638/22, ECLI:EU:C:2023:103 (T.C.).

101 CJEU 1 July 2010, C-211/10, ECLI:EU:C:2010:400 (Povse/Alpago).

102 CJEU 1 July 2010, C-211/10, ECLI:EU:C:2010:400 (Povse/Alpago); CJEU 22 December 2010, C-491/10 PPU, ECLI:EU:C:2010:828 (Aguirre Zarraga/Pelz); CJEU 9 January 2015, C-498/14 PPU, ECLI:EU:C:2015:3 (Bradbrooke/Aleksandrowicz).

the question of habitual residence, while affirming the principles mentioned above, the CJEU has ruled that the best interests of the child do not require an interpretation different from the one offered by these principles.[103] In the respective case the interpretation was that habitual residence cannot be established if a child has never lived in a specific place.[104] On substance, it can be inferred that the best interests of the child is intimately linked to the integration of the child in a particular environment; however, it appears that the CJEU's approach is to highlight what the best interests of the child is not rather than what that right entails. In the case of *Rinau*, the CJEU has equally linked the best interests of the child substantively with the stability and harmony of the family and procedurally with the efficiency of the administration of evidence.[105]

In a case concerning the retention of jurisdiction after a wrongful removal to a third state, the CJEU considered that it would be against the best interests of the child for a state to retain jurisdiction indefinitely.[106] The dispute in that case concerned a situation that may have exposed inconsistencies or overlaps between the 1996 Hague Convention and the Brussels II *bis* Regulation.[107] Also, the CJEU has accepted that a court that has jurisdiction on the merits may exceptionally allow the transfer of jurisdiction to the court where the child has been wrongfully removed provided that such transfer is not likely "to have a negative impact on the emotional, family and social relationships of the child concerned".[108] It is however important to stress that CJEU's acceptance of this possibility was accompanied by emphasising that courts must "systematically decline to exercise the power to request a transfer provided for in Article 15(1)(b) of that Regulation".[109]

Further, the CJEU has linked the best interests of the child with the need to be provided with sufficient resources, resulting in a finding that habitual residence of the child for the purposes of maintenance obligations can change following a wrongful removal.[110]

#### *7.4.3.2 The right of the child to have contact with both parents: the relevance of children's rights to primary carer abductions*

The CJEU has equally referred to the right of the child to have contact with both parents and to Article 24(3) of the EU Charter which specifically enshrines this right.[111] The Court's case law draws a close link between this

103 CJEU 17 October 2018, C-393/18 PPU, ECLI:EU:C:2018:835 (U.D. v. X.B.), para 64.
104 CJEU 17 October 2018, C-393/18 PPU, ECLI:EU:C:2018:835 (U.D. v. X.B.), paras 52-53.
105 ECJ 11 July 2008, C-195/08 PPU, ECLI:EU:C:2008:406 (Rinau), para 95.
106 CJEU 24 March 2021, C-603/20 PPU, ECLI:EU:C:2021:231 (SS/MCP), para 58.
107 CJEU 24 March 2021, C-603/20 PPU, ECLI:EU:C:2021:231 (SS/MCP), para 53.
108 CJEU 13 July 2023, C-87/22, ECLI:EU:C:2023:571 (TT/AK), para 50.
109 CJEU 13 July 2023, C-87/22, ECLI:EU:C:2023:571 (TT/AK), para 49.
110 CJEU, 12 May 2022, C-644/20, ECLI:EU:C:2022:371 (W.J/L.J and J.J.), para 66.
111 CJEU 9 January 2015, C-498/14 PPU, ECLI:EU:C:2015:3 (Bradbrooke/Aleksandrowicz), para 63.

right and the best interests of the child. For example, in *Detiček v. Sgueglia* the CJEU has reiterated the underlying presumption of the Hague Convention, namely that wrongful removals deprive the child of the possibility to maintain contact with both parents.[112] In this case, it has equally affirmed that "a measure which prevents the maintenance on a regular basis of a personal relationship and direct contact with both parents can be justified only by another interest of the child of such importance that it takes priority over the interests underlying that fundamental right".[113]

The case of *Povse v. Alpago* raised the question of parent-child separation.[114] It is illustrative of the Court's approach to this important topic and for this reason a more dedicated analysis is undertaken in the subsequent paragraphs. Moreover, this case was subsequently sent to the ECtHR and it will later be discussed herein in the context of the relationship between these two supranational courts.[115]

*Povse v. Alpago* concerned the unlawful removal of a girl from Italy to Austria by her mother. The Austrian authorities had dismissed the father's application for the child's return to Italy on the ground that the return would be contrary to Article 13(b) Hague Convention. The domestic courts' reasoning is not evident from the CJEU's judgement; however, from the ECtHR's subsequent judgement it appears that the rationale was the separation of the child from her mother. The mother had also accused the father of domestic violence, including death threats.[116]

Meanwhile, upon the request of the father, the Italian court considered that it retained jurisdiction to adjudicate the merits of the custody dispute and issued an order for return of the child pursuant to Article 11(8) of the Regulation. By the same judgement of 10 July 2009, the Italian court issued the enforcement certificate under Article 42 of the Regulation.

The case was referred to the CJEU by an Austrian court (*Oberster Gerichtshof*) in the context of the father's request for enforcement of the Article 42 certificate and the ensuing return order of the child to Italy.

The question relevant for the present study reads as follows:

> "Can the second State [*i.e.* Austria] refuse to enforce a judgement in respect of which the court of origin [*i.e.* the Italian court] has issued a certificate under Article 42(2) of the regulation if, since its delivery, the circumstances have changed in such a way that the enforcement would now constitute a serious risk to the best interests of the child?"

112 CJEU, 23 December 2009, C-403/09 PPU, ECLI:EU:C:2009:810 (Jasna Detiček/Maurizio Sgueglia), para 55.
113 CJEU, 23 December 2009, C-403/09 PPU, ECLI:EU:C:2009:810 (Jasna Detiček/Maurizio Sgueglia).
114 CJEU 1 July 2010, C-211/10, ECLI:EU:C:2010:400 (Povse/Alpago).
115 ECtHR 18 June 2013, no 3890/11 (*Povse v. Austria* (Dec)).
116 ECtHR 18 June 2013, no 3890/11 (*Povse v. Austria* (Dec)).

Advocate General Sharpston in her View clarified that the change of circumstances mentioned by the Austrian Government related to the fact that the mother would most likely refuse to return to Italy with the child and that, by the time the enforcement were to take place the child would have lived most of her life in Austria, separated from her father.[117]

Before answering this preliminary question the CJEU ruled that a judgement requesting the return of the child by the state of habitual residence pursuant to Article 11(8), does not have to be a final judgement in that state.[118] In this context it stressed that the need to deter child abductions taken together with the child's right to maintain contact with both parents take precedence over potential hardships the child might suffer as a result of moving between two countries.

Thus, final non-return orders issued pursuant to Article 13(b) Hague Convention may be overruled by non-final return orders issued by the authorities in the state of habitual residence. The CJEU further asserted that once a certificate of enforcement had been issued, there were no possibilities for opposing the return in the country of presence, this certificate being automatically enforceable pursuant to Recital 24 and Articles 42(1) and 43(2) of the Regulation.[119]

The CJEU resolved in a similar manner the question concerning a change in the circumstances, which would constitute a serious risk to the best interests of the child. It considered that this aspect was a matter of substance, which fell within the competence of the state of habitual residence.[120] Therefore, in this case only the Italian courts were competent to adjudicate on the serious risk to the child's best interests entailed by the return. Assuming that these courts were to consider such risk justified, they retained sole competence to suspend their own enforcement order.[121]

In its reasoning, the CJEU stressed the principle of mutual trust as the basis for the Regulation.[122] Indeed, according to the CJEU, in view of this principle the Hague Convention states should trust that the child's best interests shall be best protected by the authorities of the state of habitual residence.

It should also be noted that the CJEU shared the view of the Advocate General in this case. With respect to the best interests of the child the Advocate General outlined that the Regulation adopted a more comprehensive concept of the child's best interests, which is generally applicable to the

117 CJEU 16 June 2010, C-211/10, ECLI:EU:C:2010:344 (Povse/Alpago), View of AG Sharpston, paras 117 & 118.
118 CJEU 1 July 2010, C-211/10, ECLI:EU:C:2010:400 (Povse/Alpago), paras 62, 67.
119 CJEU 1 July 2010, C-211/10, ECLI:EU:C:2010:400 (Povse/Alpago), para 70.
120 CJEU 1 July 2010, C-211/10, ECLI:EU:C:2010:400 (Povse/Alpago), para 81.
121 CJEU 1 July 2010, C-211/10, ECLI:EU:C:2010:400 (Povse/Alpago).
122 CJEU 1 July 2010, C-211/10, ECLI:EU:C:2010:400 (Povse/Alpago), paras 40, 59.

detriment of an individualised approach.[123] In the Advocate General's View it was in the interests of children in general to return to their country of habitual residence and the final decision as to the child's best interests is within the competence of these courts and not (even in exceptional circumstances) for the Hague Convention courts.[124]

Consequently, the CJEU considers the 'child's best interests' as a matter of substance which is to be ultimately addressed by the courts of the child's habitual residence. The same reasoning goes for the child's right to maintain contact with both parents. This right is only mentioned as an underlying principle of the Regulation. The CJEU has so far refrained from making any reference as to the practical application of this principle and consequences for the child if for example the taking parent would be in an objective impossibility to return. As to the child's best interests, the CJEU's approach is that these are matters of substance to be entirely assessed by the courts with jurisdiction on the merits, i.e. the courts in the country of habitual residence.

In more recent cases, the CJEU has referred to the right of the child to maintain on a regular basis a personal relationship and direct contact with both parents when finding that the Polish Commissioner for Children's Rights and the Prosecutor General acted in breach of Article 11(3) of the Brussels II bis Regulation when they used the power to suspend enforcement proceedings of the return order.[125] Also, in the case of *RG and SF* the CJEU has linked this right to expeditious proceedings.[126]

#### *7.4.3.3 The right of the child to be protected from violence*

The CJEU has not directly addressed the right of the child to be protected from harm in its child abduction case law. Several cases decided so far have touched on this aspect: harm was connected to the separation from the taking parent[127] or to allegations of violent behaviour by the left-behind parent.[128] In none of these cases has the CJEU elaborated on the notion

123 CJEU 16 June 2010, C-211/10, ECLI:EU:C:2010:344 View of AG Sharpston, para 28; for the approach to the child's best interests concept under the Hague Convention see *supra* Chapter IV.

124 It should be recalled that in this study the term 'Hague Convention courts' or 'the courts of the state of refuge' has been used to refer to the courts vested with a Hague Convention application. The CJEU usually uses the term 'courts of the state of refuge' to refer to the aforementioned courts. Also, the term '(courts of) the state of habitual residence' or 'courts of origin' has been used to refer to the courts which normally have jurisdiction on the merits of the custody dispute, i.e. the courts where the child is to be returned. The CJEU usually uses the term '(courts of) the state of origin'.

125 CJEU 16 February 2023, C-638/22, ECLI:EU:C:2023:103 (T.C.).

126 CJEU 9 January 2015, C-498/14 PPU, ECLI:EU:C:2015:3 (Bradbrooke/Aleksandrowicz), para 52.

127 CJEU, 23 December 2009, C-403/09 PPU, ECLI:EU:C:2009:810 (Detiček/Sgueglia); CJEU 1 July 2010, C-211/10, ECLI:EU:C:2010:400 (Povse/Alpago).

128 CJEU 2 August 2021, C-262/21 PPU, ECLI:EU:C:2021:640 (A./B.).

of harm under the Regulation. One specific reference made in the case of *Detiček v. Sgueglia* may become relevant for approaches to harm. Here, the CJEU has accepted that the right to maintain a personal relationship and direct contact with both parents may only be overridden by "another interest of the child of such importance that it takes priority over the interests underlying that fundamental right."[129]

#### *7.4.3.4 The right to be heard*

The Brussels II *bis* Regulation had also included the right of the child to be heard, albeit more restrictively than the Brussels II *ter* Regulation. Article 11(2) provided that "When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his age or degree of maturity." Trimmings found that this provision of the Regulation resulted in an automatic inquiry into the views of the child which appears to be virtually unheard of in non-European Union States.[130] Thus, she concludes, credit is to be given to the Regulation for exhibiting a more child focused approach.[131] However, in a subsequent report commissioned by the European Parliament practitioners warned that in some cases hearing of the child in cases where the circumstances of the case allowed for ordering the return could interfere with the timeliness of the proceedings.[132]

Additionally, Article 42(2)(b) Brussels II *bis* Regulation provided that a judge may issue a certificate for return solely if "the child was given the opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity". However, the CJEU ruled that it is solely for the courts issuing the Article 42 certificate to assess if the child has indeed been given the opportunity to be heard.[133]

Article 42(2)(b) was the basis of the preliminary reference in the case of *Andoni Aguirre Zarraga v. Simone Pelz* – the only CJEU case discussing the child's right to be heard.[134] The preliminary reference was filed after the Spanish authorities had issued an Article 42 certificate for the return of a child from Germany to Spain.[135] The German authorities had denied the return on the basis of Article 13(2) Hague Convention, i.e. the fact that the child objected to return. At the same time, Spanish authorities had issued the Article 42 certificate for the return of the child. The child had not been

129 CJEU, 23 December 2009, C-403/09 PPU, ECLI:EU:C:2009:810 (Detiček/Sgueglia).
130 Trimmings 2013, p. 236.
131 Trimmings 2013, p 236.
132 Cross-border parental child abduction in the European Union, Study for the LIBE Committee European Parliament 2015.
133 CJEU 22 December 2010, C-491/10 PPU, ECLI:EU:C:2010:828 (Aguirre Zarraga/Pelz), para 69.
134 CJEU 22 December 2010, C-491/10 PPU, ECLI:EU:C:2010:828 (Aguirre Zarraga/Pelz).
135 CJEU 22 December 2010, C-491/10 PPU, ECLI:EU:C:2010:828 (Aguirre Zarraga/Pelz).

heard in Spain, therefore the German courts considered that the issuance of the certificate had been in breach of Article 42(2)(a) whereby such a certificate may only be issued if the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity.

The CJEU stressed that it was only for the courts in the state of origin – in this case the Spanish courts- to review the lawfulness of the certificate. In other words, there was no possibility for the courts of the requested state (here the German courts) to evaluate whether the child had been given the opportunity to be heard, this being a matter solely for the authorities which should hear the child. The CJEU also looked at Article 24 of the EU Charter which covers the rights of the child. It stressed that the hearing of the child was not an absolute right, yet whenever a court decides this is necessary it must offer the child a genuine opportunity to express his views.[136] However, according to the CJEU it is only for the courts of the child's habitual residence to examine the lawfulness of their own judgments in the light of the EU Charter.[137] One facet of the mutual trust principle is that the Member States' legal systems provide effective and equivalent protection of fundamental rights.[138] Therefore, the interested parties should bring any human rights-based challenge before the Spanish courts, as these courts had jurisdiction over the merits of the custody dispute pursuant to the Regulation.[139] The CJEU noted that the proceedings in that case were still pending in Spain, therefore it was still possible to appeal. Again, in line with its previous judgement it held that no action could be taken in the Member State of presence against an enforcement certificate issued pursuant to Article 42 of the Regulation, even if it had been issued contrary to the requirements of the Regulation interpreted in accordance with the EU Charter.[140]

The CJEU partially shared Advocate General Bot's views.[141] One aspect raised by the Advocate General and not addressed by the CJEU concerned the Member State where the child should be heard so as to comply with the requirements of Article 42 of the Regulation. In the Advocate General's view, the silence of the Regulation on this point could be interpreted to mean that if the child had been heard in one Member State (in this case in

136 CJEU 22 December 2010, C-491/10 PPU, ECLI:EU:C:2010:828 (Aguirre Zarraga/Pelz), para 66.
137 CJEU 22 December 2010, C-491/10 PPU, ECLI:EU:C:2010:828 (Aguirre Zarraga/Pelz), para 69.
138 CJEU 22 December 2010, C-491/10 PPU, ECLI:EU:C:2010:828 (Aguirre Zarraga/Pelz), para 70.
139 CJEU 22 December 2010, C-491/10 PPU, ECLI:EU:C:2010:828 (Aguirre Zarraga/Pelz), paras 71, 72.
140 CJEU 22 December 2010, C-491/10 PPU, ECLI:EU:C:2010:828 (Aguirre Zarraga/Pelz), paras 74, 75.
141 CJEU 22 December 2010, C-491/10 PPU, ECLI:EU:C:2010:828 (Aguirre Zarraga/Pelz), View of AG Bot delivered on 7 December 2010.

Germany) this was enough to be able to consider that the child had been given the opportunity to be heard in another Member State.[142] Thus, the Spanish authorities could take into account the statements of the child given before the German courts, and therefore it could be assumed that the child had effectively had the opportunity to be heard in Spain. Therefore, according to AG Bot, the child had been given the opportunity to be heard as required under Article 42 of the Regulation and Article 24 of the Charter. In his opinion, thus, proceedings in different Member States should not be seen as separate proceedings, but rather as complementary components of one and the same set of proceedings.[143] Even though the CJEU did not ultimately incorporate in its judgement this part of AJ Bot's opinion, such reasoning may prove particularly interesting for the content of the child's right to be heard. A *prima facie* conclusion would be that such an analysis would not *per se* go against Article 12 of the CRC, provided that there would be an obligation for the Spanish authorities (in this case) to show that they have given *due weight* to the views of the child. In other words, it would be a clear advancement for children's right to be heard if courts were to give an explanation as to how they have taken their view into account. Nevertheless, it does not appear that this was the intention of AG Bot. Also, the CJEU's position, as expressed above, leaves little room for oversight on its part of the way children are heard.

## 7.5 Conclusions: balancing comity with individual rights

This Chapter has addressed the EU's approach to parental child abduction. It has been shown that the EU's competence in international child abduction is subsumed to its wider role in judicial cooperation in civil matters and the cross-border recognition of judgments. Indeed, the principle of mutual trust and the important role of the CJEU in affirming it in child abduction case law have equally been noted in academic commentaries.[144]

At legislative level, the Brussels II *ter* Regulation has brought an important contribution to both cross-border cooperation and individual children's rights. In line with previous legislative initiatives, the Regulation which is now in force, mandates that domestic authorities enforce return orders if adequate arrangements for the protection of the child are in place in the country of habitual residence. Member States remain competent to assess on a case-by-case basis the existence of such adequate arrangements, and no clarification on their content has yet emerged from the CJEU's case law. Also, from the perspective of harmonisation, parental responsibilities have

142 CJEU 22 December 2010, C-491/10 PPU, ECLI:EU:C:2010:828 (Aguirre Zarraga/Pelz), para 99.

143 CJEU 22 December 2010, C-491/10 PPU, ECLI:EU:C:2010:828 (Aguirre Zarraga/Pelz), para 96.

144 Walker/Beaumont 2011, p. 239; Lamont 2019, p. 236.

received a uniform definition across the European Union. The right to veto a relocation is an integral element thereof and the conferral of such right at national level will trigger the qualification of a cross border removal as unlawful within the meaning of the Brussels II *ter* Regulation. Lastly, this Regulation has integrated child abduction proceedings within the wider context of custody litigation, allowing, albeit on an exceptional basis, children to remain in a jurisdiction while proceedings on the substance of the custody rights are pending in another jurisdiction.

From the perspective of children's rights, while the Regulation is replete with references to the best interests of the child, little clarification as to the substance is given. The same presumption as in the Hague Convention applies: that the best interests of the child are best served by the return mechanism. Within this framework, domestic authorities retain discretion to decide on an individual basis on the circumstances where it would be against the best interests of the child to depart from this presumption. Nevertheless, the Regulation clearly links the best interests of the child with the right to maintain contact with both parents and the right to be heard. It clarifies that courts should examine how to ensure contact between the child and the person seeking the return and it provides that the assessment of the best interests of the child should be guided by the child's views. The lack of any guidance on how the child's hearing should take place, albeit a shortcoming of the Regulation, could be attributed to the Union's lack of competence in domestic civil procedural law, coupled with the requirement for unanimity in passing legislation in the field of cross-border cooperation in civil matters. Further, the Regulation also allows for the suspension of enforcement, in exceptional circumstances, if enforcement would expose the child to a grave risk of harm, an option which is not envisaged by the Hague Convention, and which could improve the practical application of The Convention.

On the other hand, the CJEU's case law has reflected a clear deference to mutual trust to the detriment of an individualised assessment of the relevant rights of children. The Court has set important rules on habitual residence and has favoured a child-centred interpretation thereof, by encouraging courts to assess the child's place of integration. It should be noted that in preliminary reference proceedings, the CJEU's role is primarily to give binding guidance to domestic courts, rather than to adjudicate the dispute in question.[145] The CJEU has accepted that the child's right to have contact with both parents -which militates in favour of return- can exceptionally be overridden by another interest of the child of such importance that it takes priority over the interests underlying that fundamental right."[146] Nevertheless, the CJEU has so far refrained from giving any guidance on how domestic courts should interpret in substance the best interests

145 Tridimas/Tridimas 2004, pp.125-145.
146 CJEU, 23 December 2009, C-403/09 PPU, ECLI:EU:C:2009:810 (Detiček/Sgueglia).

of the child, or on how to strike the balance between individual children's rights and mutual trust.

The strongest criticism to the CJEU's child abduction jurisprudence has emerged in the context of the overriding return mechanism under Articles 11(8) of the Brussels II *bis* Regulation.[147] Here, the CJEU has insisted on the primacy of mutual trust resulting in an absolute deferral to the state of habitual residence for always retaining the power to decide on a child's return.[148] On the basis of the presumption of equivalent protection of fundamental rights, the CJEU has held that a breach of the child's right to be heard cannot result in a refusal to enforce an Article 42 certificate, issued in breach of the conditions of the Brussels II *bis* Regulation.[149]

Indeed, as it has been pointed out, the CJEU has failed to scrutinise whether the child's return would be in reality safe.[150] Such an approach has also been criticised for failure to reflect a child-centred approach and to give effect to Article 24(3) of the EU Charter.[151]

More broadly, research on the application of Articles 11(6)- 11(8) of the Brussels II *bis* Regulation has revealed systemic deficiencies in this area across Member States.[152] Following a domestic case law review, Beaumont and others showed that only 73% of children over six-year-old have been heard in domestic proceedings; that judges do not explain in their judgments or in the Article 42 certificate how they have given children the opportunity to be heard, why children have not been heard, other than for reasons of age alone.[153] Moreover, contrary to Article 42(2)(c) of the Brussels II *bis* Regulation, it has been shown that judges do not consistently show how they have taken into account the non-return order and that this is at times rendered difficult due to the lack of reasons for non-return or due to a failure of hearing all parties during the Article 11(6)-11(8) proceedings.[154]

It is important to note that within the EU, the Commission has the possibility to remedy such systemic deficiencies through infringement proceedings under Articles 258-260 of the TFEU; however, it did not act in this direction during the period the Brussels II *bis* Regulation had been in force.

Returning to the CJEU, an overview of its case law indicates that indeed, this Court has been so far willing to refer to the rights of children primarily where such references supported the child's return and the goals of Brussels II *bis* Regulation.[155] This notwithstanding, and with reference to

147 Bartolini 2019; Beaumont e.a. 2016.
148 Bartolini 2019, p. 100.
149 CJEU 22 December 2010, C-491/10 PPU, ECLI:EU:C:2010:828 (Aguirre Zarraga/Pelz), paras 59-61.
150 Bartolini 2019, p. 106.
151 Bartolini 2019, p. 106.
152 Beaumont e.a. 2016, pp. 241-248.
153 Beaumont e.a. 2016, p. 241.
154 Beaumont e.a. 2016, p. 248.
155 CJEU 16 February 2023, C-638/22, ECLI:EU:C:2023:103 (T.C.); CJEU 9 January 2015, C-498/14 PPU, ECLI:EU:C:2015:3 (Bradbrooke/Aleksandrowicz), para 52.

the overriding return mechanism of the Brussels II *bis,* it should equally be stressed that the text of Article 42 left no room for interpretative discretion. It is therefore questionable to what extent the CJEU could have provided for a (more) child rights-based interpretation of these provisions.

Finally, it should be noted that the revised mechanism laid out in Brussels II *ter* has yet to receive scrutiny by the CJEU. It is to be hoped that this Court will employ the enhanced children's rights guarantees to trigger harmonisation in favour of children's rights at national level – an aspect which it has failed to do under the previous legal framework.

# 8 The European Court of Human Rights

## 8.1 Introduction

This chapter continues the focus on the second sub-research question. It addresses the contribution of the ECtHR to the field of child abduction and it inquires whether this Court has adopted a child rights-based analysis to child abduction cases. Over time, the ECtHR has become the most prolific international court in handing down rulings in child abduction cases. By 15 June 2024, the ECtHR had decided on a total of 122 child abduction applications over a time span of 27 years from the first decision of 1 September 1996[1] to the latest judgement analysed here delivered on 16 April 2024.[2]

An overview of the ECtHR case law is relevant for a number of reasons. First, as discussed above, this Court issues binding judgments that can have a significant impact on domestic practice. It follows that its case law has a high potential for harmonising the interpretation of the Child Abduction Convention across the Council of Europe Member States. Second, the ECtHR offers a human rights perspective to the Child Abduction Convention. Even though the ECtHR's material scope is not restricted to children's rights, the Court often refers to the CRC and children's rights in its judgments.[3] It is therefore important to assess on the one hand the extent to which the ECtHR's interpretation meets the rights-based approach identified in Chapter 2 of this dissertation, and on the other hand how the Court has construed the parent-child relationship and the role of primary carers in these cases. Lastly, the Court's extensive reasoning, the inclusion of dissenting opinions in its judgments, as well as the considerable period it takes to reach a judgement, give a unique opportunity to identify the tensions raised in child abduction applications as well as the different considerations which ultimately play a role in adopting a judgement.

As with the previous Chapter, Section 8.2 is dedicated to analysing the context within which the ECtHR operates. Section 8.3 focuses on the child abduction case law of the ECtHR, starting with an overview of the cases and followed by the main themes which have been identified. Section 8.3.3 delves into an analysis of the Court's approach to children's rights. The rights selected for analysis are the same ones as those identified in Chapter 3.

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1 ECtHR 4 September 1996 no. 26376/95 (*Catherine Irene Laylle v. Germany* (dec.)).

2 ECtHR 16 April 2024, no. 10772/21 (*Fernandes de Arauso v. Romania v. Romania*).

3 For an overview of the relevance of children's rights and CRC to the ECtHR see Fenton-Glynn 2021.

In addition, Chapter 5, brought in new dilemmas specifically for the field of child abduction: (i) primary carer abductions; (ii) domestic violence and child abductions and (iii) immigration considerations. The same chapter showed that these three phenomena are to a certain extent interrelated. Moreover, as explained in Chapter 3, the CRC Committee requires judges to assess all the rights of children relevant to a concrete dispute. In this light, in addition to the three core rights of children, sections 8.3.3.2 and 8.3.3.3 delve into the topics of primary carer abductions and issues of violence against children. Section 8.4 offers some reflections on the balancing between comity and individual rights in the specific context of the ECtHR.

## 8.2 General considerations: competences, constitutionality, human and children's rights

The ECHR was the first 'legislative' achievement of the Council of Europe.[4] It was signed in Rome on 4 November 1950 by the ten members of the Council of Europe.[5] It entered into force on 3 September 1953 and at that time it was primarily seen as a system of human rights control at inter-state level.[6] The ECHR envisaged the creation of a court, but 8 declarations had to be lodged by State parties to the ECHR for such a court to come into being.[7] The ECtHR was finally set up in 1959.[8] Its jurisdiction was optional, in that each Member State was only bound by its jurisdiction after having made a declaration to this effect.[9] The right to individual petition and the jurisdiction of the ECtHR became mandatory to all Member States since the entry into force of Protocol 11 on 1 November 1998.[10]

Similarly to the acceptance of the ECtHR's jurisdiction, the right to individual petition was envisaged in the initial text of the ECHR. Pursuant to Article 25 of the initial text, acceptance of individual petitions was an optional clause requiring a separate declaration to this effect.[11]

The ECtHR is a supranational body whose success depends on the acceptance of its judgments by the national constitutional and supreme courts.[12] As opposed to national constitutional courts, an inherent feature of its supranational character is the principle of subsidiarity according to which the primary obligation to ensure compliance with the rights and

4 Bates 2010, p. 49.
5 van Dijk et al 2006, p. 4.
6 Bates 2010, p. 8.
7 Bates 2010, p. 9.
8 Bates 2010, p. 124.
9 Bates 2010, p. 134.
10 Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, Strasbourg, 11.V.1994, European Treaty Series – No. 155.
11 Drzemczewski 2000.
12 Garlicki 2009, p. 391.

freedoms set forth in the ECHR rests with the Contracting States.[13] Furthermore, as part of this principle the task of the ECtHR is only to secure minimal standards which should be universally accepted, the domestic authorities being free to secure higher levels of protection.[14] The subsidiarity principle is backed up by considerations of state sovereignty and the fact that the ECtHR's judgments lack direct effect.[15]

The ECtHR functions in several formations: single judge, committee of three judges, Chambers of seven judges and a Grand Chamber of 17 judges.[16] Out of these formations it is the Grand Chamber which most closely resembles a national constitutional court, as it can overrule previous precedents and ensure uniformity in the ECtHR's case law.[17]

The ECtHR decides on the interpretation of the ECHR in petitions brought by individual applicants. The ECHR, drafted in 1950 is a general human rights treaty, and its focus is not on children or children's rights.[18] However, over time its case law has developed an extensive body of case law on matters concerning children.[19] It is beyond the scope of this dissertation to analyse the case law of the ECtHR in relation to children. Scholars have noted the potential of litigating the rights of children under the ECtHR.[20] At the same time the ECtHR has been criticised for not always adopting a child rights perspective in its judgments. [21] The ECtHR has been using the CRC and the CRC Committee to support its findings however it was proposed that this Court could enhance its reliance on the CRC in its case law.[22] Fenton-Glynn has noted several deficiencies of the Court's approach to children's rights: the lack of clarity on standing/representation; the insufficient attention to participation rights of children; the subjugation of children rights within the family and finally the overuse of the best interests principle to the detriment of other rights of children.[23] In addition to the Court's substantive approach to the rights of children, other systemic deficiencies, such as an overreliance on subsidiarity and its high workload have equally been noted and they could impact its ability to adopt a child-rights approach.[24]

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13 Garlicki 2009, p. 391; see also Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 24 June 2013, Council of Europe Treaty Series – No. 213.
14 Garlicki 2009, p. 391.
15 Garlicki 2009, p. 391.
16 Article 26 ECHR.
17 Senden 2011, at p. 19.
18 Fenton-Glynn 2021, p. 1
19 Two books dedicated to the ECtHR case law on children's rights have been published to date, Kilkelly 1999 and Fenton-Glynn 2021.
20 Kilkelly 2014, p. 207; Fenton-Glynn 2021.
21 Kilkelly 2014, p. 207, Peleg 2018, Fenton-Glynn 2021.
22 Kilkelly 2014, p. 207.
23 Fenton-Glynn 2018, pp. 394-396.
24 Fenton-Glynn 2018, pp. 397-398, Huijbers 2017.

Despite these deficiencies, from the perspective of human rights, the ECtHR remains an important actor and trough its jurisdiction in individual petitions it has the potential to adopt a child rights-based approach to cases involving children. The following sections focus on the Court's approach to the rights of children in the context of parental child abduction.

## 8.3 Child abduction before the European Court of Human Rights

### 8.3.1 Overview of cases and selection methods

The ECtHR's case law has been selected from the Court's online database, Hudoc where all the decisions and judgments are published, save for the ones decided in a single judge formation under Article 27(1) ECHR.

The search terms "child abduction" yielded 223 results. The French version of the site has been searched using the term "enlèvement" and in the section for 'relevant international law materials' "Haye" – retrieving 18 results. All cases decided until 15 June 2024 have been reviewed. Only the applications where the ECtHR was called to review the ECHR in light of the Child Abduction Convention were considered. Also, cases which had been struck out of the list or dismissed as inadmissible for reasons, other than manifestly ill-founded, were not included.

After review, a total of 122 applications were included in the analysis. They cover both judgments and inadmissibility decisions, where the ECtHR engaged with the substance of the dispute. They have been decided by the Grand Chamber, a Chamber of seven judges, or by a Committee of three judges. Two judgments have been decided by a chamber and subsequently referred to the Grand Chamber.[25] Of the 122 applications, 86 cases (70%) were brought by left-behind parents and 36 by taking parents (30%).

The Court found at least one violation of the Convention in 68 cases (79%) brought by the left-behind parents and in 7 cases (19%) brought by the taking parents. Until the Grand Chamber judgement in the case of *Neulinger and Shuruk v. Switzerland*[26] the Court declared all applications of the taking parents inadmissible or declined to find a violation.[27] In most of the child abduction cases, the adult applicant (the left-behind or taking parent, as the case may be) joined the child to the application to the effect that the children also became parties to the ECtHR proceedings.

25 ECtHR 6 July 2010, no. 41615/07 *(Neulinger and Shuruk v. Switzerland)* and ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia).*

26 ECtHR 6 July 2010, no. 41615/07 *(Neulinger and Shuruk v. Switzerland).*

27 ECtHR 6 December 2007, 39388/05 (*Maumousseau and Washington v. France*) is the first case where the ECtHR delivered a judgement in a case brought by a taking parent. It ultimately found no violation of the ECHR.

The types of complaints submitted to the Court reflected the position of the adult applicants in the domestic child abduction proceedings.[28] Left-behind parents who sought the return of their children have mostly complained before the ECtHR about the non-enforcement of return orders or the length of the domestic proceedings. When the domestic courts refused the return of the child, they complained in Strasbourg about the outcome of the domestic proceedings.

The taking parents submitted their case to the ECtHR after having lost the litigation in national courts. Their complaints in Strasbourg challenged the outcome of domestic proceedings, specifically that courts had disregarded the child's best interests when ordering the return. In addition, all applicants complained on occasion about the fairness of the decision-making process in that the principles of equality of arms or access to court had been denied. In two situations, both the left-behind and taking parents filed different applications to the Court.[29]

Seen from the perspective of the Child Abduction Convention, the complaints of the left-behind parents required the Court to align its case law to the comity considerations of the Child Abduction Convention. Conversely, in the complaints of the taking parents, the rights of the children were central, and the Court was challenged to find an adequate balance between comity and individual children's rights. It is not surprising therefore that the applications of the taking parents stirred more controversy, two of them ultimately becoming landmark cases in this field.[30] In *X v. Latvia*, its second Grand Chamber ruling, the Court has laid down its standard of review, which also represents the current approach to child abduction cases.[31]

The ECtHR's child abduction case law is analysed in section 8.3.2 below along the main themes which could be identified from its judgments. This case law overview will enable in turn a more in-depth analysis of the way the ECtHR has considered the rights of children in its decision-making process (Section 8.3.3). Chapter 5 has discussed the new social paradigms in which child abductions operate. This Chapter was drafted against the background of primary carer abductions and domestic violence issues. In this light, Section 8.3.3.2 includes the Court's perspective on the topic of primary carer abductions whereas Section 8.3.3.3 addresses the Strasbourg Court's approach to child abduction cases raising issues of violence against children.

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28 From the perspective of children's rights this has been a subject of criticism given that the Court has traditionally assumed that children's interests are identical to their parents: see Fenton-Glynn 2021, p. 257.

29 ECtHR 7 July 2020, no. 9256/19 (*Voica v. Romania*) and ECHR 17 May 2022, no 20425/20 (*Loiry v. Romania*); ECtHR 18 June 2013, no 3890/11 (*Povse v. Austria* (Dec)) and ECtHR 15 January 2015, no 4097/13 (*M.A. v. Austria*).

30 They have been qualified as landmark cases here as they are the only two child abduction judgments which have been delivered by the Grand Chamber: ECtHR 6 July 2010, no. 41615/07 *(Neulinger and Shuruk v. Switzerland*; ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia).*

31 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia).*

### 8.3.2 Themes in the ECtHR child abduction case law

#### *8.3.2.1 Non-enforcement of return orders*

Non-enforcement of the return orders has been a recurrent complaint of left-behind parents who have argued that the failure of the authorities to execute a final return order resulted in a breach of their family life with the child(dren). These complaints have been filed mainly under Article 8 of the ECHR which protects the right to private and family life. As with many other child abduction applications the applicants have lodged the complaint in their own name and in the name of their children, even if in some cases the children had opposed the return.[32]

The Court's analysis focused on the states' positive obligations to reunite parents with their children.[33] In its interpretation of the state's positive obligations the Court adhered closely to the Hague Convention. For example, the Court emphasised that under Article 11 of the Abduction Convention, domestic authorities are required to act swiftly in proceedings for the return of children.[34] In a number of cases the respondent governments argued that enforcement could not be carried out due to a significant change of circumstances.[35] The significant change was the passage of time which had elapsed between the return order and several failed enforcement attempts to the effect that the children had become accustomed to their new environment. The ECtHR consistently dismissed this argument ruling that states could not invoke their own failure to enforce return orders as a defence.[36]

Upon a closer analysis, it appears that in these judgments the ECtHR did not follow an individualised assessment of children's rights. The best interests of the child were mentioned in passing and they were aligned with the aims of the Hague Convention to have the status quo restored; there was thus a convergence between Article 8 ECHR and the Abduction Convention. In several cases, the return was not enforced due to the chil-

32 ECtHR 7 March 2013, 10131/11 *(Raw and others v. France);* ECtHR 7 June 2022, no. 29601/20 (*C.-A.D. and L.-C.D. v. Russia*).

33 for e.g. ECtHR *25 January 2000*, no. *31679/96* (*Ignaccolo-Zenide v. Romania);* ECtHR 24 April 2003, nos. 36812/97 and 40104/98 (*Sylvester v. Austria*); ECtHR 1 December 2020, no. 61984/17 (*Makhmudova v. Russia*).

34 ECtHR *25 January 2000*, no. *31679/96* (*Ignaccolo-Zenide v. Romania)*, para 102.

35 ECtHR 24 April 2003, nos. 36812/97 and 40104/98 (*Sylvester v. Austria*), ECtHR 22 June 2006, no 7548/04 (*Bianchi v. Switzerland)*; ECtHR 8 January 2008, no 8677/03 (P.P. v. Poland); ECtHR 21 September 2017, no. 53661/15 (*Severe v. Austria*).

36 see most recently ECtHR 21 September 2017, no. 53661/15 (*Severe v. Austria*).

dren's strong objection thereto.[37] Other than in the case of *M.K. v. Greece*,[38] -discussed below-, the Court has declined to assess the rights of children. Instead, the ECtHR has consistently focused on the obligation of the state to organise preparatory contacts between the children, their parents, and the social workers in view of securing their return.[39] The Court has accepted that coercion was not desirable in this area, however, it has encouraged states to use such measures against the parents.[40] Nevertheless, even when police intervened to remove children, the Court placed the emphasis on the fact that the public prosecutor was also present; no analysis of the child's rights had been undertaken.[41] The Court refrained from delving into the arguments of the parties that return would have exposed the children to violence, or evidence that enforcement attempts resulted in the children's hospitalisation.[42]

So far, the ECtHR has found violations in all but two of the applications concerning non-enforcement of return orders.[43] Also, by and large the judges were unanimous in their finding of a violation of Article 8 ECHR.[44] Only in one case has the Court accepted the government's argument that the passage of time represented a significant change in the circumstances which justified the authorities in refusing to enforce a return order. This was the case of *Serghides v. Poland* and the outcome was highly divided with three out of the seven judges dissenting.[45] In the respective case, after a court judgement ordering the return of the child, and while the proceedings for enforcement were pending, the applicant attempted to re-abduct his daughter. This led the Polish authorities to reverse the return order on the ground that the attempt to re-abduct the child had had a highly negative impact on her which in turn justified a reversal of the return order. Here, the Court found that the change of circumstances relied upon by the domestic authorities was attributable to the applicant rather than to the authorities

37 ECtHR *25 January 2000*, no. *31679/96* (*Ignaccolo-Zenide v. Romania* ECtHR 17 January 2013, no. 61680/10 *(Chabrowski v. Ukraine);*, ECtHR 7 March 2013, 10131/11 *(Raw and others v. France);* ECtHR 1 February 2018, no 51312/16 (*M.K. v. Greece*); ECHR 17 May 2022, no 20425/20 (Loiry v. Romania); ECtHR 1 December 2020, no. 61984/17 (*Makhmudova v. Russia*).

38 ECtHR 1 February 2018, no 51312/16 (*M.K. v. Greece*).

39 For example, ECtHR *25 January 2000*, no. *31679/96* (*Ignaccolo-Zenide v. Romania)* para 112, ECHR 17 May 2022, no 20425/20 (Loiry v. Romania), para 25.

40 ECtHR *25 January 2000*, no. *31679/96* (*Ignaccolo-Zenide v. Romania)*, para 106.

41 ECtHR 6 December 2007, 39388/05 (*Maumousseau and Washington v. France*), para 86.

42 ECtHR 7 March 2013, 10131/11 *(Raw and others v. France)*, paras 30 and 31.

43 ECtHR 2 November 2010, no 31515/04 (*Serghides v. Poland)*, ECtHR 1 February 2018, no 51312/16 (*M.K. v. Greece*).

44 In addition to the cases discussed below, two other cases were met with dissenting opinions: that of ECtHR 25 January 2000, no. *31679/96* (*Ignaccolo-Zenide v. Romania)*, and that of ECtHR 7 March 2013, 10131/11 *(Raw and others v. France)* (these will be discussed in more detail in the section concerning the child's right to be heard).

45 ECtHR 2 November 2010, no 31515/04 (*Serghides v. Poland).*

themselves. The dissent was critical of this approach, however not from the perspective of the 'passage of time' argument but rather as they considered that the length of the abduction proceedings themselves, of over a year, should have been considered unreasonable under Article 8 ECHR.

*M.K. v. Greece* is the only other case where the ECtHR has found that Article 8 of the Convention had not been breached in a claim concerning the non-enforcement of return order.[46]

This case is worth a more in-depth analysis as children's rights were at the core of the Court's findings.

The case concerned an abduction of a 12-year-old boy from France to Greece. The boy's mother who had sole custody decided to relocate to France with the children. However during a holiday in Greece the father refused to return the boy back to France. Following the mother's petition, by a final judgement of 30 September 2015 the Greek courts found that all the conditions of the Abduction Convention were met and therefore ordered the boy's return. When assessing the child's position, the Greek court ruled that the child did not object to returning to France, but rather that he had merely expressed feelings of loneliness which in the court's view were inherent to living in a new country.[47]

The enforcement of this final judgement proved problematic principally due to the child's adamant refusal to return.[48] This was attested by several reports of social workers conducted at the enforcement stage. Also, almost one year after the final judgement of 30 September 2015 the boy was heard again in court, where he objected to return. When the application was brought to the ECtHR, proceedings in Greece were pending regarding the imposition of fines on the taking father in relation to the abduction of his son. The left-behind mother complained that the Greek authorities had refused to facilitate her son's return to France.

In its reasoning the Court relied heavily on the boy's refusal to return. The Court also criticised the Greek authorities' first order of return for failure to take into account that the boy had a brother who lived with the father in Greece, in other words the Greek authorities did not take into account the entire family situation.[49] The ECtHR also mentioned that the child's right to be heard is guaranteed by several international instruments, including Article 12 CRC, Article 24 EU Charter, the European Convention on the Exercise of Children's Rights, as well as other recommendations of the CoE.[50] In light of all these instruments, taken together with Article 13 of the Hague Convention, the Court considered that there had not been a violation of Article 8 ECHR. Two judges dissented. First, Judge Wojtyczek stressed that in family situations the parent who has the physical custody of

46 ECtHR 1 February 2018, no 51312/16 (*M.K. v. Greece*).
47 ECtHR 1 February 2018, no 51312/16 (*M.K. v. Greece*), para 20.
48 ECtHR 1 February 2018, no 51312/16 (*M.K. v. Greece*), para 27.
49 ECtHR 1 February 2018, no 51312/16 (*M.K. v. Greece*), para 90.
50 ECtHR 1 February 2018, no 51312/16 (*M.K. v. Greece*), para 91.

the child also has the capacity to influence the child; therefore the Court -by not finding a violation- is encouraging parents to determine the outcome of proceedings by their own wrongdoings. In the second dissenting opinion, Judge Koskello focused on the rule of law and the fact that "the child's best interests and other rights of the child must operate within the framework of the rule of law".[51] On the facts, her main criticism was that the Greek authorities had placed a strong emphasis on the voice of the child *after* the final judgement in the abduction proceedings. Thus, in her opinion, the Greek authorities used the child's best interests "as a justification […] to re-examine the substance of issues which have already been the subject of final adjudication by the competent courts".[52]

*M.K. v. Greece* is an outlier in the Court's judgments concerning non-enforcement of child abduction. In two more recent judgments where the children objected to the enforcement of return orders, the ECtHR's reasoning was entirely construed around the states' failure to impose coercive measures on the parents and refrained from addressing the relevance of the children's objections to enforcement.[53] With direct reference to the children, in *Makhmudova v. Russia*, the Court criticised the authorities for failing to prepare the children psychologically and to address the risk of serious psychological trauma that had been identified by the same authorities.[54] Similarly, in the recent case of *Loiry v. Romania*, the Court did not address the relevance of the children's objections to return. Rather, the reasoning focused on the length of the enforcement proceedings and the failure of the authorities to seek assistance from police and child-protection experts or psychologists during the enforcement acts.[55]

#### *8.3.2.2 Fairness of the decision-making process: procedural considerations*

Child abduction cases have largely been brought under Article 8 of the Convention. Pursuant to its well-established Article 8 case law, the Court must be satisfied that the decision-making process was fair, meaning that the domestic authorities have allowed each party the opportunity to present their case while taking into account the best interests of the child(ren) involved.[56] Thus, complaints which would more typically fall under Article 6 of the Convention, such as equality of arms, adversarial proceedings,

51 ECtHR 1 February 2018, no 51312/16 (*M.K. v. Greece*), dissenting opinion of judge Koskello, para 21.

52 ECtHR 1 February 2018, no 51312/16 (*M.K. v. Greece*), dissenting opinion of judge Koskello, para 20.

53 ECtHR 1 December 2020, no. 61984/17 (*Makhmudova v. Russia)*, and ECHR 17 May 2022, no 20425/20 (*Loiry v. Romania*).

54 ECtHR 1 December 2020, no. 61984/17 (*Makhmudova v. Russia)*, para 75.

55 ECHR 17 May 2022, no 20425/20 (*Loiry v. Romania*), para 25.

56 ECtHR 1 July 2014, no. 54443/10 (*Blaga v. Romania*), para 67; ECtHR 2 May 2019, no. 19601/16 *(Adžić v. Croatia (no2)*.

reopening of the case by way of extraordinary remedies or length of the proceedings have been analysed under Article 8 of the Convention.[57]

Also, with few exceptions,[58] and similarly to complaints about the non-enforcement of domestic judgments, the applicants in these cases were the left-behind parents.

The most common allegation regarding the fairness of the decision-making process was that the proceedings for the return of the child had lasted longer than the 6-week time limit provided for under Article 11 of the Abduction Convention. The ECtHR found numerous violations on this account, focusing on the states' failure to ensure the speedy reunification of children with their left-behind parents.[59]

In other complaints, the applicants argued that the domestic authorities refused to initiate steps under the Hague Convention and this in turn resulted in a prolonged separation from their children.[60] The ECtHR held that this failure had indeed constituted a breach of Article 8 ECHR.

Applicants also complained under Article 8 of the Convention about equality of arms in that they had not been given the opportunity to be heard or present their case before the domestic courts.[61] The Court also found an infringement of Article 8 ECHR in cases where it was possible to reopen final national proceedings by way of extraordinary remedies.[62]

An overview of these judgments indicates that the Court has incorporated the Articles of the Hague Convention and, as the case may be of the Brussels II *bis* Regulation, into the procedural guarantees of Article 8 of the ECHR. This line of case law has followed closely the Abduction Convention, thus contributing to a uniform application thereof.

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57 See among others, ECtHR 2 May 2019, no. 19601/16 *(Adžić v. Croatia (no2)*, ECtHR 19 September 2019, 79441/17 (*Andersena v. Latvia)*; ECtHR 1 April 2021, no 16202/14 *(M.V. v. Poland)*; it should be noted that in the past the ECtHR has addressed some of the complaints under Article 6 of the Convention (see for example: ECtHR 13 January 2015, no. 35632/13 (*Hoholm v. Slovakia*) concerning the length of the proceedings which has been analysed under Article 6 of the Convention or ECtHR 25 June 2013, no. 5968/09 (*Anghel v. Italy*) concerning access to court which has been analysed under Article 6 of the Convention)however it seems that in more recent cases (decided After 2019) all complaints related to procedure have been analysed under Article 8 of the Convention.

58 As an exception to the general pattern where left-behind parents have brought procedural complaints regarding the fairness of the proceedings, in ECtHR 19 September 2019, 79441/17 (*Andersena v. Latvia)* the applicant was a taking mother who alleged that she had not been heard in person in the domestic proceedings and that she has not been informed of the other party's (the left-behind parent) submissions.

59 Among many other cases, see: ECtHR 1 April 2021, no 16202/14 *(M.V. v. Poland)*; ECtHR 17 March 2022, no. 80606/17 *(Moga v. Poland)*; ECtHR 04 May 2023, no. 28982/19 (*Baharov v. Ukraine)*.

60 ECtHR 5 March 2002, no. 56673/00 (*Iglesias Gil and A.U.I. v. Spain*).

61 ECtHR 6 November 2008, no 49492/06 (*Carlson v. Switzerland*); ECtHR 21 February 2012, no. 16965/10 (*Karrer v. Romania)*; ECtHR 2 May 2019, no. 19601/16 *(Adžić v. Croatia (no2)*; ECtHR 28 November 2023, no. 30129/21 (*Ghazaryan v. Armenia)*

62 ECtHR 3 June 2014, no. 10280/12 (*López Guió v. Slovakia*).

#### *8.3.2.3 The outcome of the proceedings: flawed assessment of key child abduction concepts: habitual residence or custody rights*

The Strasbourg Court has also proved instrumental in ensuring that key Hague Convention concepts, such as habitual residence or custody rights are applied in the spirit of this instrument. This required a closer scrutiny, and this does not always sit well with the fourth instance doctrine of the Court. Indeed, the ECtHR had repeatedly stressed that: "it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far they have infringed the rights and freedoms protected by the Convention".[63] The Court indicated that it would intervene solely where there was an appearance of arbitrariness at domestic level.[64] In some child abduction cases, it did indeed find that domestic authorities had delivered arbitrary decisions. For example, it was considered arbitrary that domestic courts ignored foreign custody decisions in child abduction applications.[65] The ECtHR considered that this interpretation of the Hague Convention contradicted the very meaning of this text.[66]

More recently, the ECtHR appears to have delved further into assessing the merits of domestic decisions even beyond situations of arbitrariness. For example, in the case of *Ushakov v. Russia*, the ECtHR looked closely at the way domestic courts have approached the concept of habitual residence.[67] Similarly, in the case of *Michnea v. Romania*, the ECtHR analysed whether the Romanian courts have correctly interpreted the notion of habitual residence in the light of the CJEU's *Barbara Mercredi* judgement.[68] Arguably, such a change in approach – from reviewing domestic decisions only when identifying appearances of arbitrariness to a closer inspection of the reasons put forward- has been justified by the standard adopted following the judgement in the case of *X v. Latvia.*[69] The emergence of this standard of review as well as its impact and challenges shall be discussed into more detail below.

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63 ECtHR 3 June 2008, no. 19055/05 (*Deak v. Romania and the United Kingdom*), para 66; this position was reiterated in ECtHR 2 September 2003, no. 56838/00 (*Guichard v. France(Dec))*, ECtHR 13 October 2009, no. 37395/08 (*Bayerl v. Germany (Dec*)), ECtHR 5 April 2012, 3684/07 (*Stromblad v. Sweden*), para 92, ECtHR 6 March 2018, no. 9114/16 (*Royer v. Hungary*), para 61.

64 Ibidem.

65 ECtHR 5 April 2005, no. 71099/01 (*Monory v. Romania and Hungary)*.

66 ECtHR 5 April 2005, no. 71099/01 (*Monory v. Romania and Hungary)*, para 81.

67 ECtHR 18 June 2019, no. 15122/17 *(Ushakov v. Russia*), paras 91-93; See also ECtHR 6 June 2023, no. 12083/20 (*Viotto v. Moldova*), para 20 where the Court criticised the Moldovan's courts approach to habitual residence.

68 ECtHR 7 July 2020, no 10395/19 (*Michnea v. Romania)*.

69 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia)*.

#### 8.3.2.4 *The emerging standard of review: a genuine assessment of relevant factors*

Most of the cases outlined above have been brought by left-behind parents; the role of the ECtHR in these applications has been to interpret the Hague Convention in light of Article 8 ECHR. Overall, the Court found that there is a convergence between the guarantees of the Hague Convention and those of Article 8 ECHR. Scholars have equally observed that the ECtHR has contributed to the uniform application of the Hague Convention, and they have welcomed these developments.[70]

However, taking parents have also filed applications to the ECtHR; their complaints faced the Court with a more difficult task: that of assessing whether the domestic courts have adequately balanced the relevant rights when deciding to order the return of the child. The majority of the taking parents complained that in ordering the return, the domestic judgments disregarded the best interests of the child. Here, the focus of the analysis under Article 8 ECHR was the proportionality of the interference with the right of the parent (and child) to enjoy the right to family life.

Initially the Court declared such complaints inadmissible albeit not by unanimity of votes.[71] The first admissible case was *Maummuseau and Washington v. France* where the ECtHR found by a majority of five votes to two that Article 8 ECHR had not been breached.[72] It is the first case which contains a more elaborate analysis of the child's best interests on the basis of several international instruments, including the CRC, the Hague Convention and the Recommendation No. 874 (1979) of the Council of Europe's Parliamentary Assembly.

Nevertheless, as the dissent shows, the standard for assessment of the child's best interests remained disputed between the Court's judges. Even though the Grand Chamber refused to accept the referral request for *Maummuseau and Washington v. France,* two later cases, *Neulinger and Shuruk v. Switzerland*[73] and *X v. Latvia*[74] were decided in this formation. These two judgments have crystalised the Court's position in child abduction cases and the latter, *X v. Latvia* has cemented the ECtHR's standard of assessment in child abduction cases. These two judgments are analysed into more detail below as they are key in understanding the approach of the ECtHR to child abduction and its position to the best interests of the child within these proceedings.

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70 Silberman 2004, Duncan 2000.

71 ECtHR 15 May 2003, no. 4065/04 (*Paradis and others v. Germany (Dec)*); ECtHR 16 December 2005, no. 14600/05 (*Eskinazi and Chelouche (Dec*)); ECtHR 12 November 2006, no. 41092/06 (*Mattenklott v. Germany (Dec))*; Court decisions do not include dissenting opinions, however, it is mentioned therein if the judges were unanimous or whether the decision was adopted by a majority. Until 2007, all the decisions taken in child abduction cases where the applicants were the taking parents were decided by a majority.

72 ECtHR 6 December 2007, 39388/05 (*Maumousseau and Washington v. France*).

73 ECtHR 6 July 2010, no. 41615/07 *(Neulinger and Shuruk v. Switzerland (GC)).*

74 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC)).*

*Neulinger and Shuruk v. Switzerland* was accepted for reconsideration by the Grand Chamber following a chamber judgement where the Court had found that Article 8 of the ECHR was not breached.[75] This case concerned the removal of a boy (Noam) by a mother, following her separation from the boy's father and the latter's joining an ultra orthodox religious movement -which he intended to raise his son into. Before the abduction, the mother was the boy's primary carer; she had been granted sole physical custody and the father a supervised access right. At the same time however, under Israeli law they continued to exercise joint guardianship, meaning that the child could not be removed from Israel.

The father's Hague Convention application for the return of his son was initially dismissed by the Swiss courts. However, by a final judgement of 16 August 2007 the Swiss Federal Court reversed the previous judgments and ordered Noam's return to Israel. Pursuant to the court order the return should have been enforced by the end of September 2007.

On 27 September 2007 the ECtHR granted the Rule 39 request and ordered Switzerland not to enforce the return order pending the decision by the ECtHR. The Rule 39 measures were prolonged on 5 June 2009 when the case was referred to the Grand Chamber.

Finally, in view of the continuous suspension of the enforcement, on 29 June 2009 the President of the Lausanne District Court provisionally decided that Noam should live with his mother, suspended the father's right of access and granted her parental authority in order to renew her son's identity papers. The court also noted that the father did not show an interest in wanting a relationship with his son whom he had not seen since he had left Israel in 2005 and that the child had formed a bond with his mother.

The Grand Chamber judgement only dealt with the proportionality of the interference. The Court's focus was on whether the best interests of the child had been observed by the Swiss authorities.

In its reasoning, the ECtHR departed from its standard approach in previous child abduction cases in that it scrutinised closely the judgments of the Swiss authorities. [76] It took notice that the Swiss domestic courts were not unanimous in deciding whether Article 13 of the Hague Convention applied and that the expert report concluded that there was a grave risk of harm to the child in the eventuality of the return. Nevertheless, the ECtHR held that it was prepared to accept that the position adopted by the Federal Court was within its margin of appreciation.[77] It was the factual circumstances *after* the Federal Court's decision which constituted a turning point.[78] Here, the Court stressed that the passage of time was vital for the

75 ECtHR 8 January 2009, no 41615/07 (*Neulinger and Shuruk v. Switzerland* (Chamber)).
76 ECtHR 6 July 2010, no. 41615/07 *(Neulinger and Shuruk v. Switzerland (GC))*, para 141.
77 ECtHR 6 July 2010, no. 41615/07 *(Neulinger and Shuruk v. Switzerland (GC))*, para 145.
78 ECtHR 6 July 2010, no. 41615/07 *(Neulinger and Shuruk v. Switzerland (GC))*, para 145.

effectiveness of the Hague Convention.[79] Also, it distinguished the Hague Convention as a procedural instrument from a human rights treaty, the latter being designed to protect individuals on an objective basis.[80] Finding similarities between this case and cases related to the expulsion of aliens, it stressed it was important to take into account the difficulties that Noam would encounter upon his return to Israel considering that he was well integrated into Swiss society and that he had lived there continuously since June 2005.[81] It also looked at the mother's refusal to return to Israel and, after analysing the evidence adduced before the domestic courts, it did not find it 'totally unjustified'.[82]

Therefore, in view of all the elements of the case and considering the developments after the provisional order of 29 June 2009, the Court found that there would be a violation of Article 8 if the Swiss authorities enforced the return order.[83] The judgement was adopted by sixteen votes to one, with 6 judges writing concurring opinions. The one dissent criticised the finding of a 'conditional' violation as opposed to a full-blown violation.[84]

The *Neulinger* judgement spurred significant academic debate.[85] While the outcome was not in itself criticised, scholars submitted that the ECtHR set too high of a threshold for the 'child's best interests' test.[86] It was argued that with the requirement of an in-depth analysis of the child's best interests the ECtHR deviated not only from its previous case law, but it also displayed an incorrect understanding of the Hague Convention.[87] Others deemed that *Neulinger* did not in any way change the Court's case law and that this situation should be seen as an exceptional one.[88]

Rietiker underlined that looking at the best interests of the child on a case-by-case basis was mandated by the principle of effectiveness which is one facet of the teleological interpretation of a treaty as envisaged by Article 31(1) of the Vienna Convention on the Law of Treaties.[89] According to him, the application presented the ECtHR with an isolated situation, to which the Court responded by reconciling principles of treaty interpretation.

The criticism to the Court's judgement did not focus on the two-limb approach to the child's best interests but rather to the requirement of an in-depth examination by the domestic courts coupled with the fact that the

79 ECtHR 6 July 2010, no. 41615/07 *(Neulinger and Shuruk v. Switzerland (GC))*, para 147.
80 ECtHR 6 July 2010, no. 41615/07 *(Neulinger and Shuruk v. Switzerland (GC))*, para 145.
81 ECtHR 6 July 2010, no. 41615/07 *(Neulinger and Shuruk v. Switzerland (GC))*, paras 146 and 147.
82 ECtHR 6 July 2010, no. 41615/07 *(Neulinger and Shuruk v. Switzerland (GC))*, para 150.
83 ECtHR 6 July 2010, no. 41615/07 *(Neulinger and Shuruk v. Switzerland (GC))*, para 151.
84 ECtHR 6 July 2010, no. 41615/07 *(Neulinger and Shuruk v. Switzerland (GC))*, dissenting opinion of Judge Zupančič.
85 Walker 2010, p. 649; Silberman 2010, p. 733; Rietiker 2012, p. 377.
86 Walker 2010.
87 Silberman 2010, Walker 2010.
88 Rietiker 2012.
89 Rietiker 2012, p. 15.

violation was found precisely due to the length of the proceedings before the ECtHR.[90]

Post *Neulinger*, the Court looked more into detail at the practicalities of contact between the child and the taking parent. For example, in the Šneersone and Kampanella v. Italy the Court considered that the 'safeguards' in place upon the child's envisaged return to Italy were inadequate.[91] Also, the Court held that the Italian authorities had not duly discharged of the identified risks that the child would suffer a trauma as a result of separation and that the taking parent had not any material resources in Italy and that she was unemployable.[92] Similarly, in the case of *B v. Belgium* the Court held that the taking parent had been the child's primary carer for the first four years of her life, that the psychological reports ascertained a risk of trauma if the child returned without her mother, that the mother was risking a prison sentence and loss of parental rights upon return and finally that the child was well integrated into the environment in Belgium.[93] For all these reasons the Court held that there had been a violation of Article 8 ECHR.

Against this background, on 4 June 2012, roughly two years after the *Neulinger* judgement, the case of *X v. Latvia* was referred to the Grand Chamber, at the request of the Latvian Government. On 15 November 2011 by a majority of five votes to two the ECtHR's Third Section had found a violation of Article 8.[94]

The case concerned the removal of a girl of three years and five months from Australia to Latvia. At the time of the removal (17 July 2008) the father had not acknowledged paternity, and he did not have custody over the child. Following the mother and daughter's departure to Latvia, the father initiated proceedings in Australia for establishing his parental rights. By a judgement of 6 November 2008, the Australian Family Court retroactively recognized the father's paternity and held that he had joint parental responsibility over the girl since her birth.

On 22 September 2008, before his paternity had been acknowledged in Australia, the father then initiated proceedings under the Hague Convention for the return of his daughter to Australia. The Latvian courts were unanimous in allowing the application. The mother's opposition under Article 13(1) (b) of the Hague Convention was dismissed. On appeal, the mother produced a psychological report attesting that an immediate separation from her would cause the child psychological trauma. By a final judgement of 26 January 2009, the Riga Regional Court dismissed the applicant's

90 Silberman 2010, Walker 2010.

91 ECtHR 12 July 2011 no. 14737/09 (*Šneersone and Kampanella v. Italy*): these safeguards consisted of contact amounting to thirty days within the first year with the parent who had been until that point the child's primary carer.

92 ECtHR 12 July 2011 no. 14737/09 (*Šneersone and Kampanella v. Italy*): para 94 and 95.

93 ECtHR10 July 2012, 4320/11 (*B v. Belgium*), paras 72-76.

94 ECtHR 13 December 2011, no 27853/09 (*X v. Latvia (Chamber)*).

appeal reasoning that (i) there had been enough evidence that the father had cared for the child prior to her departure from Australia, (ii) the Australian system provided enough safeguards against ill-treatment within the family, (iii) the psychological assessment produced by the applicant concerned custody rights for which the Latvian courts were not competent and (iv) the applicant did not adduce evidence in support of her claim concerning the father's liability for criminal charges in Australia. While the proceedings for enforcement of the return order were pending, on 14 March 2009 the father returned with the daughter to Australia. In September 2009, the Australian Family Court reversed previous judgements and granted the father sole parental rights over his daughter while imposing severe limitations on the applicant's visiting and contact possibilities.

The judgement of the Grand Chamber dealt only with the 'necessity of the interference' requirement under Article 8 of the Convention. Importantly, the Grand Chamber clarified the applicable principles in child abduction cases. In line with its past case law it reaffirmed the necessity of adopting a harmonious interpretation of the relevant international instruments.[95] With particular relevance for child abduction cases the Court stressed that the domestic authorities are not to order the return automatically or mechanically.[96]

Most importantly, the Grand Chamber clarified that the ECtHR did not require an in-depth analysis of the entire family situation for the purposes of Hague Convention proceedings. Instead, the Court put forward a 'new' test: domestic courts must duly consider *arguable* allegations of a grave risk of harm and provide reasoned decisions which are not automatic and stereotyped.[97] Further, the ECtHR discounted the relevance of the passage of time argument from the analysis.[98]

On the facts of the case, the Court found that the applicant had presented an arguable claim that the separation might entail a psychological trauma for the child and that the father had been criminally convicted. The Court found it particularly problematic that the Latvian regional court refused to examine the psychological certificate produced by the applicant and did not carry out further checks in respect of the allegations of criminal convictions of the father and the ill-treatment.[99] Further, as to the separation of mother and child, the Court indicated that the Latvian authorities could have addressed the issue under Article 20 HC, as the rights enshrined in Article 8 ECHR form part of the 'fundamental principles of Latvia related to the protection of human rights and fundamental freedoms'.[100] The ECtHR also expressly stated that the Latvian courts should have dealt with the

95 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC)*), paras 93-94.
96 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC)*), para 98.
97 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC)*), para 107.
98 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC)*), para 109.
99 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC)*), paras 114, 116.
100 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC)*), para 117.

issue of whether it would have been possible for the mother to follow her daughter to Australia and to maintain contact with her.[101] Such finding is to be corroborated with the Court's statement in the general principles part according to which before ordering a return "courts must satisfy themselves that adequate safeguards are convincingly provided in that country, and, in the event of a known risk, that tangible protection measures are put in place".[102] On the basis of all these factors a violation of Article 8 ECHR was found.

The judgement was adopted with nine votes to eight. The dissenting judges expressly pointed out that their disagreement with the majority did not concern the general principles but rather the application of these principles to the facts of the case.[103] In particular, the dissenting judges disagreed with the fact that the reasoning of the Latvian courts had not been sufficiently detailed or that the Latvian courts should have ordered a second expert report and submitted further inquiries to the Australian authorities.

Overall, commentators have welcomed the Grand Chamber judgement in the case of *X v. Latvia*.[104] The new test requiring a genuine assessment of arguable allegations of grave risk of harm, was perceived as clear and in line with the overall philosophy of the Hague Convention. However, as with the dissenting opinions, commentators disagreed with the application of the test in practice. On the one hand, it was submitted that the ECtHR test was met even if the Latvian courts did not analyse the findings of the psychological report and did not seek further clarifications from the Australian authorities concerning the criminal convictions of the father.[105] In this view, the examination of the Latvian courts was effective because the strict standard of applying Article 13(1)(b) of the Hague Convention was not met on the facts of the case.[106] It was further argued that the grave risk of harm could only materialise if the child was separated from her mother and the mother did not prove any objective impossibility to return.[107]

Others considered that the Court succeeded in achieving a harmonised interpretation of the ECHR with the Hague Convention.[108] Also, it was highlighted that in *X v. Latvia* as opposed to *Neulinger and Shuruk v. Switzerland*, the Strasbourg Court moved from a material assessment of the child's best interests to a procedural one, while at the same time adopting a wide definition of the 'grave risk'.[109]

Indeed, when looking into the Court's approach to the child's best interests, a clear departure from the *Neulinger* approach can be seen. In

101 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC)*), 117.
102 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC)*), 108.
103 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC)*), dissenting opinion, para 2.
104 Beaumont et. al. 2015; Keller/Heri 2015.
105 Beaumont et. al. 2015.
106 Beaumont et. al. 2015, p. 46.
107 Beaumont et. al. 2015, p. 46.
108 Keller/Heri 2015, p. 288.
109 Keller/Heri 2015, p. 287 and 289.

*Neulinger*, -as shown above-, the Court made express references to the child's best interests as having two limbs -that of maintaining contact with both parents and the personal development one – while no such reference was made in the case of *X v. Latvia*. In *X v. Latvia,* the child's best interests was approached from a procedural angle. Here, the Court oversaw the domestic process and whether courts had effectively discharged the allegations of grave risk (which included the child's best interests in the narrow sense of the Hague Convention). Also, the Court looked specifically at the child's right to maintain contact with both parents by mandating national authorities to ensure that adequate safeguards were in place in the country of origin and that tangible protection measures were put in place.

The disagreement between scholars and ECtHR judges alike could be approached from the angle of the principle of effectiveness. Under this principle, the Convention guarantees rights that are practical and effective and not theoretical and illusory. The facts of the case show that Latvian courts dismissed the psychological certificate without looking at the specific allegations and that in practice no arrangements had been made for the child to return with her mother. On the contrary, the child had traumatically been separated from her primary carer; the Australian courts granted the father sole parental authority and only allowed visitation from the mother under the supervision of a social worker. Further, she was prohibited from speaking to her daughter in Latvian or to visit or communicate by any means with any childcare facility, preschool or school attended by the daughter, with any parent or child attending such an institution until her daughter reached the age of 11.[110] One cannot escape the conclusion that such harsh conditions were imposed as a sanction for the abduction and not on the basis of a merits assessment of the child's best interests in Australia.[111]

In the judgments and decisions following *X v. Latvia* the ECtHR has continued to apply the same test, both to cases filed by left-behind parents as to those lodged by taking parents. As discussed below, this test appears to have resulted in a shift from the ECtHR's standard of review, from a focus on arbitrariness to a more thorough assessment of the domestic courts' application of the Hague Abduction Convention. This standard shall be discussed in the following subsections with reference to the areas of particular relevance for the present dissertation.

### 8.3.3 Children's rights in the ECtHR's parental abduction case law

All child abduction cases concern children, and this is evident as the best interests of the child are mentioned in most of the Court's judgments. This does not mean however that these cases follow a child rights-based approach. This section examines in more detail how the Court has incor-

110 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC)*), para 32.

111 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC)*), concurring opinion of Judge Albequrque.

porated children's rights into its child abduction case law in order to determine to what extent it has adopted a rights-based approach in its child abduction case law.

First, from a procedural point of view it appears that in many applications the parents have joined the children as parties to the proceedings, regardless of whether they were vested with parental responsibility at the time of the application.[112] The Court has accepted without reservations that parents have the right to bring complaints on behalf of their children. For this, the Court has relied on its case law concerning the placement of children in care where it has considered that a person deprived of parental rights may nevertheless file a complaint to the Court on behalf of the children if there is a conflict of interests between that parent and the person exercising parental rights which in turn may lead to the child being deprived of effective protection of their rights under the Convention.[113] This approach has sometimes been criticised for conflating the issue of standing and representation, in that while indeed the child should have standing before the Court in these cases, it sometimes appeared that the interests of the applicant parent and the child were not aligned and that separate representation may have been suitable.[114] For example, in the case of *Raw and others v. France*, the children had vehemently opposed the return to the applicant parent, yet they became parties to the ECtHR application together with that parent. Moreover, the facts of this case showed evidence of violence and neglect towards the children by the parent with whom they joined the proceedings. Specifically, a report had been drawn up by a psychologist and a social worker when the children were aged 14 and 12 years old. That report had established that the children, whose statement had been qualified as credible, lived in a climate of terror created by their mother (left-behind parent) and paternal grandfather who had exposed them to physical and psychological violence.[115] The Court however accepted that the left-behind parent could represent the children in the proceedings. As highlighted in the dissenting opinion of Judge Nussberger, the issue in that case was not so much that of standing, but rather of representation. For her it was clear that the children could claim to be victims of violations. However, them being represented by the left-behind parent was not appropriate in the specific circumstances of the case. She considered that the risk of children being instrumentalised could have been avoided if the parents could not represent their children in cases of conflict of interests between them, unless a national institution confirmed that such a representation corresponded to the best interests of the child. In the same

112 See among many other cases: ECtHR 27 July 2006, no. 7198/04 (*Iosub Caras)*, para 29; ECtHR 6 December 2007, 39388/05 (*Maumousseau and Washington v. France*); ECtHR 12 July 2011 no. 14737/09 (*Šneersone and Kampanella v. Italy*); ECtHR 7 June 2022, no. 29601/20 (*C.-A.D. and L.-C.D. v. Russia*).

113 See ECtHR 7 March 2013, 10131/11 *(Raw and others v. France)*, para 51 referring to ECtHR 13 July 2000 nos. 39221/98 and 41963/98 (*Scozzari and Giunta v. Italy* [GC]), paras 138-139.

114 Fenton-Glynn 2021, p 265.

115 Fenton-Glynn 2021, p. 14.

vein, Fenton-Glynn argues that allowing the parents to represent children risks subsuming the rights of children to those of their parents – an aspect which forms also one of the main criticisms to the Court's case law concerning children in general.[116] To date the Court has not laid down clear guidelines in dealing with the representation of children so as to avoid conflict of interests and at the same time to allow their perspective to be presented. However, in other cases concerning vulnerable applicants the Court had contacted National Bar Associations for ensuring representation.[117] No such attempt has been made in child abduction cases. Neither do the Rules of the Court envisage solutions for such situations.

#### *8.3.3.1 The Best Interests of the Child*

On the merits, children's rights have been argued in most child abduction applications, in line with the structure of the Abduction Convention. In its case law between 1996 to the first Grand Chamber case of 2010, the Strasbourg Court's understanding of the child's best interests was entirely aligned to the aim and purpose of the Abduction Convention. For example, in a case decided in 2005 the taking parent argued that the return of her daughter ran contrary to the child's best interests. The European Court agreed that the child's best interests were paramount in Hague Convention cases; yet the child's right not to be removed from one parent and retained by the other was an inherent element of the best interests.[118] No further reference was made to the circumstances of the child in the respective case. This approach appears to defer to a collective view of the best interests as opposed to an individualised assessment.[119] In other judgments, the ECtHR further endorsed the Hague Convention's general aim of protection of children to the detriment of any inquiry into individualised best interests assessments.[120]

The first more elaborate articulation of the best interests standard occurred in the case of *Maummusseau and Washington v. France.*[121] Here, the taking parent argued that the domestic courts had failed to take account of her daughter's best interests which should have comprised of an assessment of the risk of separation of a very young child from her mother, an assessment of the situation as a whole and a broader understanding of

116 Fenton-Glynn 2021, p. 257.

117 See for example, ECtHR 11 October 2011, no. 36815/02 (*Dragusin v. Romania*) or ECtHR 13 March 2012, no 1282/05, (*Tatu v. Romania*), referred to in Constantin Cojocariu, *Silencing the Voices of People with Disabilities: Recent Developments before The European Court Of Human Rights*, 3 December 2014, available at << https://strasbourgobservers.com/2014/12/03/silencing-the-voices-of-people-with-disabilities-recent-developments-before-the-european-court-of-human-rights/>>, last accessed on 28 August 2023.

118 ECtHR 16 December 2005, no. 14600/05 (*Eskinazi and Chelouche(Dec*)).

119 In this sense see also Chapter IV above.

120 ECtHR 12 November 2006, no. 41092/06 (*Mattenklott v. Germany (Dec))*; ECtHR 15 May 2003, no. 4065/04 (*Paradis and others v. Germany (Dec)*).

121 ECtHR 6 December 2007, 39388/05 (*Maumousseau and Washington v. France*), paras 68-81.

the concept of 'harm' to the child. [122] The Court's interpretation started by stressing the alignment in the understanding of the best interests between the CRC and the Hague Convention, with the latter allowing for an individualised assessment of the best interests of the child in the context of the exceptions to return.[123] The Court agreed that the French courts had conducted an in-depth examination of the family situation and did not see any reason to further scrutinise the situation of the child upon her return to the United States.[124] The Court also focused on procedure emphasising that all parties had been allowed to present their case fully.[125] The child had also been a party to the ECtHR application. In her regard however, the Court, while noting in passing the CRC Committee's General Comments, found that in view of her age, "taking of testimony […] could have been regarded in the present case as non-decisive."[126]The dissenting judges criticised the majority's approach, specifically as they considered that the abrupt removal of the child from the village by police authorities as well as her strong relationship with her mother did not correspond to her best interests.

Roughly two years after the case of *Mammouseau*, the best interests of the child came again to the fore in the case of *Neulinger and Shuruk v. Switzerland*. Here the ECtHR further clarified its approach to the child's best interests by stressing that it comprises two limbs.[127] First, it is in the child's interests to maintain ties with their family except for cases where the family has proven particularly unfit. Severance of family ties must only occur in very exceptional circumstances, and everything must be done to preserve or if appropriate to rebuild these ties. The second limb of the child's interests is to develop in a sound environment, and Article 8 ECHR prohibits measures that would harm the child's health and development.[128] It further accepted that the child's best interests are the underlying principle of the Hague Convention.[129] The Court also ruled that while the child's interests are to be assessed on a case by case basis and in such assessment domestic courts benefit of a certain margin of appreciation, an automatic or mechanic return under the Hague Convention would run contrary to Article 8 ECHR.[130] The years between *Neulinger* and *X v. Latvia* saw an increase in infringements of Article 8 ECHR motivated by faulty assessments of the child's best interests. *Sneestrone and Kampanella v. Italy* and *B v. Belgium* are illustrative of this change.[131]

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122 ECtHR 6 December 2007, 39388/05 (*Maumousseau and Washington v. France*), para 64.
123 ECtHR 6 December 2007, 39388/05 (*Maumousseau and Washington v. France*), para 72.
124 ECtHR 6 December 2007, 39388/05 (*Maumousseau and Washington v. France*), para 74.
125 ECtHR 6 December 2007, 39388/05 (*Maumousseau and Washington v. France*), para 76.
126 ECtHR 6 December 2007, 39388/05 (*Maumousseau and Washington v. France*), para 80.
127 ECtHR 6 December 2007, 39388/05 (*Maumousseau and Washington v. France*), para 135.
128 ECtHR 6 December 2007, 39388/05 (*Maumousseau and Washington v. France*), para 136.
129 ECtHR 6 December 2007, 39388/05 (*Maumousseau and Washington v. France*), para 137.
130 ECtHR 6 December 2007, 39388/05 (*Maumousseau and Washington v. France*), para 138.
131 ECtHR 12 July 2011, no. 14737/09 (*Šneersone and Kampanella v. Italy*); ECtHR 10 July 2012, 4320/11 (*B v. Belgium*).

*Sneerstrone and Kampanella v. Italy* concerned the issuing of a certificate of enforcement by the Italian authorities following a Latvian non-return order of a child. While maintaining the same principles as in *Neulinger,* the Court looked closely at *how* the Italian authorities had assessed *that* child's best interests. They found that the child was at risk of neurotic problems and/or illnesses if separated from the mother and that the Italian authorities had not considered any of the evidence in this regard which had previously been administered in Latvia.[132] The Court also considered that the strict visiting schedule set by the Italian courts was manifestly inappropriate to the inevitable psychological trauma of the child.[133] The best interests of the child in this case was closely linked to the separation from the primary carer and to -what the Court found to amount to- an objective impossibility for her to return to Italy.[134] Similarly, in the case of *B v. Belgium* the ECtHR linked the best interests of the child with the trauma which she would have suffered as a result of the separation.[135] The Court considered that the Belgian authorities were under an obligation to order forensic reports to assess the likelihood that the trauma to which the child may have been exposed to upon return was real.[136]

Nevertheless, overall, the Court's interpretation of the best interests of the child remained faithful to the aims and purposes of the Hague Convention. For example, in *Karrer v. Romania*, it criticised the Romanian authorities for having inadequately assessed the child's best interests. In that particular case, Article 13(1)(b) of the Hague Convention had been applied; yet the ECtHR found that the child's best interests assessment failed to consider reports of the social services, expert reports or whether appropriate arrangements had been in place to secure the child's protection upon return.[137] The Court had thus utilised the requirement of an 'in-depth examination of the family situation' to further the object of return of the Hague Convention. In other cases, it dismissed the applications of the taking parents considering that the domestic courts had carried out such an in-depth assessment of the family situation.[138] In all these cases the taking parents had submitted that they had been the children's primary caretakers and that they were in an objective impossibility to return. Therefore, return would have exposed the children to a grave risk of harm due to the separation from the parents.

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132 ECtHR 12 July 2011, no. 14737/09 (*Šneersone and Kampanella v. Italy*), paras 93-95.

133 ECtHR 12 July 2011, no. 14737/09 (*Šneersone and Kampanella v. Italy*), para, 96.

134 For more details on the approach to the separation of the child from the primary cares, see Section 8.3.3.2 below.

135 ECtHR 10 July 2012, 4320/11 (*B v. Belgium*), para 72.

136 ECtHR 10 July 2012, 4320/11 (*B v. Belgium*), para 72.

137 ECtHR 21 February 2012, no. 16965/10 (*Karrer v. Romania)*, para 46; in the same sense see also ECtHR 6 June 2023, no. 12083/20 (*Viotto v. Moldova*), para 22.

138 ECtHR 7 May 2010, no. 26755/10, (*Lipkowsky and Dawn McCormack v. Germany (dec))*; ECtHR 4 February 2008, no 7239/08, (*Van den Berg and Sarri v. The Netherlands (dec))*; ECtHR 6 September 2011, no. 8984/11 (*Tarkhova v. Ukraine*), ECtHR 15 May 2012, no. 13420/12, (*M.R. and L.R. v. Estonia (dec))*.

The Court accepted that the domestic courts had carried out an in-depth examination of the family situation as, for example they had heard the child in court,[139] they had assessed that the child had a good relationship with the left-behind parent and could therefore be left in the care of that parent.[140]

In most of the judgments dealing with the appropriate standard of review to the child's best interests the Court was not unanimous, and where available[141] dissenting opinions revolved precisely around this question. In other words, judges disagreed as to whether the Court's role was merely to assess whether the domestic court's approach to the child's best interests in abduction cases was arbitrary, or on the contrary whether the Court should review the best interests of the child on an individual basis, taking into account the concrete circumstances of the respective case.

The case of *X v. Latvia* was likely referred to the Grand Chamber precisely to clarify these contentious aspects. The Court ultimately found a procedural solution:

"When assessing an application for a child's return, the courts must not only consider arguable allegations of a "grave risk" for the child in the event of return, but must also make a ruling giving specific reasons in the light of the circumstances of the case. Both a refusal to take account of objections to the return capable of falling within the scope of Articles 12, 13 and 20 of the Hague Convention and insufficient reasoning in the ruling dismissing such objections would be contrary to the requirements of Article 8 of the Convention and also to the aim and purpose of the Hague Convention."[142]

The disagreement within the Court concerned the evidence necessary to meet this test. For the majority, the left-behind parent's previous criminal convictions and the charges against him amounted to arguable claims of a risk of harm to the child. [143] Latvian authorities should have investigated this further. The dissent rejected this position, arguing that the mother should have brought this as evidence.[144] The majority, perhaps influenced by the extremely harsh conditions imposed on the mother and child upon return, argued that child abduction courts needed to consider the future relationship between the mother and the child if the child returned to Australia.[145] Neither the dissenting opinions, nor the academic commentators supporting this view discuss the punitive conditions imposed on the

139 ECtHR 4 February 2008, no 7239/08, (*Van den Berg and Sarri v. The Netherlands (dec)).*

140 ECtHR 7 May 2010, no. 26755/10, (*Lipkowsky and Dawn McCormack v. Germany (dec)).*

141 As per Rule 56 (1) of the Rules of Court: 1. "The decision of the Chamber shall state whether it was taken unanimously or by a majority and shall be reasoned." In decisions, dissenting opinions are not published.

142 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC))*, para 107.

143 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC))*, para 111.

144 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC))*, joint dissenting opinion at paras 9 and 10.

145 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC),* concurring opinion of Judge Pinto De Albuquerque, summarising the key facts which led the Court in finding a violation of Article 8 of the Convention.

mother upon return by virtue of the Australian judgments or whether it would have been at all legally possible for her to obtain details of another person's (left-behind parent) criminal convictions. In any event, it is per *a contrario* accepted that the immigration position of the taking parent should be a relevant factor in the assessment of a grave risk of harm.[146]

In the cases decided after *X v. Latvia* the Court continued to apply the standard developed therein regardless of whether the adult applicants had been the taking or the left-behind parents.[147] The Court's review of the domestic decisions intensified beyond a mere review of arbitrariness.[148] Also, references to the best interests of the child increased and in some cases, it linked the best interests to specific substantive and/or procedural safeguards. For example, in a situation where due to the domestic court's intervention the status of the child had not been determined by any court, the ECtHR considered that such a state of affairs was manifestly not in the best interests of the child.[149] Also, the Court continued to affirm that the Hague Convention institutes a strong presumption that return is in the best interests of the child.[150] Also, save for exceptional circumstances, it found that the enforcement of return orders, even through coercive means, corresponded to the best interests of the child.[151] The Court clarified that in Hague cases the best interests of the child shall be examined in light of the exceptions to return, -as opposed to a wider, more substantive examination.[152]

In several judgments the applicants' relied on the hearing of children to argue that return was or, as the case may be, was not in their best interests.[153] The sections below delve into the link between the child's best interests and these three other rights: (1) the right to have contact with both parents, (2) the right to be free from violence and (3) the right to be heard.

146 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC)*, joint dissenting opinion at para 9 and Beaumont et al 2015, at p. 47.

147 See for example ECtHR 18 June 2019, no. 15122/17 *(Ushakov v. Russia*), para 80.

148 See for example the case of ECtHR 7 July 2020, no 10395/19 (*Michnea v. Romania*) where the ECtHR undertook a detailed assessment of whether the domestic courts' determination of habitual residence corresponded to the approach of the CJEU in the case of CJEU 22 December 2010, C-497/10 PPU, ECLI:EU:C:2010:829 (Mercredi/Chaffe). Contrast this with the case of ECtHR 5 April 2005, no. 71099/01 (*Monory v. Romania and Hungary*.

149 ECtHR 3 June 2014, no. 10280/12 (*López Guió v. Slovakia*), para 110.

150 ECtHR 23 October 2014, 61362/12 (*V.P. v. Russia*), para 135, ECtHR 15 January 2015, no 4097/13 (*M.A. v. Austria*), para 136.

151 ECtHR 23 October 2014, 61362/12 (*V.P. v. Russia*), para 156.

152 ECtHR 19 September 2019, 79441/17 (*Andersena v. Latvia)*, para 119.

153 For example, ECtHR 1 July 2014, no. 54443/10 (*Blaga v. Romania*), ECtHR 1 February 2018, no 51312/16 (*M.K. v. Greece*), ECtHR 1 December 2020, no. 61984/17 (*Makhmudova v. Russia*), ECHR 17 May 2022, no 20425/20 (*Loiry v. Romania*); ECtHR 9 May 2023, no. 46263/20 *(Bercuci v. Romania(dec)).*

### *8.3.3.2 The right of the child to have contact with both parents: the relevance of children's rights to primary carer abductions*

The first limb of the child's best interests (as identified by the ECtHR) – that of maintaining ties with the biological family-, is similar to the right to have contact with both parents as laid down in Article 9 and 10 of the CRC. Indeed, in child abduction proceedings the Court has given priority to parental ties over relations with the wider biological family. For example, in a case where the child had been abducted by the father but was in practice living with his uncle and cousins the Court held that "[…] keeping the child, who had spent the first six years of his life in Ukraine with his mother, in Georgia in the absence of both parents – *per se* raises questions as to its compatibility with the principle of the best interests of the child".[154]

Overall, the Court's child abduction case law articulates many elements of the right to have contact with both parents in this specific context. As with the best interests of the child, some elements are substantive whereas others reflect a procedural understanding of the concept.

Substantively, the Court has expressly rejected approaches which attribute a gendered element to the right to have contact with both parents. For example, in two applications against Russia, the domestic court had relied on Principle 6 of the 1959 Declaration according to which a child of tender years shall not, save in exceptional circumstances, be separated from the mother.[155] The Court found such an approach unacceptable and incompatible with the ECHR, CRC and the Hague Convention.[156] Similarly, the Court dismissed as inadequate refusals to return a child on the main ground of their attachment to the mother.[157]Also, related to the right of the child to have contact with *both* parents the Court has imposed obligations on the domestic courts to determine the emotional bond of the child with the left-behind parent before assessing that the child would suffer harm if returned without the taking parent.[158]

The approach above supports the aims and purposes of the Hague Convention which is to restore contact with the left-behind parent. Here, there is a convergence between the right of the child to have contact with both parents as laid down in the CRC, Article 8 of the ECHR and the Hague Convention. In many other cases however, the convergence between these instruments was less evident. As Judge Pinto De Albuquerque has highlighted in his concurring opinion in the case of *X v. Latvia*: "both the universal acknowledgment of the paramountcy of the child's best interests as a principle of international customary and treaty law, and not a mere

154 ECtHR 21 July 2015, no. 2361/13, (*G.S. v. Georgia)*, para 61.
155 ECtHR 30 March 2021, 36048/17 *(Thompson v. Russia)*, para 92 and 97; ECtHR 7 June 2022, no. 29601/20 (*C.-A.D. and L.-C.D. v. Russia*), para 19.
156 ECtHR 7 June 2022, no. 29601/20 (*C.-A.D. and L.-C.D. v. Russia*), para 19.
157 ECtHR 1 March 2016 no 30813/14, (*K.J. v. Poland*), para 68.
158 ECtHR 12 March 2015, no. 22643/14, *(Adzic v. Croatia)*, para 90.

"social paradigm", and the consolidation of a new sociological pattern of the taking parent now call for a purposive and evolutive interpretation of the Hague Convention, which is first and foremost mirrored in the construction of the defences to return in the light of the child's real situation and his or her immediate future." In his opinion, the "sociological shift from a non-custodial abductor to a custodial abductor, who is usually the primary caregiver, warrants a more individualised, fact-sensitive determination of these cases in the light of a purposive and evolutive approach to the Hague defence clauses".

Indeed, situations where the grave risk of harm or an intolerable situation to the child arise due to the refusal of the primary carer taking parent to return with the child are among the most contentious cases. In these cases, the parent claims that the child will suffer harm if returned without them and that the parent cannot and will not return with the child.

The change in circumstances and the loss of contact between the child and the taking parent if the child were to return have been put forth before the ECtHR since 2003.[159] Taking parents applying to the Court argued that their children's right to have contact with them would be curtailed if return was ordered as for example sole custody had been granted to the left-behind parent post abduction.[160] The ECtHR did not accept this fact alone to be strong enough to warrant a violation as long as the taking parent had a right or a reasonable expectation to have contact with the child.[161] The Court did not look at how the right to maintain contact with the taking parent would be exercised *in practice* post abduction. The Court became more attuned to the obstacles to return of the taking parent as of the case of *Mammousseau and Washington v. France*; however, the approach remained deferential to the national authorities. The ECtHR did not articulate a standard of review for such situations. *Neulinger and Shuruk v. Switzerland* marked a shift in approach: the ECtHR scrutinised the circumstances of the child upon his return. It held that the mother was facing a serious prison sentence; that prior to the abduction the father had only exercised a limited access right and that post abduction he had never sought to see his child. Further, the child was integrated into the Swiss society. Thus, when balancing all these elements the Court held that it would not be in the child's interests to return. It is clear that the child's best interests in this case were intimately linked with the contact with his mother.

Post *Neulinger*, the Court looked more into detail at the practicalities of contact between the child and the taking parent. For example, in the Šneersone and Kampanella v. Italy the Court considered that the safeguards in place upon the child's envisaged return to Italy were inadequate. They

159 ECtHR 24 April 2003, nos. 36812/97 and 40104/98 (*Sylvester v. Austria*), para 61.

160 ECtHR 24 April 2010, no. 7354/10 *(Levadna v. Ukraine (dec)),* ECtHR 4 February 2008, no 7239/08, (*Van den Berg and Sarri v. The Netherlands (dec)).*

161 ECtHR 24 April 2010, no. 7354/10 *(Levadna v. Ukraine (dec)),* ECtHR 4 February 2008, no 7239/08, (*Van den Berg and Sarri v. The Netherlands (dec)).*

consisted of contact amounting to thirty days within the first year with the parent who had been until that point the child's primary carer. Also, it found that the Italian authorities had not duly discharged of the identified risks that the child would suffer a trauma as a result of separation and that the taking parent had not any material resources in Italy and that she was unemployable.[162] Similarly, in the case of *B v. Belgium* the Court held that the taking parent had been the child's primary caretaker for the first four years of her life, that the psychological reports ascertained a risk of trauma if the child returned without her mother, that the mother was risking a prison sentence and loss of parental rights upon return and finally that the child was well integrated into the environment in Belgium.[163] For all these reasons the Court held that there had been a violation of Article 8 ECHR. In both Šneersone and Kampanella v. Italy as in *B v. Belgium* the children had no relationship with their left-behind parents prior to the abduction. Similarly, in *Raban v. Romania* the left-behind parent had only visited the children once and had not undertaken his maintenance obligations.[164] Conversely, where such a relationship existed and the father had given undertakings to alleviate the concerns of the taking parent, the ECtHR accepted that Article 8 ECHR had not been breached. This was the case of *Tarkhova v. Ukraine* where the father had been involved in raising his child prior to departure and he had guaranteed financing the applicant's return together with the child. Similarly in the case of *M.R .and L.R. v. Estonia* the Court noted the undertakings of the left-behind father as well as the fact that the taking mother had been well adjusted into the country of habitual residence, hence the refusal to return was unjustified.[165]

As shown above, *X v. Latvia* represented a milestone in the Court's child abduction case law. From the perspective of the child's right to maintain contact with both parents the ECtHR expressly stated that the Latvian authorities should have assessed if it had been possible for the mother to return with the daughter and to maintain contact with her upon return.[166] Further, the Court stated as a matter of principle that domestic authorities needed to satisfy themselves that adequate safeguards are convincingly provided in the country of origin and that tangible measures of protection are put in place to discharge of known risks.[167]

It also appears that post *X v. Latvia,* the Court has crystalised its approach to the right of the child to have contact with both parents in abduction proceedings. The assessment of the child's right to have contact with both parents here typically concerns an evaluation of the relationship of care between the child and the parents, followed by an assessment of

162 ECtHR 12 July 2011 no. 14737/09 (*Šneersone and Kampanella v. Italy*), paras 94, 95.
163 ECtHR10 July 2012, 4320/11 (*B v. Belgium*), para 72-76.
164 ECtHR 26 October 2010, no. 25437/08 *(Raban v. Romania)*, para 37.
165 ECtHR 15 May 2012, no. 13420/12 (*M.R. and L.R. v. Estonia (dec)).*
166 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC))*, para 117.
167 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC))*, 108.

the trauma which the child may suffer if returned without that parent. The burden of proof lies on the parent but if for example psychological evaluations have been produced, the domestic courts need to genuinely take into account their findings. Then, to the extent it is established that there is a high risk of the child suffering trauma, it will be assessed whether the taking parent is in an objective impossibility to return. It has been repeatedly stated that "the grave risk of harm to the child cannot arise solely from the separation from the parent who was responsible for the wrongful removal. This separation, however difficult for the child, would not automatically meet the grave risk test.[168] Even when the parent is in an objective impossibility to return, states through cooperation or through undertakings of the left-behind parent may alleviate the concerns and facilitate the return of the child with the taking parent. Also, as mentioned above a demonstrated relationship between the child and the left-behind parent may overturn the arguments related to the objective impossibility of return.[169]

Even though the Court extended the scope of examination beyond arbitrariness, cases decided after 2014 demonstrate that the assessment remains closely aligned to the Hague Convention. The ECtHR only exceptionally finds that domestic courts did not sufficiently reason their decisions, intervening more readily to align the domestic practice to the Hague Convention. For example, cases where the primary taking parents raised issues concerning their financial situation upon return were dismissed if the domestic court reasoned their refusal or if the left-behind parent had offered undertakings to alleviate the concerns.[170] Also, it appears that the Court imposes an obligation on the domestic courts to seek assurances from the courts in the state of habitual residence before refusing to return a child. For example in the case of *E.D. v. Russia* the Court found that the domestic authorities failed to assess whether equivalent treatment was available in Israel and whether return would necessarily entail the separation from the mother.[171] Similarly in the case of *Kukavica v. Bulgaria*, the Court considered that the Bulgarian Supreme Court should have taken further steps to instruct the left-behind parent on the possibilities to convert undertakings into enforceable orders.[172]

168 ECtHR19 July 2016, no. 2171/14, *(G.N. v. Poland)*, para 61, ECtHR 1 March 2016 no 30813/14, (*K.J. v. Poland*), para 67, ECtHR 21 July 2015, no. 2361/13, (*G.S. v. Georgia)*, para 56.

169 ECtHR 12 March 2015, no. 22643/14, (*Adzic v. Croatia)*, para 89; ECtHR 1 March 2016 no 30813/14, (*K.J. v. Poland*), para 78.

170 On undertakings ECtHR *18 October 2016,* no. 49437/14 (*Akdag v. The Netherlands (dec))*, ECtHR 6 March 2018, no. 9114/16 (*Royer v. Hungary*) or ECtHR 13 June 2023, no. 57202/21 *(Kukavika v. Bulgaria)*; cases where the court accepted the reasoning of domestic courts in situations where the applicants had argued a precarious financial position upon return: ECtHR 19 September 2019, 79441/17 (*Andersena v. Latvia)*; ECtHR 12 June 2018, nos. 42825/17 and 66857/17 *(Roche v. Malta (dec))*.

171 ECtHR11 January 2022, no 34176/18 *(E.D. v. Russia)*, para 14.

172 ECtHR 13 June 2023, no. 57202/21 *(Kukavika v. Bulgaria)*, para 19.

At the same time, the case law indicates that certain circumstances may amount to an objective impossibility to return. Immigration status or possible criminal convictions are such situations. For example, in a case where the Court ultimately found a violation of Article 8 ECHR in favour of the left-behind parent, it did nevertheless accord importance to the taking parent being a national of the state of habitual residence coupled with her precarious immigration status in the host country.[173] In the case of *Satanovska and Rodges v. Ukraine* a violation of Article 8 was found on the ground that the domestic courts did not analyse the mother's contention that she could not follow her son due to health, financial and entry visa issues.[174] In addition, in that respective case several psychological reports had been administered indicating that the separation of the child from his mother would result in profound psychological trauma with long-term consequences.[175]

The Court accepted the reasoning of domestic courts who applied Article 13 (b) of the Hague Convention when such application was not solely based on the primary carer status of the taking parent. The additional reasons put forth by domestic courts and endorsed by the ECtHR were that the left-behind parent had refused contact with the child pending abduction proceedings, that it would not be the left-behind parent who would take care of the child upon return but a relative and that the courts in the country of origin had issued custody judgements which heavily restricted the taking parent's contact with her child.[176]

The reasoning of the Court concerning the right of the child to have contact with both parents is closely tailored to how the case was presented before and adjudicated by the domestic courts. For example in *Andersena v. Latvia*, a case involving allegations of domestic violence coupled with the inability to return to the country of habitual residence, the Court declined to intervene on the ground that the applicant had not addressed these concerns before the domestic authorities.[177] Similarly, in the case of *Thompson v. Russia*, the applicant had raised before domestic courts the fact that she could not return to Spain due to the lack of a legal residence permit and income.[178] In refusing the return the domestic court relied on the tender year doctrines and the attachment between a young child and his mother. This was the reason for the ECtHR in finding a violation of Article 8. The Court did not further analyse the other elements which, as the dissent pointed out, were indicative of a systemic problem: that of foreign mothers who cannot obtain a residence order to live with their children after divorce.[179] Similarly, in the case of *M.V. v. Poland*, the domestic courts

173 ECtHR 23 October 2014, 61362/12 (*V.P. v. Russia*), para 39.
174 ECtHR 28 January 2021, no 12354/19, (*Satanovska and Rodges v. Ukraine)*, para 89.
175 ECtHR 28 January 2021, no 12354/19, (*Satanovska and Rodges v. Ukraine)*, para 14.
176 ECtHR 6 March 2018, no. 9114/16 (*Royer v. Hungary*), paras 18 and 57.
177 ECtHR 19 September 2019, 79441/17 (*Andersena v. Latvia)*, para 120.
178 ECtHR 30 March 2021, 36048/17 *(Thompson v. Russia)*, para 92.
179 ECtHR 30 March 2021, 36048/17 *(Thompson v. Russia)*, dissenting opinion of judge Dedov.

had initially dismissed the case for return on the ground that the mother had been the victim of domestic violence and that she was in a financial impossibility to return. Such reasoning had been rejected by the court of last resort, who instead relied on the fact that the mother was the primary carer of a young child which in itself justified a non-return order.[180] The Court found a violation of Article 8 on the ground of the reasoning of the court of last resort. No other reference was made to the relevance of domestic violence and whether that would have justified the application of Article 13 (2) of the Hague Convention.

On this basis, it appears that the ECtHR scrutinises the domestic decision-making process to assess whether there is an objective impossibility for the taking parent to return to the country of habitual residence with the child. The scrutiny is stricter in the case of primary care takers, however primary carer status on its own is not enough to justify a non-return to the country of origin. The Court has indicated that primary carer status coupled with factors such as lack of access to the territory or criminal sanctions in the state of habitual residence could qualify as objective impossibilities to return which should be taken into account by domestic authorities.[181] Defences concerning allegations of financial insecurity may be taken into account as well, however it appears that undertakings of the left-behind parents in this sense were so far perceived sufficient.[182]

Nevertheless, in the recent case of *Verhoeven v. France* the ECtHR appears to depart from its own standards.[183] Here, the applicant submitted that she could not return to Japan, her child's country of habitual residence as she had been subjected to domestic violence and the Japanese court would not grant custody or visitation rights to a parent who is not a Japanese citizen. Throughout the domestic proceedings it was confirmed that Japanese laws do not permit joint parental authority in the case of divorce.[184] It was further confirmed by the Public Prosecutor's Office, and by the French Embassy in Japan that this country did not allow for a visiting visa for a foreign parent wishing to visit their child.[185] A report of a psychologist attested that the separation of the three-year-old child at the time from his main carer can constitute a traumatic event for him; the psychologist recommended a psychiatric expertise of the mother and child for a better assessment of the risk that separation posed for the child.[186] No such forensic report was administered. Instead, the domestic courts reasoned that the allegations of domestic violence of the taking parent had not been proven. The French courts also considered that the applicant had not justified any objective impossibility

180 ECtHR 1 April 2021, no 16202/14 *(M.V. v. Poland)*, para 42.
181 ECtHR19 July 2016, no. 2171/14, *(G.N. v. Poland)*, para 64; ECtHR 23 October 2014, 61362/12 (*V.P. v. Russia*).
182 ECtHR 18 October 2016, no. 49437/14 (*Akdag v. The Netherlands (dec)).*
183 ECtHR 28 March 2024, no. 19664/20 (*Verhoeven v. France*).
184 ECtHR 28 March 2024, no. 19664/20 (*Verhoeven v. France*), para 23.
185 ECtHR 28 March 2024, no. 19664/20 (*Verhoeven v. France*), paras 23 and 33.
186 ECtHR 28 March 2024, no. 19664/20 (*Verhoeven v. France*), para 16.

to reside in Japan, specifically in light of the proposals which had been submitted by the left-behind parent to allow visits between the child and the taking parent. In its assessment the ECtHR examined the application of the Hague Convention, similar to a domestic court: it assessed each of the exceptions to the return of the child as laid down in the Hague Convention. The question for the ECtHR was only whether the domestic courts provided sufficient reasoning.[187] The Court also accepts political justifications as a valid argument. Thus, for the Court France's acceptance without reservations of the ratification of the Hague Convention by Japan seems to preclude it from any review of the concrete circumstances.[188] The Court did not apply its well established test developed in *X v. Latvia* in that it did not look at whether the domestic authorities refuted arguable allegations of grave risk of harm to the child. By disregarding its own case law, the ECtHR became here an enforcer of the comity objectives of the Hague Convention: it followed its policy aims but disregarded individual human rights. In his dissenting opinion Jude Mits observed that the letter and not the spirit of Article 8 ECHR had been followed in this case.[189] The focus of his dissent is both on domestic violence and the ensuing power imbalances it creates and on the parent child separation. In relation to the right of the child to have contact with both parents he emphasises that the French court did not examine the possibility of the mother to return to Japan and have accepted undertakings from the left-behind parent without examining the impact on the child of being separated from his mother.[190]

This case is striking due to the Court's overt departure from its own standards and the minimal engagement with the rights of the child. It is also striking when assessed against the background of the previous cases analysed above where the Court indicated that it would look into immigration and visa issues as part of its assessment of the objective impossibility to return criterion. No such assessment was carried out here; instead the Court remained deferential to the domestic courts, in the face of impartial evidence attesting to a parent's immigration position. Further, no assessment of the relationship of care was carried out either, in stark contradiction to previous judgements. Nor did the Court refer to the CRC and the standards therein. Incidentally, it should be noted that Japan has filed a reservation to Article 9(3) of the CRC, stating precisely that it does not understand Article 9(3) to apply to the right of children to contact with their immigrant parents.[191] In the present case, the legal system in this country resulted in the breakdown of the relationship between the child and the parent that cared most for him.

187 ECtHR 28 March 2024, no. 19664/20 (*Verhoeven v. France*), paras 56-61.
188 ECtHR 28 March 2024, no. 19664/20 (*Verhoeven v. France*), paras 56-61, para 63.
189 ECtHR 28 March 2024, no. 19664/20 (*Verhoeven v. France*), dissenting opinion Judge Mits, para 1.
190 ECtHR 28 March 2024, no. 19664/20 (*c*), dissenting opinion Judge Mits, para 18.
191 This aspect has also been discussed in Section 3.3.1 of this dissertation.

The ECtHR was reluctant to assess, even summarily, the issue of parent-child separation. Furthermore, the ECtHR failed to distinguish between two matters. First as the Court points out, Japan has indeed ratified the Child Abduction Convention and France has accepted this ratification. Second, Japan's ratification does not mean that its legal system is beyond scrutiny in individual cases. The Strasbourg Court failed to distinguish between exceptions to return where laws are assessed for their impact on children in concrete cases and policy considerations leading a state to accept the ratification of the Convention. The former does not exclude the latter. In practice, there may very well be cases where children have been abducted to France by persons who do not face the same immigration obstacles as the child's parent in the *Verhoven* case. In those cases, there is no grave risk of harm to the child. In the case of Ms Verhoven, the argument is not that the French courts should have dismissed the return. The argument is that the immigration position of the child and his mother should have prompted the French courts to assess closer the relationship of care between this child and the mother. The case clearly exhibits an objective impossibility of the parent to return; hence it is for the courts to assess whether the separation from the primary carer exposed the child to a grave risk of harm. From the perspective of the ECtHR, the arguments raised domestically should have clearly been considered arguable. Thus, when applying the *X v. Latvia* test the ECtHR should have determined if the domestic courts had genuinely dismissed such arguable allegations. It is submitted here that the Court's assessment of 'the genuine nature of the dismissal' should have departed from the fact that the taking parent had demonstrated that return results in the child's separation from her. It is difficult to reach any other conclusion based on the objective evidence presented to the case. Furthermore, it should be pointed out that this is hardly a matter of custody adjudication. It is a decision of the domestic courts as to whether the child would be exposed to a grave risk of harm if returned to the country of habitual residence. Had Japan ratified the 1996 Child Protection Convention, Japan would remain competent to decide on the allocation of custody and then the French courts could recognise this judgement – provided it is not contrary to human rights. In the meantime, the French authorities could secure an access right between the child and the left-behind parent so as to ensure that the parent child bond was not broken.

Conversely, it could also be argued that sending the child back is equally a matter of custody adjudication as deciding to refuse the return. In any event, it remains to be seen whether *Verhoeven v. France* marks a return to the pre-Neulinger position of the ECtHR or whether this was an isolated case.

The ECtHR case law analysis therefore indicates that it is the right of the child to have contact with both parents -seen as an element of the child's best interests- which has been essential in the ECtHR's change of approach. While initially the Court did not look into detail at the way this right will be exercised post abduction, this approach gradually changed to the extent

that at the moment the Court conducts a more careful analysis, especially where it appears that a loss of contact with the primary carer is imminent and that such primary carer is in an objective impossibility to return. Nevertheless, the recent case of *Verhoeven v. France* may mark a change in approach although it remains to be seen how this will influence the Court's position on the right of the child to have contact with both parents in abduction proceedings.

#### *8.3.3.3 The right of the child to be protected from violence*

Under the ECtHR's case law, the second limb of the best interests assessment in abduction cases is the child's right to develop in a sound environment. The very text of Article 13(1) of the Hague Convention mentions 'a grave risk of harm' to the child. Article 19 of the CRC also enshrines the right of children to be protected from violence.

Similarly to the best interests of the child, 'harm' has a specific understanding in the context of the Hague Convention. It is accepted that not all inconveniences amount to a grave risk of harm, the risk has to go beyond a level which is considered reasonable or acceptable in a given situation.[192] The ECtHR has also endorsed this approach in its case law by reading Article 8 ECHR in light of Article 13(1) of the Hague Convention.[193]

As discussed in the previous Section, in child abduction cases it is often argued that the separation of the child from the taking parent will have important psychological consequences for that child.

This Section focuses on harm to the child, outside the question of separation from the primary carer as this has been discussed above. More specifically the question here is: how has the ECtHR analysed the right of the child to be protected from violence where such harm is not the direct result of the separation from the taking parent?

In child abduction cases, it has sometimes been argued that the child will be exposed to a grave risk of harm due to the aggressive behaviour/abuse towards the child by the left-behind parent or another private person[194]; due to exposure of the child to domestic violence against the taking parent,[195] or war in the country of habitual residence.[196] Also, in some cases

192 See Chapter IV above for a discussion concerning the grave risk of harm exception under the Child Abduction Convention.

193 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC)*), para 116; ECtHR 21 July 2015, no. 2361/13, (*G.S. v. Georgia)*, para 56.

194 Violence towards the child: ECtHR 15 May 2012, no. 13420/12, (*M.R. and L.R. v. Estonia (dec)*), ECtHR 21 May 2019, no. 49450/17 (*O.C.I. v. Romania)*, ECtHR 26 March 2019, no. 37043/16 *(Nedelcu v. Romania (dec));* ECtHR 1 April 2021, no 16202/14 *(M.V. v. Poland)*; another private person: ECtHR 23 October 2014, 61362/12 (*V.P. v. Russia*).

195 Domestic violence against the taking parent: ECtHR 1 April 2021, no 16202/14 *(M.V. v. Poland)*, ECtHR 17 March 2022, no. 80606/17 *(Moga v. Poland)*, ECtHR 7 February 2023, no. 39298/20 (*Ciocirlan v. Romania* (dec)); ECtHR 13 June 2023, no. 57202/21 *(Kukavika v. Bulgaria)*, ECtHR 12 May 2022, no. 64886/19 *(X. v. The Czech Republic)*.

196 ECtHR 15 June 2021, no 17665/17 (*Y.S. and O.S. v. Russia*).

evidence of neglect upon return has been presented coupled with the fact that the children would be placed in foster care.[197] Other than the situations where harm was connected to war, the instances of harm addressed in the Court's case law are closely related to the rights of children against wider debates on domestic violence and contact rights which are at the heart of this dissertation.

The Court's approach to these cases has followed the test developed in *X v. Latvia*: domestic courts must take into account and provide adequate reasoning to arguable allegations of abuse. On some occasions the ECtHR had the opportunity to build on its existing case law on aspects such as corporal punishment. More often however, it has refrained from departing from the reasoning of the domestic courts.

In one of the early cases, the children had objected to return on the ground that their father had often applied inappropriate punishing methods.[198] The domestic court had accepted that these statements had been accurate, however it saw no reason to refuse the return. Also, even though the children, -aged nine years old at the time-, objected to return, the domestic court considered that "nothing suggested that [they] were particularly mature for their age."[199] The ECtHR also accepted this reasoning, ultimately finding that the applicant and her children had remedies available in Canada (country of habitual residence) to defend their interests, should that become necessary. The case of *Blaga v. Romania* also concerned the refusal of children to return, motivated in part by the use of corporal punishment by their father.[200] In its reasoning the Court did not accord any weight to the allegations of violence, finding on the contrary that the domestic courts had not adequately balanced "the applicant's interests of a right to family life against the competing interests of the other parties in the case."[201] Consequently, in the Court's view the domestic court had not sufficiently protected the best interests of the children.[202] In the case of *Raw and Others v. France*, the children, aged 14 and 12 at the time, had described a climate of terror created by their mother and maternal grandfather including physical and psychological violence, neglect and alcoholism.[203] In the same case the authorities of the country of habitual residence were considering the placement of the children in residential care, if returned without the father.[204] In its reasoning, the ECtHR did not pay any dedicated attention to the substantive considerations concerning the potential risk of violence to children.

197 ECtHR 7 March 2013, 10131/11 *(Raw and others v. France)*.
198 ECtHR 15 May 2003, no. 4065/04 (*Paradis and others v. Germany (dec)*).
199 ECtHR 15 May 2003, no. 4065/04 (*Paradis and others v. Germany (dec)*).
200 ECtHR 1 July 2014, no. 54443/10 (*Blaga v. Romania*), para 135.
201 ECtHR 1 July 2014, no. 54443/10 (*Blaga v. Romania*), para 137.
202 ECtHR 1 July 2014, no. 54443/10 (*Blaga v. Romania*), para 137.
203 ECtHR 7 March 2013, 10131/11 *(Raw and others v. France)*, para 14.
204 ECtHR 7 March 2013, 10131/11 *(Raw and others v. France)*, paras 34, 36.

More recently, the ECtHR reached a different conclusion in a case concerning allegations of corporal punishment against the children by their left-behind father.[205] Domestic courts had dismissed the allegations of violence considering that "occasional acts of violence such as those which were proved by the recordings adduced in the file, would not reoccur often enough to pose a grave risk ... under Article 13 § 1 (b) of the Hague Convention."[206] The Court heavily criticised the domestic authorities, specifically relying on the absolute nature of the right of children to be protected from violence. The Court referred to a previous judgement[207] where it had condemned in absolute terms domestic corporal punishment and highlighted that "children's dignity cannot be ensured if the domestic courts were to accept any form of justification for ill-treatment, including corporal punishment."[208] It also specifically rejected the deferential approach to the capacity of the Italian system to protect the children from violence.[209] It can be inferred that in such cases the Court would consider that a return order under the Hague Convention may only be appropriate if the domestic authorities seek concrete assurances and are satisfied that the children will no longer be at risk of being disciplined if returned. Nevertheless, the right of the children not to be subject to violence was less prominent in other factually similar cases.[210] In *Moga v. Poland* the domestic courts established that the applicant had been violent towards the taking parent and that the children had witnessed the violence. Domestically, the father's behaviour to leave his daughter crying in the room and the physical violence of the paternal grandfather had also been considered, together with the violence against the taking parent, to amount to a grave risk of harm to the child.[211] However, the ECtHR's analysis of the violence against the children was minimal. On the one hand, without any further emphasis on the rights of children, it did not consider that the Polish courts' analysis had been 'manifestly misguided'.[212] On the other hand, it considered that, given the separation of the parents, the argument concerning the risk of the children witnessing violence was misplaced.[213] This is surprising because it discounts existing research showing that the risk of violence increases with parental separation and it may be the highest immediately in its aftermath.[214] Also, the ECtHR has relied on social science research in find-

205 ECtHR 21 May 2019, no. 49450/17 (*O.C.I. v. Romania)*.
206 ECtHR 21 May 2019, no. 49450/17 (*O.C.I. v. Romania)*, para 14.
207 ECtHR 3 October 2017, no. 23022/13 *(D.M.D. v. Romania)*.
208 ECtHR 21 May 2019, no. 49450/17 (*O.C.I. v. Romania)*, para 36.
209 ECtHR 21 May 2019, no. 49450/17 (*O.C.I. v. Romania)*, paras 44-45.
210 ECtHR 17 March 2022, no. 80606/17 *(Moga v. Poland)*; ECtHR 1 April 2021, no 16202/14 *(M.V. v. Poland)*.
211 ECtHR 17 March 2022, no. 80606/17 *(Moga v. Poland)*, para 32.
212 ECtHR 17 March 2022, no. 80606/17 *(Moga v. Poland)*, para 67.
213 ECtHR 17 March 2022, no. 80606/17 *(Moga v. Poland)*, para 67.
214 See also Chapter 5 above.

ing violations of the Convention in other cases.[215] Similarly, in the case of *M.V. v. Poland* where the witnesses had recounted instances of the applicant using physical violence towards the child and the taking parent, the ECtHR limited its assessment to the length of the proceedings without any further incursions into the relevance of the acts of violence in the specific context of the Hague Convention.[216] In the case of *Ciocarlan v. Romania*, the taking mother had alleged domestic violence as a ground of non-return. Here, the domestic courts had nevertheless ordered the child's return following a hearing of the 9-year-old child who had declared that the mother had been violent to her and that she wished to return to The Netherlands.[217] The ECtHR deferred to the approach of the domestic authorities.

The case of *P.D. v. Russia* concerned an opposition to return to Switzerland on the ground that while in the care of the left-behind parent, the child's half brother had been sexually abused by S. – a friend of the half sister's father. S. had been convicted in Switzerland and contact between him and the half brother had been prohibited; no such prohibition of contact with respect to the child subject to return had been made. Therefore, return of the child exposed her to harm due to a risk of revenge or further criminal offences by S.[218] The ECtHR accepted as valid this reasoning of the domestic court; it did not impose any further obligations to secure protective measures in Switzerland.[219]

In other cases, the child was at risk of violence due to a security situation in the state of habitual residence. In the case of *Y.S. and O.S. v. Russia*, the applicant argued that the "child's return to Ukraine would put her physical and emotional well-being at risk in view of the ongoing military conflict on the territory of the DPR."[220] In this case the domestic courts had addressed these arguments and had found that the risk was a general consequence of living in a conflict zone and that such risk could have been adequately addressed by the Ukrainian authorities.[221] For the ECtHR this approach did not amount to a genuine assessment of arguable allegations of risk. In particular, the Russian courts did not address a situation which had been documented from a wide range of sources attesting the human rights violations and human casualties.[222] The domestic courts did not take into

215 ECtHR 4 December 2003, no. 39272/98 *(M.C. v. Bulgaria)*, para 164 where the Court has relied on social science evidence on the evolving understanding of how rape is experienced by victims.
216 ECtHR 1 April 2021, no 16202/14 *(M.V. v. Poland)*, paras 77-81.
217 ECtHR 7 February 2023, no. 39298/20 (*Ciocirlan v. Romania* (dec)).
218 ECtHR 3 May 2022, no 30560/19 (*P.D. v. Russia*) para 24.
219 ECtHR 3 May 2022, no 30560/19 (*P.D. v. Russia*), para 44. The relied instead on the absence of such protective measures to find that the domestic courts had adequately taken into account arguable allegations of grave risk.
220 ECtHR 15 June 2021, no 17665/17 (*Y.S. and O.S. v. Russia*), para 59.
221 ECtHR 15 June 2021, no 17665/17 (*Y.S. and O.S. v. Russia*), para 62.
222 ECtHR 15 June 2021, no 17665/17 (*Y.S. and O.S. v. Russia*), para 62.

account the views of the child (aged 10 at the time) nor did they rule on the availability and adequacy of effective protection measures or whether the applicant would have timely access to justice following return.[223]

In finding a violation of Article 8 ECHR, the Court clearly undertook a more detailed assessment of the allegations of violence. The dissenting judges criticised this position on account of the impossibility to comply with the speediness requirement while at the same time obliging courts to look on their own motion for other evidence.[224]

#### *8.3.3.4 The right to be heard*

The right to be heard is one of the core principles of the CRC.[225] Article 13(2) of The Hague Convention includes a dedicated exception to return, according to which authorities in the country of habitual residence may refuse the return they find that "the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take into account of its views."[226]

Cases brought to the ECtHR included on many occasions references to children's wishes as recorded by the domestic authorities.[227] Early on it appeared that children's wishes may conflict with the return mechanism; the ECtHR role was then to strike an adequate balance between the aim of the Hague Convention, the rights of the child and those of their parents. In the case of *Ignaccolo Zenide v. Romania* decided in 2000, Judge Maruste dissented on the ground that the human rights of children had been disregarded in that case. Specifically, the children had objected to the enforcement of the return orders and Judge Maruste considered that enforcing the return against the express wishes of children was tantamount to violence against them.[228] Several of the judgements where the children's opinion is central to the Court's decisions have been met with dissenting opinions revolving around the relevance of the children's wishes in proceedings.[229]

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223 ECtHR 15 June 2021, no 17665/17 (*Y.S. and O.S. v. Russia*), para 62.

224 ECtHR 15 June 2021, no 17665/17 (*Y.S. and O.S. v. Russia*), joint dissenting opinion of Judge Lemmens, Dedov and Elósegui, para 7.

225 For an overview see also Chapter 3 of this dissertation.

226 For a discussion concerning Article 13(2) please refer to Chapter IV above.

227 See among many other cases: ECtHR 15 May 2003, no. 4065/04 (*Paradis and others v. Germany (dec)*); ECtHR 6 December 2007, 39388/05 (*Maumousseau and Washington v. France*), ECtHR 7 March 2013, 10131/11 *(Raw and others v. France),* ECtHR 1 February 2018, no 51312/16 (*M.K.v Greece*), ECtHR 1 July 2014, no. 54443/10 (*Blaga v. Romania*); ECtHR 15 June 2021, no 17665/17 (*Y.S. and O.S. v. Russia*), ECtHR 7 February 2023, no. 39298/20 (*Ciocirlan v. Romania* (dec)).

228 ECtHR 25 January 2000, no. *31679/96* (*Ignaccolo-Zenide v. Romania),* dissenting opinion Judge Maruste.

229 For example: ECtHR 1 July 2014, no. 54443/10 (*Blaga v. Romania*); ECtHR 7 March 2013, 10131/11 *(Raw and others v. France)* or ECtHR 1 February 2018, no. 51312/16 (*M.K.v Greece*).

For example, in the case of *Raw and Others v. France* the two children aged 14 and 12 at the time, objected strongly to returning to the United Kingdom resulting in the need of their hospitalisation.[230] The ECtHR judgement omitted references to the children's rights to be heard other than that their objections were not immutable given that the younger child had later chosen to return to the United Kingdom.[231] Similarly, in the case of *Blaga v. Romania,* the Romanian authorities had given decisive weight to the objections to return of the children aged 9 and 11 at the time of the hearing.[232] The Court criticised the domestic courts for hearing younger children as they were below the minimum domestic legal age.[233] Also, the Court considered that under Article 13 (2) of the Hague Convention the child's voice cannot amount to a veto right to removal, and that the courts should have considered more broadly the family situation and the circumstances upon return.[234] The Court reached the opposite conclusion in the case of *M.K. v. Greece* where it found that the child's right to be heard was a key element to consider in any proceeding concerning the child.[235] Here the Court relied on Article 12 of the CRC and other international instruments in accepting that the domestic authorities have been correct in refusing to enforce a final judgement on account of the child's objections.[236]

*M.K. v. Greece* indicates that the Court had considered Article 13(2) of the Hague Convention in light of the CRC. The paragraphs below include an overview of the Court's position on the children's right to be heard in abduction proceedings along the elements of Article 12 of the CRC.

The CRC Committee has interpreted Article 12 of the CRC as imposing a positive obligation on states to hear all children, irrespective of their age and maturity. The assessment of their age and maturity is to be undertaken in the next step, when authorities decide on the weight to attach to children's views.[237] The ECtHR took a different approach in child abduction cases. For the ECtHR it was important to stress that children of a young age are not capable of forming their own views.[238] For example, in *Roche v. Malta* the Court agreed with the Maltese government that a child of less than 4 years

230 ECtHR 7 March 2013, 10131/11 *(Raw and others v. France)*, paras 30 and 31.
231 ECtHR 7 March 2013, 10131/11 *(Raw and others v. France),* para 94.
232 ECtHR 1 July 2014, no. 54443/10 (*Blaga v. Romania*), para 20.
233 ECtHR 1 July 2014, no. 54443/10 (*Blaga v. Romania*), para 79.
234 ECtHR 1 July 2014, no. 54443/10 (*Blaga v. Romania*), paras 80-82.
235 ECtHR 1 February 2018, no. 51312/16 (*M.K .v. Greece*), para 91.
236 ECtHR 1 February 2018, no. 51312/16 (*M.K. v. Greece*), paras 91-93. For a more elaborate description of the facts and reasoning in this case, please refer to Section 8.3.2.1 above.
237 See CRC Committee General Comment no. 12 (2009); For an assessment of Article 12, please refer to Chapter 3 of this dissertation.
238 ECtHR 12 June 2018, nos. 42825/17 and 66857/17 *(Roche v. Malta (dec))* (the child was under 4 years old), ECtHR 1 July 2014, no. 54443/10 (*Blaga v. Romania*) (the children were 11 and 9 years old – the Court's criticism focused in particular on hearing the two 9 year old children), ECtHR 7 July 2020, no. 9256/19 (*Voica v. Romania*), para 42 (children were aged 6 and 4 at the time), ECtHR 24 April 2010, no. 7354/10 *(Levadna v. Ukraine (dec))* (the child was 5 year old).

old was not capable of expressing his views on the matter.[239] Also, in the case of *Levanda v. Ukraine*, the Court dismissed the applicant's complaint that the domestic courts had failed to obtain her son's opinion by arguing that a five year old child had not reached the age and maturity to decide for himself what was in his best interests.[240] The same view was reiterated in 2020 in *Voica v. Romania* where the Court accepted that children of four and six years old are not of an age and maturity to be heard directly in court.[241]

Further, under Article 12 of the CRC, a child's opinion should be given due weight in light of their age and maturity.[242] Chapter 3 of this dissertation has touched upon the discussions around the requirement to give children's opinions due weight. It is worth reiterating here that in principle the biological age of a child should not alone be determinative of the weight to be accorded to a child's view.[243] For children, the way their view is heard is essential and has a key role in determining the weight to be accorded to their declarations.[244] The ECtHR has not attached any importance in its child abduction case law on how the views of the children are obtained. Rather, the Court has been critical of the weight accorded by domestic courts to children's views, when their views have been determinative in refusing the return. In the case of *Blaga v. Romania*, the three children subject to return were 9 and 11 years old at the time of the hearing. While pointing out that the nine year old siblings had been under the minimum age for being heard in court, the ECtHR had reluctantly accepted that the domestic court relied on Article 13(2) of the Hague Convention.[245] The Court nevertheless found a violation of Article 8 of the Convention on the ground that the domestic courts had attached excessive weight to children's voices.[246] This finding was supported by the text of the Hague Convention and its Explanatory Protocol. Also, in a case concerning children of 14 and 12 years old the ECtHR highlighted that their views were not immutable and as such the French authorities should have intensified their enforcement efforts.[247]

In other cases, where the children's opinion supported a return order the ECtHR was less critical of the domestic courts' approach. For example, in the case of *Van den Berg and Sarri v. The Netherlands*, the domestic courts relying on the direct hearing of a six year old child found that she had demonstrated a level of maturity for her opinion to be taken into consideration.[248] The domestic courts noted in particular that the child had shown not to

239 ECtHR 12 June 2018, nos. 42825/17 and 66857/17 *(Roche v. Malta (dec))*, para 99.
240 ECtHR 24 April 2010, no. 7354/10 *(Levadna v. Ukraine (dec))*.
241 ECtHR 7 July 2020, no. 9256/19 (*Voica v. Romania*), para 70.
242 CRC Committee, General comment No. 12 (2009), paras 28-31.
243 CRC Committee General Comment no. 12 (2009), para 29.
244 CRC Committee General Comment no. 12 (2009), para 29.
245 ECtHR 1 July 2014, no. 54443/10 (*Blaga v. Romania*), no. 54443/10, 1 July 2014, para 78.
246 ECtHR 1 July 2014, no. 54443/10 (*Blaga v. Romania*), no. 54443/10, 1 July 2014, para 80.
247 ECtHR 7 March 2013, 10131/11 *(Raw and others v. France)*, para 94.
248 ECtHR 4 February 2008, no 7239/08, (*Van den Berg and Sarri v. The Netherlands (dec))*.

have a negative attitude towards her father and she was unharmed in her relationship with him. In its inadmissibility decision the ECtHR attached importance to the fact that the child had been heard by the domestic courts and that they had deemed that she had reached a level of maturity sufficient for her opinion to be taken into consideration. Similarly, in the case of *Ciocirlan v. Romania*, the domestic authorities had ordered the return of the children relying, *inter alia,* on the declaration of the 9-year-old daughter that she wished to return to the country of habitual residence.[249] As opposed to previous cases where the domestic courts had been criticised for taking into account the opinions of a 9 year old, in this case the ECtHR mentioned such hearing as rightly supporting a finding of return.[250]

Exceptionally, the Court has accepted that children's opinion was decisive, or important as the case may be in refusing the return. The case of *M.K. v. Greece* analysed above concerned the refusal to return of a 12-year-old boy. Here, the Court linked its child abduction case law with its case law concerning the children's opinions in custody disputes and reframed the analysis to focus on the right of the child to participate in proceedings concerning him.[251] Also, in the case of *Y.S. and O.S. v. Russia* the domestic courts had not considered the views of a 9-year-old child on account that she had not reached the minimum age to be heard and in any event her wishes reproduced in a forensic report did not amount to an objection to return; rather they concerned a custody determination.[252] In finding a violation of Article 8 ECHR the Court pointed out that the domestic authorities had failed to consider the views of the child.[253]

One further aspect which is relevant to the right of the child to be heard, and which has been addressed from the perspective of the CRC in Chapter III, is the type of participation: direct or indirect and whether a child should have independent representation.

Applicants have complained of issues such as the failure of the domestic authorities to appoint an independent representative to the child in domestic proceedings.[254] The ECtHR has rejected these arguments in general terms finding that there is no obligation under the Hague Convention to hear children directly.[255] In turn, in its case law the Court has condoned and encouraged the administration of forensic reports for ascertaining the children's wishes or any other aspects concerning the substance of Hague Convention proceedings.

249 ECtHR 7 February 2023, no. 39298/20 (*Ciocirlan v. Romania* (dec)).
250 ECtHR 7 February 2023, no. 39298/20 (*Ciocirlan v. Romania* (dec)), para 21.
251 ECtHR 1 February 2018, no. 51312/16 (*M.K.v Greece*), para 91, referring to ECtHR 3 December 2015 no. 10161/13 (*M and M v. Croatia),* para 171.
252 ECtHR 15 June 2021, no 17665/17 (*Y.S. and O.S. v. Russia*), paras 31 and 67.
253 ECtHR 15 June 2021, no 17665/17 (*Y.S. and O.S. v. Russia*), para 98.
254 ECtHR 12 June 2018, nos. 42825/17 and 66857/17 *(Roche v. Malta (dec))*, para 99.
255 ECtHR 12 June 2018, nos. 42825/17 and 66857/17 *(Roche v. Malta (dec))*, para 99.

## 8.4 Conclusions: balancing comity with individual rights

Through its extensive child abduction case law spanning over 27 years, the ECtHR has become the most prolific international court in this area. Until the first Grand Chamber judgement of 2010, the ECtHR's rulings were fully aligned with the Hague Convention's underlying policy aim of returning children to their country of habitual residence. Although some internal tensions could be observed within the Court's judges, until *Neulinger* the ECtHR did not carry out an individualised assessment of the rights of children in abduction cases. Instead, it relied on the Hague Convention's general aim to protect children to dismiss allegations of breaches of the best interests of the child. This approach in turn received the support of private international law commentators and of the Hague Conference.[256]

Starting with *Neulinger* the ECtHR mandated that domestic authorities carry out an 'in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, […] for determining what the best solution would be for the abducted child in the context of an application for his return to his country of origin."[257] This judgement triggered substantial criticism due to what was seen as the Court's jeopardising the careful balance of the Hague Convention between return and the merits of the custody dispute.[258] *Neulinger* was the first case where the ECtHR found a violation of Article 8 ECHR in an application of a taking parent; however the Court had used the test before, in the case of *Maummusseau*.

The ECtHR has subsequently refined its approach to child abduction, and it now follows the criteria adopted in the Grand Chamber judgement of *X v. Latvia*. Under this new test, domestic authorities must consider arguable allegations of grave risk of harm and give reasoned decisions that are not automatic or stereotyped. The ECtHR's new approach has been positively received as suitable for striking the delicate balance between comity and individual rights. However, as already visible from the dissenting opinions, the practical application of the 'arguable allegations of grave harm' remained contested. In particular, the extent to which authorities must seek assurances and verify the situation of the child upon return is unclear. In other words, how should the capacity of the system in the country of habitual residence to protect the child be determined? Procedurally, the Court is requiring that domestic authorities must satisfy themselves that adequate safeguards exist and that tangible measures of protection are put in place in the country of habitual residence.

Further, it appears that since the cases of *Neulinger* and *X*, the Court has moved toward a more individualised assessment of children's rights

256 Walker 2010; Silberman 2004, for a discussion on the reactions to Neulinger, including that of the Hague Conference: Kvisberg 2019, pp. 98-99.

257 ECtHR 6 July 2010, no. 41615/07 *(Neulinger and Shuruk v. Switzerland (GC))*, para 139.

258 McEleavy 2015; Beaumont et. al. 2015; Silberman 2010, Walker/Beaumont 2011.

in abduction cases. Such individualised assessment has primarily been procedural, in line with the Court's overall tendency towards a procedural review of human rights. The Court has focused on the evidence administered at domestic level and the position of the parties. Nevertheless, along this primarily procedural position, the ECtHR has also delineated some important principles of adjudication in child abduction cases.

First, the Court has consistently upheld the mechanism of the Hague Convention by clearly endorsing the Convention's presumption in favour of the child's return. It has moved from arbitrariness – a more deferential standard of review – to a closer scrutiny of domestic decisions whenever it found that these authorities had departed from the Hague Convention. This is most evident in the Court's approach to cases concerning the issue of habitual residence where the Court has closely scrutinised whether the domestic authorities have correctly interpreted the notion of habitual residence. The Court has also mandated domestic authorities to assess whether adequate standards of protection exist in the country of habitual residence.[259] It has accepted undertakings of the left-behind parents as viable alternatives for discharging of the grave risk of harm.[260] Even more, when the domestic court did not accept the undertakings, it found a violation of the Convention on the ground that it did not explore further the possibility of converting the undertakings into mirror orders.[261] This approach indicates that the ECtHR continues to contribute substantially to the application of the Hague Convention across Council of Europe Member States.

Second, the ECtHR has made important contributions to the substantive understanding of the child's best interests' principle. It has defined the best interests as comprising two limbs: to maintain ties with the family and to develop in a sound environment.[262] These two limbs are closely connected with Articles 9, 10 and 19 of the CRC. Further, in determining the first limb – that of maintaining ties with the family, it has expressly rejected gendered approaches which resemble the tender years doctrine where courts have automatically linked the best interests of infants to their mothers. Moreover, the Court has shown a willingness to assess the relationship of care in the context of child abduction proceedings. Here, as a departure from the principle of return, it has been accepted that a primary carer's objective impossibility to return to the country of habitual residence can amount to a grave risk of harm to the child. Here, the Court has found a link between the best interests of the child and the relationship of care between the child and the primary carer. In the Court's reasoning, a child may be exposed to a grave risk of harm where the primary carer is in an objective impossibility

259 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC)*), para 79.

260 ECtHR 6 September 2011, no. 8984/11, (*Tarkhova v. Ukraine*), ECtHR 15 May 2012, no. 13420/12, (*M.R. and L.R. v. Estonia (dec)*), ECtHR 18 October 2016, no. 49437/14 (*Akdag v. The Netherlands (dec)*).

261 ECtHR 13 June 2023, no. 57202/21 *(Kukavika v. Bulgaria)*.

262 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC)*).

to return. Precarious immigration status may amount to an objective impossibility to return.[263] It is important to note that while the relationship of care is important and the ECtHR takes into account the primary carer status of the taking parent, the Court remains reluctant in finding a violation of Article 8. For example, a demonstrated relationship of care between the child and the left-behind parent will tip the balance in favour of the child's return.[264]

Nevertheless, it appears that the second limb of the child's best interests, that of developing in a sound environment, remains underdeveloped in the Court's case law. Here, other than in the case of *O.C.I v. Romania*, the ECtHR has not analysed allegations of grave risk of harm stemming from the behaviour of the left-behind parent. Also, the Court did not analyse allegations of neglect against the children.[265] Overall, it does not appear that the ECtHR has adopted a consistent approach to allegations of violence against children. It should be recalled that in Chapter V the concept of violence against children was discussed within the wider context of domestic violence. The child abduction case law of the ECtHR shows that the domestic violence against the taking parent was brought as an exception to return, as well as other allegations of violence against children, ranging from the behaviour of the left-behind parent to the situation in the country of return. When looking at the arguable allegations of grave risk, the findings are mixed. In the case of *O.C.I. v. Romania* it has condemned corporal punishment in absolute terms.[266] However, in other cases where violence against children by the left-behind parent was equally raised, the ECtHR refrained from analysing these allegations.[267] In the case of *Ciocarlan v. Romania*, the Court emphasised the child's declarations attesting to the violence of the taking parent to support a finding of return. Conversely, in *P.D. v. Russia* the risk of sexual assault was enough for the Court to not require that further assurances on the part of the authorities in the country of habitual residence are sought.

Robinson has argued in favour of an assessment of cases involving violence against children under the angle of Article 3 of the ECHR.[268] To this, it is important to add that from the perspective of the rights of children, the risk of harm should be assessed from the perspective of the child. This means that risks which are not grave for an adult may be so for a child, depending on their particular situation.

263 ECtHR 28 January 2021, no 12354/19, (*Satanovska and Rodges v. Ukraine).*
264 ECtHR 12 March 2015, no. 22643/14, *(Adzic v. Croatia).*
265 ECtHR 7 March 2013, 10131/11 *(Raw and others v. France).*
266 ECtHR 21 May 2019, no. 49450/17 (*O.C.I. v. Romania),* para36.
267 ECtHR 17 March 2022, no. 80606/17 *(Moga v. Poland*); ECtHR 1 April 2021, no 16202/14 *(M.V. v. Poland)*; ECtHR 7 March 2013, 10131/11 *(Raw and others v. France).*
268 Robinson 2023.

Further, whenever the violence was linked to the situation in the state of habitual residence, the Court has mandated that domestic courts look at existing reports documenting the situation.[269]

Finally, similar to cases concerning violence, it should also be noted that the Court's examination of the child's right to the heard in the context of abduction cases needs further alignment to the CRC. Here the Court has sometimes criticised domestic courts for taking into account the children's views or for refusing to enforce return orders on that basis.[270] In other cases, the ECtHR has expressly endorsed the domestic courts approach of relying on the children's views.[271] Exceptionally it has found that the children's views were decisive of the outcome.[272] Furthermore, as opposed to the CRC Committee which links the child's best interests to the right to be heard, no such correlation is made in the ECtHR's case law. While the Court's reliance on the right to be heard in some cases is welcomed, a more consistent approach could arguably provide better guidance to domestic authorities dealing with child abductions.

Overall, the case law overview indicates that the Court has consistently contributed to the correct application of the Hague Convention. Since 2010, more room for individual children's rights has been created and the court has outlined the elements of the child's best interests in abduction proceedings as well as procedural requirements for authorities dealing with abduction cases. Immigration considerations as well as the child's relationship of care are important elements to take into account, however, on their own they are unlikely to result in an infringement of Article 8 ECHR. There is more room for the Court to refine its position to the rights of children, and in particular the right to be heard and the right to be free from violence, and to further harmonise the interpretation of these rights with the CRC.

269 ECtHR 15 June 2021, no 17665/17 (*Y.S. and O.S. v. Russia*).

270 ECtHR 1 July 2014, no. 54443/10 (*Blaga v. Romania*); ECtHR 7 March 2013, 10131/11 *(Raw and others v. France)*.

271 ECtHR 4 February 2008, no 7239/08, (*Van den Berg and Sarri v. The Netherlands (dec))*; ECtHR 7 February 2023, no. 39298/20 (*Ciocirlan v. Romania* (dec)).

272 ECtHR 1 February 2018, no 51312/16 (*M.K.v Greece*).

# 9 The Relationship Between the two European Supranational Courts

## 9.1 Introduction

Both the ECtHR and the CJEU have important adjudicative functions in child abduction cases. The child abduction judgments of the CJEU are binding on all EU Member States except for Denmark.[1] The same states are equally bound by the judgments of the ECtHR. In this light, it is important to establish how their case law impacts on domestic courts and whether their approach is consistent, or rather it sets out conflicting standards of human rights protection.

This Chapter aims to contextualise these courts' child abduction case law (Section 9.3) against their interaction in general (Section 9.2). Finally, a conclusion is drawn as to the relationship of these two Courts in child abduction cases and the implications for domestic authorities (Section 9.4).

## 9.2 General Considerations

To date, there is no formal link between the CJEU and the ECtHR. Since 1994, there have been several attempts to establish an institutional, treaty-based link, between the two supranational courts. One such first attempt ended with the Advisory Opinion 2/94 when the European Court of Justice (as it then was) ruled that the treaties did not permit the European Community's accession to the ECHR.[2] In 2009 the Treaty of Lisbon inserted a new Article 6(2) to the Treaty of the European Union (the "TEU") which envisaged the accession of the EU to the ECHR. Nevertheless, the CJEU once again dismissed this possibility.[3] One of the key grounds for the dismissal was that the EU's accession could undermine the principle of mutual trust underpinning the area of freedom, security, and justice.[4] According to

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1 In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the TEU and to the TFEU, Denmark is not taking part in the adoption of the Brussels II ter Regulation.

2 CJEU 28 March 1996, C 2/94, ECLI:EU:C:1996:140 (Opinion 2/94; Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms), para 35.

3 CJEU 18 December 2014, C 2/13, ECLI:EU:C:2014:2454 (Advisory Opinion 2/2013). First the CJEU considered that accession could undermine the primacy of EU law as the ECtHR would become the final arbiter on matters of EU law (paras 186; 190).

4 CJEU 18 December 2014, C 2/13, ECLI:EU:C:2014:2454 (Advisory Opinion 2/2013), para 191.

the CJEU, in this area Member States are presumed to comply with fundamental rights and, save for exceptional circumstances, may not check, on a case-by-case basis, whether such compliance actually existed.[5] The ECtHR in turn requires that a Member State checks whether another Member State has observed fundamental rights. In the opinion of the CJEU such a requirement would render the accession "liable to upset the underlying balance of the EU and undermine the autonomy of EU law."[6]

With the delivery of Advisory Opinion no. 2/2013 the accession of the EU to the ECHR was effectively halted. While Member States have reiterated their commitment to keep the accession on the agenda,[7] it has been argued that there is no prospect of materialisation in the coming years.[8]

These developments have restored the relationship between the two Courts to one primarily based on judicial dialogue through case law and, more rarely, through informal meetings, invitations for conferences or speeches or even private meetings.[9]

The subsequent paragraphs analyse this relationship as it emerges from these Courts own case law and academic commentaries, first from the perspective of the CJEU and subsequently from the perspective of the ECtHR. Particular attention is devoted to mutual trust as understood in the context of the area of freedom, security and justice given that child abduction falls under this area.

### 9.2.1 The interaction with the ECHR and the ECtHR from the perspective of the CJEU

The CJEU's involvement with human rights has a long history. Even if the founding Treaties did not include human rights guarantees, it gradually became clear that Member States would be reluctant to accept the principles developed by the CJEU, in particular the supremacy of EU law, in the absence of a possibility for this Court to offer protection of human

5 CJEU 18 December 2014, C 2/13, ECLI:EU:C:2014:2454 (Advisory Opinion 2/2013), para 192.
6 CJEU 18 December 2014, C 2/13, ECLI:EU:C:2014:2454 (Advisory Opinion 2/2013), para 194.
7 See the Declaration issued by the High Level Conference on the Convention System held in Copenhagen, 12-13 April 2018, para 63.
8 Callewaert 2018, p. 1687; it should be also noted that the negotiations for the EU's accession to the ECtHR continue. The latest meeting of the negotiation group took place on 17 March 2023 when the negotiating group adopted a draft accession agreement (see <<https://rm.coe.int/meeting-report-18th-meeting/1680aa9807>>, last accessed on 10 June 2024).
9 Jacobs 2003, p.552; for current developments in the negotiation, see <<https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/accession-of-the-european-union-to-the-european-convention-on-human-rights#%7B%2230166137%22:%5B0%5D%7D>>, last accessed on 10 June 2024).

rights similar to that of national constitutions.[10] The CJEU then gradually incorporated human rights as general principles of EU law.[11] Also, since the mid-70s CJEU started citing the ECHR, and attached particular significance to the ECtHR in this regard.[12]

The relevance for the EU of human rights as laid down in the ECHR was codified in 2009 with the adoption of the EU Charter of Fundamental Rights and the Treaty of Lisbon.[13] Article 52(3) of the EU Charter provides that, to the extent that the Charter includes rights which are guaranteed by the ECHR, their meaning and scope shall be the same as in the ECHR, without prejudice to the Union's possibility to provide for more extensive protection. Thus, the ECHR's rights and freedoms are regarded as a minimum standard in the EU. This Article prevents Member States from being subject to two different standards of human rights protection when implementing EU law.[14] Indeed, as per the explanations to Article 52(3) the aim of this provision was intended to ensure consistency between EU law and the ECHR.[15]

The same explanations clarify that the meaning and scope of the rights shall be interpreted in accordance with the case law of the CJEU and the ECtHR. Furthermore, derived from Article 52(3) of the Charter, substantial amendments to the ECHR shall automatically become the new minimum standard of human rights protection in the EU.[16] It has been considered that the references to the autonomy of the EU law in the context of Article 52(3) of the Charter should be interpreted as allowing the EU solely to raise the ECHR level of protection in respect of EU law rather than to lower it.[17]

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10 The discussions arose in particular with regard to the perceived conflict between the German Basic law and EU. In the famous case of Solange I, the German Constitutional Court held that as long as the EU lacked a structure for protection of fundamental rights similar to the protection offered in the Basic law, the German Constitutional Court had the power to ensure that the EU law was in conformity with the German Constitutional requirements. For commentary see: Monaghan, p. 1453-1454.

11 The ECJ first affirmed the recognition of general principles of EU law, including protection for human rights in the Stauder case (ECJ 12 November 1969, C-29/69, ECLI:EU:C:1969:57 (Stauder v. City of Ulm)). Its position was further refined and developed in the case of Internationale Handesgesellschaft, where the CJEU stated that respect for fundamental rights formed an integral part of the general principles of Community law protected by the Court of Justice. (ECJ 17 December 1970, C-11/70, ECLI:EU:C:1970:114 (Internationale Handesgesellschaft), para 4).

12 Glas/Krommendijk 2017, pp. 2-3.

13 At legislative level, prior to the Treaty of Lisbon, provisions concerning the EU's commitment to respect for fundamental rights were included in the Treaty of Maastricht (Article F(2)) and in the Treaty of Amsterdam (Article 6). Also, the CJEU continued its line of case law on general principles of law.

14 Lock 2009, p. 382.

15 Explanations relating to the Charter of Fundamental Rights, OJ C 303/17, 14 December 2017.

16 *ibidem*; For a discussion on the impact of the ECtHR's case law on the CJEU, see *infra*, Chapter 7, Section 7.2.

17 Callewaert 2018, p.1699.

Since the entry into force of the EU Charter and after the delivery of Opinion 2/2013, scholars have noted an increased Charter centrism of the CJEU marked by a (selective) reliance on ECHR and ECtHR case law.[18] As with Opinion 2/2013, the area of mutual recognition of judgments has given rise to difficulties in reconciling the position of the two Courts. The intersection between mutual trust and fundamental rights became relevant specifically in cases involving transfers of asylum seekers to another Member State pursuant to the Dublin III Regulation and the transfer of prisoners in the execution of the European Arrest Warrant.

The Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (the Dublin III Regulation)[19] sets out the criteria for the Member State responsible for determining the substance of an asylum application. Article 3 of this Regulation only permits Member States to refuse the transfer of an asylum seeker where "there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions" in the Member State where the asylum seeker should be transferred "resulting in a risk of inhuman or degrading treatment."

Initially, the CJEU applied a collective test favouring the return of asylum seekers even when there was a risk of the infringement of their fundamental rights, provided that there were no systemic flaws in the reception system of the Member State responsible under the Dublin Regulation.[20] This test was considered to be in contradiction with the more individualised ECtHR one.[21]

However, in a recent case the CJEU has accepted that in the context of the Dublin process Member States may consider the circumstances of the person subject to the transfer so as to determine whether they face a real risk of inhuman or degrading treatment.[22] This latter approach has been considered more aligned with the one of the ECtHR.[23]

In addition, of specific relevance for the rights of children, it should also be mentioned that even before the entry into force of the Dublin III Regulation, the CJEU had already interpreted the best interests of the child to mean that the asylum application should be processed in the country of presence

18 Callewaert 2018, pp. 1696-1699; Glas/Krommendijk 2017, pp.7-9.

19 Official Journal L 180/31 of 29 June 2013.

20 Callewaert 2018, p. 1702, referring to the CJEU judgement in CJEU 21 December 2011 Joined Cases C-411, 493/10, ECLI:EU:C:2011:865 (N.S. and Others/Secretary of State for the Home Department), para 86.

21 Callewaert 2018, p. 1702, referring to the ECtHR 4 November 2014, no. 29217/12 (*Tarakhel v. Switzerland)*, para 104.

22 CJEU 16 February 2017, C-578/16 PPU, ECLI:EU:T:2017:590 (C.K. and Others v. Republika Slovenija).

23 Bartolini 2019, p. 96; Callewaert 2018, p. 1704.

rather than in the country of first entry.[24] This reasoning was later codified in Article 8(4) of the Dublin III Regulation.

The European Arrest Warrant has posed similar difficulties in reconciling individual rights with the principle of mutual trust. Here as well, the question was whether a fundamental rights exception could be read into the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (the "(EAW) Framework Decision").[25] Under the Framework Decision, Member States were expected to surrender prisoners to countries with appalling prison conditions – amounting to inhuman and degrading treatment under the ECHR.[26] Initially the interpretation of the CJEU was aligned to the ECtHR; the CJEU held that the surrender may be postponed if there was a real risk of inhuman and degrading treatment because of deficient detention conditions in the requesting Member State.[27] More recently however the CJEU has departed from this approach. The recent case of *Puig Gordi and Others* concerned an envisaged transfer from Belgium to Spain of a person who would have been subject to a real risk of infringement of the right to a fair trial on account of being tried by a court lacking jurisdiction for that purpose.[28] The CJEU laid out a two-step approach for domestic courts. First, the courts in the executing jurisdiction must "carry out an overall assessment of the operation of the judicial system of the issuing Member State [in the light of the requirement for a tribunal established by law"[29] Second, they must determine "to what extent the deficiencies identified in the first step […] are liable to have an impact on the proceedings to which the person for whom a European arrest warrant has been issued […]."[30] It was accepted that this test did not go against the individualised review of the ECtHR.[31] However, Callewaert emphasised that such an approach opens the door in favour of mutual trust and against an individualised assessment which would in turn directly conflict with the ECtHR's case law.[32]

Overall, within the EU, the principle of mutual trust has been perceived as contrary to a more individualised approach to human rights considerations. Both Dublin III and EAW cases concern interim proceedings where

24 CJEU 6 June 2013, C-648/11, ECLI:EU:C:2013:367 (The Queen on the application of MA, BT, DA v. Secretary of State for the Home Department).
25 Official Journal L 190, 18 July 2002 P. 0001 – 0020.
26 Glas/Krommendijk 2017, p. 9, referring, among others, to CJEU 5 April 2016, Joined Cases C-404/15 and C-659/15 ECLI:EU:C:2016:198 (Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen).
27 CJEU 5 April 2016, Joined Cases C-404/15 and C-659/15 ECLI:EU:C:2016:198 (Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen), para 94.
28 CJEU 31 January 2023, Case C-158/21 ECLI:EU:C:2023:57 (Puig Gordi and Others), para 103.
29 CJEU 31 January 2023, Case C-158/21 ECLI:EU:C:2023:57 (Puig Gordi and Others), para 103.
30 CJEU 31 January 2023, Case C-158/21 ECLI:EU:C:2023:57 (Puig Gordi and Others), para 106.
31 Callewaert 2023, p. 346.
32 Callewaert 2023, p. 346.

the state of presence should not -in principle- carry out human rights checks of the state where the person should be sent to. These cases expose the tensions between the systems-oriented approach of the CJEU and the person-oriented approach of the ECtHR; the two Courts employ different methodologies, yet commentators argued that until now their positions are not incompatible as such.[33] In respect of both the EAW and Dublin transfers the CJEU has accepted that states may refuse the execution on the ground of fundamental rights. However, the threshold for refusal was set at a high level, requiring both the assessment of systemic flaws and their impact on the individual situation.

### 9.2.2 The interaction with EU law and the CJEU from the perspective of the ECtHR

Since the Union is not a party to the ECHR, the Strasbourg Court has no jurisdiction to review the compatibility of acts of the EU institutions with the ECHR.[34] The situation is different when complaints concern the Member States' implementation or application of EU acts. Such complaints have been lodged with the Strasbourg Court as early as 1987.[35] The ECtHR's position has been crystallised in the landmark case of *Bosphorus v. Ireland*.[36] This case has cemented the *Bosphorus* doctrine under which a state's action taken in compliance with its international obligations is justified under the ECHR to the extent that such international organisation offers equivalent protection of fundamental rights.[37] There is thus a rebuttable presumption of equivalent protection in such cases.[38] The presumption of equivalent protection applies only to the extent the state has no discretion in implementing legal obligations resulting from its membership to an international organisation.[39]

The ECtHR retains competence to verify in each individual case if the protection existed or whether it was manifestly deficient.[40] In the *Bosphorus case* the ECtHR found that the EU -as an international organisation- was

33 Callewaert 2023, p. 345.

34 ECtHR 10 July 1978, no. 8030/77 (*Confédération Française Démocratique du Travail v. the European Communities, alternatively: their Member States a) jointly and b) severally(dec)).*

35 *Etienne Tete v. France*, no. 11123/84, decision of 9 December 1987; For an overview of the ECtHR's case law with respect to the EU see the ECtHR's research report, available at <http://www.echr.coe.int/NR/rdonlyres/EA6F3298-FE75-48E7-B8A7-F9C5FF5EB710/0/FICHES_Union_Europeenne_EN.pdf>, accessed on 10 April 2013.

36 ECtHR 30 June 2005, no. 45036/98 (*Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*).

37 ECtHR 30 June 2005, no. 45036/98 (*Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*), para 155.

38 ECtHR 30 June 2005, no. 45036/98 (*Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*), para 156.

39 ECtHR 30 June 2005, no. 45036/98 (*Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*), paras 156, 158.

40 ECtHR 30 June 2005, no. 45036/98 (*Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*), para 156.

capable of offering equivalent protection of fundamental rights both in light of the substantive and procedural guarantees it offered.[41] On the procedural side, the ECtHR held that the EU system of judicial remedies, even if indirect, amounted to an equivalent protection of fundamental rights.

The *Bosphorus* judgement is important in several respects. First, it applies only to actions of the Member States where no discretion was available as to the implementation thereof.[42] Conversely, where the Member States retain a certain discretion in implementing EU law, they shall remain fully responsible for their actions before the Strasbourg Court.[43] Second, the ECtHR retains the power to review on a case-by-case basis whether the EU provides equivalent protection of fundamental rights. Therefore, if the EU will be found to not have offered equivalent protection in a specific case, the Strasbourg Court will address the substance of the complaint. Such rebuttal will only occur if the ECtHR finds that the protection was 'manifestly deficient in the particular case'.[44]

The *Bosphorus* doctrine remains in force today; the ECtHR has applied it in a handful of subsequent cases, one also concerning child abduction.[45] The same deferential stance was maintained in the case of *Avotins v. Latvia* where the ECtHR's Grand Chamber considered that the enforcement of a debt in Latvia based on a Cypriot judgement complied with Article 6 ECHR, as the Latvian courts had no discretion to refuse the recognition.[46] Here, the Court focused on the applicant's conduct of not raising a certain defence domestically and not requesting a preliminary reference on the matter from the CJEU.[47] It is also important to note that the ECtHR will assess on a case-by-case basis if an applicant had requested domestic courts to file preliminary references to the CJEU; there is a likelihood of an Article 6(1) ECHR infringement if such references had not been filed and the issue in question had never been closely examined by the CJEU.[48]

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41 ECtHR 30 June 2005, no. 45036/98 (*Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*), para 159.

42 Where the Member States had discretion in implementing EU law or in entering into an agreement, the ECtHR reviewed closer such actions. See ECtHR 15 November 1996, no. 17862/91 (*Cantoni v. France*); ECtHR 18 February 1999 no. 24833/94 (*Matthews v. The United Kingdom)*, and more recently ECtHR 6 December 2012, no 12323/11 (*Michaud v. France)*.

43 ECtHR 6 December 2012, no 12323/11 (*Michaud v. France)*, paras 113 and 115.

44 In the case of *Michaud v. France (*ECtHR 6 December 2012, no 12323/11 (*Michaud v. France))*, the ECtHR rebutted the presumption of equivalent protection. On the facts of that specific case it held that the Conseil D'Etat had refused to refer the question to the CJEU for a preliminary ruling and that there was no judgement of the CJEU rendered on the matter.

45 See for example, ECtHR 10 October 2006, 16931/04 (Cooperative des agriculteurs de Mayenne and Cooperative Laitière Maine-Anjou v. France (Dec)); ECtHR 20 January 2009, no. 13645/05 (*Cooperatieve Producentenorganisatie Van De Nederlandse Kokkelvisserij U.A. v. The Netherlands*); ECtHR 18 June 2013, no 3890/11 (*Povse v. Austria* (Dec)).

46 ECtHR 23 May 2016, no. 17502/07 (*Avotins v. Latvia*).

47 ECtHR 23 May 2016, no. 17502/07 (*Avotins v. Latvia*), para 111.

48 ECtHR 23 May 2016, no. 17502/07 (*Avotins v. Latvia*), para 111; ECtHR 6 December 2012, no 12323/11 (*Michaud v. France)*.

Conversely, in cases where Member States have discretion in implementing EU law, the ECtHR will assess if such discretion has been applied in a manner compatible with the ECHR.

In cases involving transfers pursuant to the Dublin III Regulation it has found infringements of Article 3 on the ground that Member States should not have simply assumed that applicants will be treated in accordance with the Convention standard, they should have verified how the respective Member State applied the legislation asylum in practice.[49]

The case of *Bivolaru and Moldovan v. France* is the first where the ECtHR, after applying the Bosphorus doctrine, found that human rights protection in the requesting country was manifestly deficient.[50] The case concerned the execution and transfer of prisoners from France to Romania in furtherance of the EAW. Under the Court's case law a risk of inhuman and degrading treatment to the person whose surrender is sought constitutes a legitimate ground for refusing the execution of a European Arrest Warrant (the "EAW").[51] Here, the ECtHR found that the French authorities had no discretion in implementing the EAW given that the parameters for implementation had been strictly delineated by the CJEU, and that the latter had sufficiently established case law in the matter.[52] On the facts of the first case (Moldovan), the Court criticised the French Courts for overreliance on stereotypical and insufficient declarations of the Romanian authorities; the Court considered established (on the basis of its own previous case law) that the prison conditions in Romania exposed the applicant to a real risk of inhuman and degrading treatment.[53] In the case of Bivolaru, the ECtHR assessed whether the execution of the arrest warrant was in contradiction with the non-refoulement obligation under the Geneva Convention.[54] The Court considered it is not competent to assess whether the grant of refugee status in one Member State confers the same rights in all Member States.[55] It then considered that the EAW framework decision does not provide for a ground of non-execution based on refugee status.[56] The Court considered acceptable that the French authorities would review the grant of refugee status by the Swedish authorities and it paid particular attention to the time which had elapsed between the grant of the refugee status and the execution of the EAW.[57] Overall it found that the French authorities did not have

49 ECtHR 21 January 2011, no. 30696/09 (*M.S.S. v. Belgium and Greece* [GC]); ECtHR 4 November 2014, no. 29217/12 (*Tarakhel v. Switzerland)*.

50 ECtHR 25 March 2021 nos 40324/16 and 12623/17, (*Bivolaru and Moldovan v. France)*, para 126.

51 ECtHR 9 July 2019, no. 8351/17, *(Romeo Castaño v. Belgium*), paras 82-91.

52 ECtHR 25 March 2021 nos 40324/16 and 12623/17, (*Bivolaru and Moldovan v. France)*, paras 114 and 115.

53 ECtHR 25 March 2021 nos 40324/16 and 12623/17, (*Bivolaru and Moldovan v. France)*, paras 126.

54 ECtHR 25 March 2021 nos 40324/16 and 12623/17, (*Bivolaru and Moldovan v. France)*, para 134.

55 ECtHR 25 March 2021 nos 40324/16 and 12623/17, (*Bivolaru and Moldovan v. France)*, para 135.

56 ECtHR 25 March 2021 nos 40324/16 and 12623/17, (*Bivolaru and Moldovan v. France)*, para 136.

57 ECtHR 25 March 2021 nos 40324/16 and 12623/17, (*Bivolaru and Moldovan v. France)*, paras 137-141.

before them "a sufficiently sound factual basis on which to find a real risk of breach of Article 3 of the Convention and to refuse to execute the EAW on that ground."[58]

The approach of the ECtHR is to be contrasted to that of the CJEU in that the former assesses on a case by case basis whether applicants are exposed to a real risk of inhuman or degrading treatment in the country of return. However, under its established *Bosphorus* doctrine the ECtHR presumes that the EU Member States offer an equivalent protection. This presumption applies only where Member States retain no discretion in implementing EU law. The ECtHR has held to date that the presumption of equivalent protection has been rebutted both in Dublin III transfers and EAW cases on account of systemic deficiencies in the countries of return – documented through sources such as reports of NGOs or other human rights organisations.

## 9.3 The relationship between the CJEU and the ECtHR in child abduction cases

It has become evident that the principle of mutual trust underpinning the area of freedom, security and justice has been a significant source of friction between the two Courts. Together with the Dublin system and the EAW, child abduction falls within the same area of EU competence, and unsurprisingly tensions between the two Courts have been noted in this field as well.[59] This section addresses the interaction between the two Courts in child abduction cases, first from the perspective of the CJEU and subsequently from the perspective of the ECtHR.

So far, the CJEU's references to either the Strasbourg Court or the Human Rights Convention have been scarce. One such reference can be found in the case of *J.McB. v. L.E.* where the CJEU relied on the ECtHR case law on Article 8 to support its findings that the attribution of parental responsibilities remained within the competence of Member States.[60] The question in that case was whether the attribution of parental responsibilities in national law which did not allow unmarried fathers to automatically gain custody over children was contrary to the father's right to family life under Articles 7 and 24 of the EU Charter. In the other case, the CJEU relied on the ECtHR's case law to call for the speedy implementation of return orders.[61] This case concerned an extrajudicial possibility of suspending the enforcement of a return order. In both judgments the CJEU's interaction with the Strasbourg Court was rather cursory and as highlighted, principally used to support its own findings.

58 ECtHR 25 March 2021 nos 40324/16 and 12623/17, (*Bivolaru and Moldovan v. France)*, para 141.
59 Walker/Beaumont 2011; Silberman 2010; Lamont 2019.
60 CJEU 5 October 2010, C-400/10 PPU, ECLI:EU:C:2010:582 (J.McB./L.E), para 54.
61 CJEU 16 February 2023, C-638/22, ECLI:EU:C:2023:103 (T.C.), para 77.

On the other hand, in its extensive child abduction jurisprudence, the ECtHR has relied on many occasions on the Brussels II *bis* Regulation and on the case law of the CJEU.[62] It should be recalled that under the TFEU, the Brussels II *bis* Regulation (now repealed) became a part of Member States' domestic law. Similarly to the Hague Convention, the ECtHR has interpreted Article 8 ECHR in light of the Brussels II *bis* Regulation.[63] For example, the ECtHR has relied on the provisions of the Regulation to find that failure to hear the left-behind parent as required by the Regulation amounted to an infringement of Article 8 ECHR.[64] The same approach was adopted when it came to complaints about the length of the abduction proceedings: the text of the Regulation served as a basis for finding an infringement of Article 8 ECHR.[65]

The ECtHR has also relied on the CJEU's case law to find infringements of Article 8 for lack of domestic courts compliance with such case law. *Michnea v. Romania*, discussed in the preceding Chapter of this dissertation, is a case in point.[66] Here the ECtHR analysed carefully how the Romanian courts had applied the CJEU case of *Mercredi v. Chaffe*, and ultimately found a violation of Article 8 ECHR on the ground of incorrect application by the domestic courts. The ECtHR has also relied on the EU principle of mutual trust to support its findings that deference to the authorities in the country of habitual residence was necessary and called for by EU law.[67] Thus, in this line of case law, the ECtHR bolstered the uniform application of Union law.

However, in its assessment of EU law the ECtHR has reached a different conclusion to the CJEU: that mutual trust does not call for a blind deferral to the authorities in the country of habitual residence. For example, in the case of *O.C.I. v. Romania* which involved allegations of violence against the children, the Strasbourg Court considered that "the existence of mutual trust between child protection authorities does not mean that the State to which children have been wrongfully removed is obliged to send them back to an environment where they will incur a grave risk of domestic violence solely because the authorities in the State in which the child had its habitual

62 ECtHR 1 February 2011, no. 23205/08 (*Karoussiotis v. Portugal)*; ECtHR 12 July 2011 no. 14737/09 (*Šneersone and Kampanella v. Italy*); ECtHR 26 July 2011, no. 6457/09 (*Shaw v. Hungary*); ECtHR 21 February 2012, no. 16965/10 (*Karrer v. Romania)*; ECtHR 18 June 2013, no 3890/11 (*Povse v. Austria* (Dec)); ECtHR 15 January 2015, no 4097/13 (M.A. v. Austria); ECtHR14 January 2020, no. 10926/09 (*Rinau v. Lithuania*); ECtHR 7 July 2020, no 10395/19 (*Michnea v. Romania*); ECtHR 21 May 2019, no. 49450/17 (*O.C.I. v. Romania)*; ECtHR 7 February 2023, no. 39298/20 (*Ciocirlan v. Romania* (dec)).

63 ECtHR 26 July 2011, no. 6457/09 (*Shaw v. Hungary*), para 70.

64 ECtHR 21 February 2012, no. 16965/10 (*Karrer v. Romania),* para 55.

65 ECtHR 26 July 2011, no. 6457/09 (*Shaw v. Hungary*), paras 71, 76.

66 See Section 8.2.1.3. above; ECtHR 7 July 2020, no 10395/19 (*Michnea v. Romania*).

67 ECtHR 7 February 2023, no. 39298/20 (*Ciocirlan v. Romania* (dec)).

residence are capable of dealing with cases of domestic child abuse."[68] In this case, the children had suffered occasional acts of violence at the hands of their father. The domestic courts had ordered their return nevertheless on the ground that the violence was not 'grave' enough, that it would not reoccur and that the Italian authorities would protect them against potential violence.[69] No evidence or assurances had been sought on the actual protection measures upon return. Here, it is evident that the ECtHR required a more individualised assessment of the risks upon return.

The ECtHR was also seized in highly controversial proceedings regarding the former Article 11(8) of the Brussels II *bis* Regulation. It should be recalled that under this Article the authorities of the country of habitual residence could override a judgement of non-return under Article 13(b) HC and secure the return of the child to the state of habitual residence.[70] Such situations expose different views of two jurisdictions: on the one hand the courts in the country of refuge have found that the child would be exposed to a grave risk of harm if returned. On the other hand, the authorities in the country of habitual residence, after having considered the reasoning under Article 13(b) HC may nevertheless find that such risk will not materialise and order the return nevertheless. These proceedings gave in practice a final say over return to the authorities in the child's country of habitual residence. Under the Regulation, these authorities should carefully consider the allegations of grave risk of harm, and take into account the rights of the child. However, as demonstrated by case law this has not always happened.[71]

From the perspective of the Strasbourg Court the outcome is different depending on the State party against which the application is filed. When the complaint was filed against the state of habitual residence that had issued the enforcement certificate in disregard of previous a non-return in the country of the child's presence, the ECtHR was not restricted by its own *Bosphorus* doctrine.[72] In such situations, the authorities have full discretion in issuing an overriding order and, in addition, they have to comply with the requirements of Article 42 of the Regulation.[73] In the case of Šneersone

68 ECtHR 21 May 2019, no. 49450/17 (*O.C.I. v. Romania)*, para 45.

69 ECtHR 21 May 2019, no. 49450/17 (*O.C.I. v. Romania)*, paras 42-46.

70 In this sense see also Chapter VII, Section 7.4.1. above.

71 CJEU 22 December 2010, C-491/10 PPU, ECLI:EU:C:2010:828 (Aguirre Zarraga/Pelz); See also Beaumont/Walker/Holliday 2016.

72 The ECtHR has dealt with this situation in the case of *Šneersone and Kampanella v. Italy*, no. 14737/09, judgement of 12 July 2011.

73 As per Article 42 of the Regulation, These conditions are: (a) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity; (b) the parties were given an opportunity to be heard; and (c) the court has taken into account in issuing its judgment the reasons for and evidence underlying the order issued pursuant to Article 13 of the 1980 Hague Convention.

and Kampanella v. Italy, while fully endorsing the provisions of the Regulation, the ECtHR had criticised the Italian authorities for failing to properly take into account the risks to the child and his situation upon return.[74] Relying on the provisions of the Regulation which enable the protection of children upon return, the ECtHR criticised the Italian authorities for their failure to implement such protection in practice. In other words, the ECtHR found a violation of Article 8 ECHR on the ground that the domestic courts had not complied with Article 42 of the Brussels II *bis* Regulation.

Conversely, when the application was directed against the authorities of the country of refuge which, under the Brussels II *bis* Regulation had no discretion and they had to enforce the return order, the *Bosphorus* doctrine substantially limited the ECtHR's scope of review. This has happened in the case of *Povse v. Austria* where the applicants had complained that the Austrian authorities had limited themselves to ordering the enforcement without examining the well-being of the child.[75] On the merits, this case equally touched upon the issue of separation of the child from the primary carer and domestic violence. After accepting that the Bosphorus doctrine was applicable, the ECtHR could not deal with the merits of the allegation. Importantly, the Court indicated that the applicants could have claimed a violation of their rights before the Italian Courts.

## 9.4 Conclusion: children's rights and the intersection between the CJEU and ECtHR in child abduction cases

Commentators have highlighted the fundamentally different approaches of the CJEU and the ECtHR to child abduction cases and the ensuing difficulty for national domestic courts in consistently applying their case law.[76] On the one hand, the CJEU has focused on mutual trust to the detriment of any individualised assessment of children's rights. On the other hand, the ECtHR's requirement that courts consider all arguable allegations of grave risk is clearly favouring a case-by-case review of the situation in the country of habitual residence and the actual risk of harm which the child may be incurring. Indeed, these approaches to the resolution of child abduction cases are different, however -it is argued here- they are not irreconcilable. Rather, the two Courts are offering complementary protection which could in turn contribute to a more robust protection of the rights of children across the EU Member States.

For a better understanding of the European supranational Courts' child abduction case law, this Chapter has proceeded by outlining their interac-

74 ECtHR 12 July 2011 no. 14737/09 (*Šneersone and Kampanella v. Italy*), paras 93-98.
75 ECtHR 18 June 2013, no 3890/11 (*Povse v. Austria* (Dec), para 57.
76 Walker/Beaumont 2011; Lamont 2019, Silberman 2010.

tion in general as well as situations which have or continue to generate debates concerning potential conflicts. Their respective competences and type of decision-making have been discussed in the previous chapters. The comparison drawn in this chapter does not assume that their adjudicative powers are identical. Rather, the approach taken here is that of assessing subject matters over which both Courts have jurisdiction and inquiring whether the competence of these two Courts has led to tensions, or whether their approach could be reconciled or reinforced in light of their different roles.

It has been shown that the EU area of freedom, security, and justice, which encompasses the Dublin transfers, the European Arrest Warrant and child abduction has given rise to substantial tension between the two Courts. Mutual trust, and specifically the balance between mutual trust and fundamental rights has been the main source of division and it has equally been highlighted by the CJEU in its rejection of the EU's accession to the ECHR.[77] Indeed, within the EU, mutual trust requires a presumption that fundamental rights are observed in the country of return whereas this may not always reflect the reality.

However, as the Dublin and the EAW cases show, so far both Courts have succeeded in reconciling their case law. Arguably under the influence of the ECtHR, the CJEU has adjusted its case law and it now accepts that Member States may consider the individual circumstances of the person subject to the transfer.[78] The CJEU has adopted a similar position to the EAW cases. The latest CJEU judgement may arguably have set too high of a threshold for a human rights review, in that the CJEU has imposed a duty for Member States to first assess the deficiencies of a system as a whole before any individualised review of the human rights at stake. However, the interaction of the two supranational Courts through their case law is in continuous flux and it remains to be seen how the balance between mutual trust and human rights will be struck in subsequent decisions.

Child abduction should also be analysed in light of the Courts' broader mandate and their interaction in the other two fields mentioned above. As highlighted by Bartolini, the EU rules on child abduction, at least until the entry into force of the Brussels II *ter* Regulation, did not allow for any derogation from the principle of mutual trust.[79] This was the result of the automatic application of the Article 42 certificate of the Brussels II *bis* Regulation. Be that as it may, it does not follow that the Regulation, and the ensuing CJEU case law were contrary to the ECtHR. Rather, the two Courts complemented each other with the ECtHR ensuring that the Brussels II *bis*- as it then was- could be applied in accordance with the rights of the children.

77 CJEU 18 December 2014 Advisory Opinion 2/2013 ECLI:EU:C:2014:2454, para 191.

78 CJEU 16 February 2017, C-578/16 PPU, ECLI:EU:T:2017:590 (C.K. and Others v. Republika Slovenija).

79 Bartolini 2019, p. 101.

The case of *Zarraga* offers a good illustration of the complementarity between the two Courts. First, it should be recalled that in this case the Spanish authorities had issued an overriding return order in breach of Article 42 of the Brussels II *bis* Regulation, and this certificate had to be enforced in Germany. The German courts considered that the enforcement would be against the child's right to be heard. The CJEU did not read any exception in the text of the Regulation which would have allowed the German authorities not to enforce the Article 42 certificate. It was solely for the Spanish authorities to withdraw such certificate, their failure to do so did not have any consequences towards their German counterparts.

It is herein argued that the commentaries to the case of *Zarraga* have so far failed to place this case in the systemic context of the two European supranational Courts. From the perspective of the system, it was not the German authorities, but rather the ECtHR which could have remedied the 'defect' of the overriding return order issued in Spain. In other words, a complaint of the child (represented by the taking parent) to the ECtHR that the issuing of the certificate was in breach of their right to be heard under Article 8 and 6 of the ECHR, would have given this Court the possibility of assessing the compliance with the individual rights of the child by the Spanish authorities.[80] Such a complaint would have focused on the failures of the Spanish authorities that had discretion in issuing the certificate and not on the German authorities that had to enforce the overriding return order and consequently lacked discretion within the meaning of the *Bosphorus* doctrine. In other similar cases raising issues under the Regulation, the ECtHR has shown a clear willingness to interpret the provisions of Article 8 in the light of the Brussels II *bis* Regulation.[81] Thus, the ECtHR has found breaches of Article 8 ECHR on the ground that the domestic authorities had not heard the left-behind parent as required under the Brussels II bis Regulation.[82] In a similar case, where the Italian authorities had issued an overriding certificate without duly taking into account the situation of the child, the ECtHR has found an infringement of Article 8 of the Convention.[83] The case of *Povse v. Austria* which was ultimately declared inadmissible is also indicative of the ECtHR willingness to contribute to the proper application of the Brussels II *bis* Regulation. Here the applicant complained against Austria which had to enforce the overriding return order and hence

80 It should equally be noted that under Rule 39 of the Rules of Court applicants have the possibility to request the suspension of domestic proceedings until the ECtHR has issued a judgement in the matter. The ECtHR has already applied Rule 39 in child abduction cases. See for example, ECtHR 6 July 2010, no. 41615/07 *(Neulinger and Shuruk v. Switzerland (GC)*); ECtHR10 July 2012, 4320/11 (*B. v. Belgium*).

81 ECtHR 21 February 2012, no. 16965/10 (*Karrer v. Romania)*; ECtHR 7 July 2020, no 10395/19 (*Michnea v. Romania*); ECtHR 12 July 2011 no. 14737/09 (*Šneersone and Kampanella v. Italy*).

82 ECtHR 21 February 2012, no. 16965/10 (*Karrer v. Romania).*

83 ECtHR 12 July 2011 no. 14737/09 (*Šneersone and Kampanella v. Italy*).

had no discretion within the meaning of the *Bosphorus* doctrine. The ECtHR even indicated that the applicants should have filed the complaint against the Italian authorities, and should that have been the case, the ECtHR could have reviewed on human rights grounds the overriding return order.[84]

In light of the overview above, it is herein concluded that the two Courts approach the rights of children in different ways. Taken together, they have the potential of contributing to a more robust application of children's rights across the European Union.[85] With respect to the rights of children, the CJEU has focused on mutual trust and on the return of the children to their country of habitual residence. Within the EU, the Brussels II *ter* Regulation has laid down the right of children to be heard in child abduction proceedings and it has included direct references to the CRC – aspects which can have an important impact on further embedding the rights of children at legislative level across the Union. However, the CJEU has been reluctant to read into the text of the Regulation exceptions which would allow for an individualised assessment of children 's rights. Nevertheless, the ECtHR has this possibility, provided that children and parents bring applications before this court. The ECtHR has shown its willingness to incorporate the guarantees of the Brussels II *bis* Regulation into the text of Article 8 of the ECtHR and to further check on a case-by-case basis whether domestic courts are applying this Regulation in accordance with human rights.

84 ECtHR 18 June 2013, no 3890/11 (*Povse v. Austria* (Dec)), para 86.

85 It should be clarified that these conclusions solely apply to countries being simultaneously bound by the Brussels II *ter* Regulation and the ECtHR, meaning all the countries of the European Union with the exception of Denmark. In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the TEU and to the TFEU, Denmark is not taking part in the adoption of the Brussels II ter Regulation.

# 10 The Impact of the European Supranational Architecture on Primary Carer Abductions with Immigration Components

## 10.1 Introduction

This dissertation has argued that context is important in adjudicating child abduction applications. Human rights violations stemming from other branches of law may and should play a role in the decision. Similarly, obstacles to return affecting a taking parent can be important when adopting a child rights-based approach to the return mechanism. In practice, the cross border element inherent in child abduction applications renders difficult the assessment of context by domestic courts. This is because such an assessment should be carried out by reference to the laws in a different legal system, and not in relation to the laws in that country. Moreover, whenever it comes to migration matters, potential conflicts exist between different branches of law, *in casu*: between family and immigration laws. The best interests of the child and other rights of children are evaluated differently in family and immigration laws and the lack of coordination impacts on the rights of children. Notwithstanding these difficulties, it was argued in the preliminary conclusions that such an assessment is necessary whenever there is a demonstrated relationship of care between the child and the taking parent, and there are arguable allegations that the child's return will result in the separation of the child from their primary carer.

Against this background, in the preliminary conclusions it was further argued that the Child Abduction Convention can only function optimally where there is a minimum level of fundamental rights protection in the country of habitual residence.

This Chapter considers the role of the European supranational Courts in creating the optimal context for the functioning of the Child Abduction Convention. As outlined in Sections 7.2 and 8.2 respectively, both Courts are competent to lay down (minimum) standards of human rights protection. They are competent to decide child abduction cases as well as immigration-related cases. Therefore, through their case law they can arguably offset the power imbalances created by immigration laws and consequently contribute to the fairness of the proceedings for children and parents with an immigration background. Section 10.2 of this dissertation assesses whether the case law of the Strasbourg and Luxembourg Courts has indeed contributed to offsetting the power imbalances mentioned above. The cases analysed concerned the separation of parents where at least one of them had a precarious immigration status. In practice, such cases could arguably arise

before a child abduction court.[1] The question here is: How have the two European supranational Courts addressed the best interests of the child and the right to maintain contact with both parents in cases involving precarious immigration status of separated primary carers?

This sub-research question exclusively addresses the case law of the European supranational Courts in the migration sphere. It does not deal with (academic) discussions around the suitability of this case law from a migration perspective, or with other policy objectives. The aim is to determine the minimum standards within the European Union as distilled from the two Courts case law and in areas which are of direct relevance for child abduction courts. For this reason, the analysis is based extensively on the case law and, where available, on documents submitted to the Courts for adjudication. Academic writings in this field have been assessed only to the extent strictly necessary for the subject matter.

Section 10.3 addresses the concerns raised by refugee considerations brought within child abduction proceedings, from the perspective of refugee law. Such considerations have equally exposed the issue of parent child separation and the capacity of the country of habitual residence to protect the child. The question of the capacity of the system to protect the child is even stronger in these cases in light of the definition of the term refugee in the Geneva Convention as a person who is unable or unwilling due to a legitimate fear of persecution to avail himself of the protection of the country of habitual residence. These cases expose a potential conflict in assessments between immigration and family courts within the same jurisdiction. This conflict may equally result in the separation of the child from their primary carer. The case law of the two supranational Courts in refugee matters is relevant for domestic courts deciding child abduction cases. This is because of these Courts' constitutional function within Europe. In other words, national family courts within the European Union/Council of Europe are bound to follow all the case law, including the case law concerning refugee matters, of the two European supranational Courts. Hence, Section 10.3 answers the following question: How should child abduction cases with refugee components be considered in the light of the case law of the CJEU and ECtHR?

Similarly to Section 10.2, given its factual nature, the answer to this sub-research question is provided by relying mainly on primary sources of law, namely the relevant EU laws and the case law of the CJEU and of the ECtHR. Whenever EU laws allow for the discretion of Member States, some examples of how they have legislated within the discretionary sphere are provided.

It should be further noted that the case law of the CJEU and ECtHR is analysed from the perspective of minimum standards of protection.

1 Cases with immigration components where an immigration-based defence was brought post-abduction were discussed in Section 5.6 of this dissertation. The cases analysed in Section 10.2 reveal the same pattern, albeit pre-abduction.

Children's rights could inform the principle of non-refoulement itself and indeed the CRC Committee has shown its willingness to contribute to such an interpretation.[2]

## 10.2 The European supranational Courts and the best interests of children from separated parents in immigration proceedings

Within the European Union, both the CJEU and the ECtHR have dealt with the child's right to have contact with both parents and best interests in separated mixed-status families. The sections below address their approaches first from the perspective of the CJEU and subsequently from the perspective of the ECtHR.

### 10.2.1 Children of separated parents in the case law of the CJEU

Over time, the CJEU has developed an extensive body of case law on the relationship between children and parents and the impact of such a relationship on residence rights within the Union. This case law has been primarily driven (i) by the principle of the freedom of movement and (ii) by the developing notion of EU citizenship.[3] Against this background, and as it shall be elaborated upon herein, it is important to note that the extent of residence rights of a parent depends largely on whether the child is an EU national.

The CJEU's analysis of EU citizen children's rights started from their status as right- holders whose rights of residence should not be deprived of a useful effect.[4] This approach has enabled the CJEU to rule that denying residence rights to parents who are the primary carers of EU citizen children would deprive the child's right of residence of any useful effect.[5] In other words, if the parent who takes care of the child cannot legally remain in the Union, their departure would result in the EU citizen child also having to leave due to their dependence. Consequently, the CJEU has ruled that EU states must allow third country national (TCN) parents to derive residence rights from their EU citizen children.[6] This obligation has been conditioned on the requirement that the child (through the parents) has sufficient resources not to become a burden on the social security system of the host

2 CRC Committee 4 February 2021, no. 83.2019 (R.H.M. on behalf of Y.A.M. v. Denmark).

3 Lonardo 2022, p.603; Dal Pozzo 2013.

4 CJEU 19 October 2004, C-20/02 ECLI:EU:C:2004:639 (Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department), para 45. In the same case (para 20) the CJEU has expressly positioned children as holders of rights guaranteed by the Treaties "which cannot be made conditional on the attainment […] of the age prescribed for the acquisition of legal capacity to exercise those rights.

5 CJEU 19 October 2004, C-20/02 ECLI:EU:C:2004:639 (Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department), para 45.

6 CJEU 19 October 2004, C-20/02 ECLI:EU:C:2004:639 (Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department), para 45.

Member State.[7] However, Member States are under a duty to grant TCN parents the right to work so as to enable the children to genuinely enjoy the substance of their rights conferred by the status as citizens of the Union.[8] This flows from the fact that a residence right without a right to work, will inevitably lead to the parent(s) not having sufficient resources necessary under the relevant EU law.

The assessment of dependency in the parent-child relations has proven of particular importance. The CJEU's case law indicates that even where only the child is an EU citizen, primary carer parents who prove the child's dependence on them should be able in certain conditions to derive residence rights from their child.[9]

However, until 2017 Member States interpreted narrowly the notion of dependency. This impacted significantly on separated mixed-status families. For example, in the Netherlands, official guidelines of the Secretary of State for Security and Justice required that except when the EU national parent was in detention or could not be awarded custody, the immigration authorities were to assume that the child could remain in The Netherlands.[10] In other words, separated third country national parents who were their children's primary carers could not derive residence rights on the basis of their children.

Against this background, the Higher Administrative Court of the Netherlands submitted a preliminary reference, registered as the *Chavez-Vilchez* case.[11] Domestically the case concerned the eligibility for child benefits and income support of eight separated mothers whose claims for residence rights had been rejected by the national immigration authorities.[12] All mothers exercised primary physical custody and shared parental responsibilities with the fathers who were either absent or minimally involved in the children's lives. For the Dutch government, the presence of another parent in the territory of the Union was a justification for enabling the

7 CJEU 19 October 2004, C-20/02 ECLI:EU:C:2004:639 (Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department). See also Article 21 TFEU in conjunction with Article 7 Citizens Directive.

8 CJEU 8 March 2011, C-34/09 ECLI:EU:C:2011:124 (Gerardo Ruiz Zambrano/Office national de l'emploi), para 42.

9 CJEU 15 November 2011, C-256/11, ECLI:EU:C:2011:734 (Murat Dereci and Others/Bundesministerium für Inneres), paras 65 to 67; CJEU 6 December 2012, C-356/11, ECLI:EU:C:2012:776 (O and S v. Maahanmuuttovirasto and Maahanmuuttovirasto /L), para 56; CJEU 8 November 2012, C-40/11, ECLI:EU:C:2012:691 (Yoshikazu Iida/Stadt Ulm), para 71 (obligation of the child to leave the territory of the EU).

10 CJEU 10 May 2017, C-133/15, ECLI:EU:C:2017:354 (H.C. Chavez-Vilchez and Others v. Raad van bestuur van de Sociale verzekeringsbank and Others), para 10.

11 CJEU 10 May 2017, C-133/15, ECLI:EU:C:2017:354 (H.C. Chavez-Vilchez and Others v. Raad van bestuur van de Sociale verzekeringsbank and Others).

12 Klaassen, The right of residence for non-EU parents of EU citizen children: the Chavez-Vilchez case, 12 May 2017, Leiden Law Blog.

expulsion of the primary carers from the Netherlands.[13] In other words, the right to have contact with both parents was not a factor to be considered in immigration proceedings. As evidenced in their observations to the CJEU, Denmark, Belgium and The United Kingdom- then still a Member State of the European Union-, equally supported the approach that an EU citizen child of separated EU national and non-EU national parents had no obstacle in remaining in the European Union. In their submissions this was the optimal solution whenever one parent, regardless of the actual relationship with the child, still resided within the European Union and could theoretically assume the care of that child.[14] They attached no relevance to the actual relationship between the child and the non-EU national parent who could be expelled simply because the child had another EU national parent. Quite on the contrary, as the Belgian Government contended, the existence of joint legal parental responsibilities required that domestic authorities pay no attention to the practical circumstances of the child, and of who cared for the respective child.[15] For the government of The United Kingdom, it was the responsibility of the EU citizen parent to take care of the child, and only if that parent had abused the child, or was incapable physically or mentally to assume care, would EU law become applicable in relation to the primary carer parent.[16] Of importance to the present dissertation, it should be stressed that any removal by these parents of their children outside the jurisdiction would have amounted to child abduction, given that in all cases, the parents exercised joint parental responsibilities. This is yet another illustration of the realities for children of mixed migration status discussed in Chapter 5 above.

In its judgement of 10 May 2017, the CJEU elaborated on the right of the child to have contact with both parents in the context of immigration law. The Court stressed that in the assessment of dependency the domestic authorities were to take into account the right to respect for family life and the child's best interests (Articles 7 and 24(2) respectively of the Charter). The Court refuted the Dutch Government's submission which was supported by the other governments mentioned above. For the CJEU, the existence of another parent willing and able to take care of the child was

13 CJEU 10 May 2017, C-133/15, ECLI:EU:C:2017:354 (H.C. Chavez-Vilchez and Others v. Raad van bestuur van de Sociale verzekeringsbank and Others), para 66.

14 As per their observations in the case CJEU 10 May 2017, C-133/15, ECLI:EU:C:2017:354 (H.C. Chavez-Vilchez and Others v. Raad van bestuur van de Sociale verzekeringsbank and Others), made available to this author by the European Commission following an application for access to documents. Commission Decision C(2017) 6671 of 29 September 2017.

15 CJEU 10 May 2017, C-133/15, ECLI:EU:C:2017:354 (H.C. Chavez-Vilchez and Others v. Raad van bestuur van de Sociale verzekeringsbank and Others), Observations of Belgium, paras 12 and 16.

16 CJEU 10 May 2017, C-133/15, ECLI:EU:C:2017:354 (H.C. Chavez-Vilchez and Others v. Raad van bestuur van de Sociale verzekeringsbank and Others), Observations of the United Kingdom, para 28.

not in itself sufficient to determine that dependency did not exist.[17] Member States were to take into account the child's best interests when deciding on granting residence rights to the third country national parent. Following this judgement, an assessment of the child's best interests must include "all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third country national parent, and the risks which separation from the latter might entail for that child's equilibrium."[18] The CJEU thus stressed that domestic authorities must assess the child's best interests in each individual case. The Court therefore considered that the burden to prove that the EU national parent is not capable or willing to undertake the day-to-day care of the child which was placed on the TCN parent, is not the sole relevant criterion in the determination.

This judgement is of particular importance to the present study as it is for the first time that the CJEU mandated states to consider the child's best interests when deciding on the derived residence rights for their TCN parents. The CJEU required national authorities to carry out a detailed assessment of the child's best interests. Such a requirement is consistent with the position of the CRC Committee in General Comment No 14.[19] Further, the CJEU ruling gives meaning to the right of the child to have contact with both parents in immigration law, by bringing it closer to the reasoning of family courts.

The importance of the child's best interests and family life were reiterated in the subsequent case of *K.A. and Others v. Belgian State* where the CJEU found that states were obliged to assess the relationship of dependency between the child and their TCN parent.[20] As with *Chavez Vilchez*, the CJEU stressed that the EU national parent's ability and willingness to assume sole responsibility for the primary day-to-day care of the child was a relevant but not sufficient factor to assess that dependency does not exist.[21] National courts had to evaluate the risks that separation may entail for the child's equilibrium.

In a different line of case law, the CJEU enabled primary carer parents to derive residence rights if their children were enrolled in educational programmes under Regulation No. 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.[22] Here the CJEU has held that children have an independent right of residence in a

17 CJEU 10 May 2017, C-133/15, ECLI:EU:C:2017:354 (H.C. Chavez-Vilchez and Others v. Raad van bestuur van de Sociale verzekeringsbank and Others), para 71.

18 CJEU 10 May 2017, C-133/15, ECLI:EU:C:2017:354 (H.C. Chavez-Vilchez and Others v. Raad van bestuur van de Sociale verzekeringsbank and Others), para 71.

19 This is also discussed in Chapter 3 of this dissertation.

20 CJEU 8 May 2018, C-82/16, ECLI:EU:C:2018:308 (K.A. and Others v. Belgische Staat), para 52; CJEU 6 December 2012, C-356/11, ECLI:EU:C:2012:776 (O and S/Maahanmuuttovirasto and Maahanmuuttovirasto /L).

21 CJEU 8 May 2018, C-82/16, ECLI:EU:C:2018:308 (K.A. and Others/Belgische Staat).

22 OJ Official Journal L 257, 19/10/1968 P. 0002 – 0012.

host EU state if they are enrolled in educational programs as per Article 12 of Regulation No. 1612/68.[23] As in the other cases discussed herein, the CJEU attached importance to the primary carer status of the parent. For the Luxembourg Court it was immaterial that this parent was divorced, economically inactive or lacked resources.[24]

The case law above concerns EU citizen children with at least one TCN carer. It should be noted that EU law grants more significant rights to EU citizen children with EU citizen parents. These rights have mostly been codified in the Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (the "Citizens' Directive" or the "CD").[25] Union citizens have the right to work and reside in a Member State other than the state of nationality: their stay can only be restricted on the ground of sufficient resources and this in turn has been interpreted narrowly by the CJEU.[26]

Finally, it should be mentioned that no relevant case law has been identified where all family members were third country nationals. These situations fall primarily under the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (the "Family Reunification Directive" or the "FRD"). Article 15(1) of the FRD sets a maximum residence period of 5 years after which the family member is entitled to receive an

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23 CJEU 7 September 2002, C-413/99, ECLI:EU:C:2002:493 (Baumbast and R/Secretary of State for the Home Department), para 63, C-480/08, CJEU 23 February 2010, C-480/08, ECLI:EU:C:2010:83, (Maria Teixeira/London Borough of Lambeth and Secretary of State for the Home Department), para 46.

24 CJEU 7 September 2002, C-413/99, ECLI:EU:C:2002:493 (Baumbast and R/Secretary of State for the Home Department), CJEU 23 February 2010, C-480/08, ECLI:EU:C:2010:83, (Maria Teixeira v. London Borough of Lambeth and Secretary of State for the Home Department) and CJEU 19 March 2019, Joined Cases C-297/17, C-318/17, C-319/17, C-438/17, ECLI:EU:C:2019:219 (Bashar Ibrahim and Others/Bundesrepublik Deutschland and Bundesrepublik Deutschland/Taus Magamadov). The same rights have been extended to TCN children with one TCN primary carer and one EU parent who were enrolled in educational establishments provided that (i) the children had a right to reside on the basis of EU law and (ii) they were dependent on a primary carer TCN parent. See: CJEU 8 May 2013, C-529/11, ECLI:EU:C:2013:290 (Olaitan Ajoke Alarape and Olukayode Azeez Tijani/Secretary of State for the Home Department).

25 Official Jounal L 158, 30.4.2004, p. 77–123.

26 For example, the CJEU has clarified that situations where women give up work temporarily due to the late stages of their pregnancies and resume their economic activity within a reasonable time after child birth are to be considered workers within the meaning of the relevant EU laws, and the income requirements referred to above are not applicable to them, see CJEU 2 October 2019, C-93/18, ECLI:EU:C:2019:809 (Ermira Bajratari v. Secretary of State for the Home Department), para 42. Further, even if the resources criteria is not met, Article 14 (3) CD provides that "An expulsion measure shall not be the automatic consequence of the Union citizen's or his or her family member's recourse to the social assistance system of the host Member State.

autonomous residence permit. Article 15(3) FRD further provides that "in the event of […] divorce, separation, […], an autonomous residence permit may be issued, upon application, if required, to persons who have entered by virtue of family reunification.

### 10.2.2 Children of separated parents in the case law of the ECtHR

Under the Strasbourg Court's settled case law, a state is entitled to control the entry and residence of aliens into its territory.[27] The ECtHR does not consider that the Convention guarantees the right of an alien to enter or to reside in a particular country.[28] Nevertheless, despite this seemingly deferential principle, over time the ECtHR has developed an extensive body of case law in the field of immigration and has been one key driver in changing Contracting States' policies in this area.[29]

This section analyses the situations where there is a risk to the relationship between one parent and the child(ren) due to parental separation and the potential expulsion of that respective parent.[30] The subject matter of analysis is the relationship between parents and children as framed by the ECtHR with a particular focus on the weight ascribed by the Court to the right of the child to maintain contact with both parents when immigration considerations appear. All of these situations have been analysed under Article 8 of the Convention: the right to family life.[31] Article 8 ECHR has been interpreted to impose on the one hand a *negative obligation* not to expel settled immigrants and, on the other hand a *positive obligation* to accept – in certain circumstances- the entry and residence of immigrants.[32] A negative obligation existed where the applicant held a valid residence permit for a while, thus the interference consisted in the state's withdrawal of the residence permit. Conversely, positive obligations were found where an applicant had never held a valid residence permit and argued that the

27 this principle was first laid down in the ECtHR 28 May 1985, nos. 9214/80 9473/81 9474/81 (*Abdulaziz, Cabales and Balkandali v. The United Kingdom*), and reiterated thereafter in virtually all cases concerning immigration questions.

28 For eg ECtHR 2 August 2001, no. 54273/00 (*Boultif v. Switzerland*), para 39.

29 Thym 2008, p. 89.

30 These cases could be qualified as expulsion cases, in that one parent risks deportation and there is a difference in legal status between the parent the other parent and the child. It should be noted though that this chapter is not only concerned with situations where the parent faces imminent expulsion, but also with those where the parent for example cannot regularise his status on the basis of the relationship with the child. Thus, from this perspective they can be seen as admission cases. Also, exceptionally first entry situations are considered when the question is that the parent has to choose between family life with one child in the host country or family life with a child from a different relationship in the country of origin. For a discussion on this classification, seecKlaassen 2015, p. 37.

31 The ECtHR does distinguish between private life and family life although at times it does admit that the distinction is not always clear cut. For the purposes of the present analysis the author has looked solely at the limb 'family life' of Article 8. For a brief discussion on the distinction see also Klaassen 2015, page 40.

32 Klaassen 2015, p. 40.

state should have granted such permit considering the relationship with the child. Nevertheless, some cases did not lend themselves to examination under either positive and negative obligations and the Court has sometimes held that such a distinction is not always clear cut.[33]

In *Boultif v. Switzerland*, the ECtHR has developed for the first time assessment criteria for claims that the main obstacle to expulsion was the family life between spouses or spouses and children in the host country.[34] The best interests of children, in particular the seriousness of the difficulties which they were likely to encounter in the country of expulsion, has been added in the subsequent case of Üner v. The Netherlands.[35] Of the *Boultif* criteria which the Court looks at in expulsion cases, Klaassen identifies the 'family life elsewhere' criterion as the basis for the ECtHR's entire case law.[36] In other words, if family life is possible in another state, the Court will most likely rule that Article 8 ECHR has not been infringed.[37]

The situation of separated parents is fundamentally different from that of a united family in that whereas in a united family spouses may be assumed to take joint decisions and choose to exercise their family life in another country, this is manifestly not the case when parents are separated. When a parent from a separated family faces expulsion it cannot be automatically inferred that their former spouse and child will follow in the country of expulsion. Thus, the element of choice of residence disappears. In these cases the determining factor is not the family life with the former partner, but rather the impact of the expulsion on the relationship with the child.

To date, the right of the child to maintain contact with their non-national parent who had separated from the other parent, was directly addressed in 14 cases.[38] An overview of these cases indicates that the Court placed a significant emphasis on the quality of the relationship between the child and their parents as well as on the age of the child. The best interests of young children who had meaningful contact with their parents before the envisaged expulsion weighed heavily in the Court's finding of Article 8 infringements.[39] For older children, it accepted that remote contact via, for example, electronic means of communication satisfied the requirements

33 ECtHR 21 February 1990, no. 9310/81 *(Powell and Rayner v. The United Kingdom)*, para 41.
34 ECtHR 2 August 2001, no. 54273/00 (*Boultif v. Switzerland*), para 48.
35 ECtHR 18 October 2006, no. 46410/99 *(Üner v. The Netherlands)*, para 65.
36 Klaassen 2015, p. 43.
37 Klaassen 2015, p. 83.
38 The following key words were used in the Hudoc database: search 1: 'child' and 'divorce' and 'immigration' retrieved 33 results and search 2: 'child' and 'separation' and 'immigration' retrieved 71 results. All of the cases were checked for relevance to the subject matter and ultimately 13 cases were found to be pertinent.
39 See case law cited below: inter alia: ECtHR, 31 January 2006, no. 50435/99 *(Rodrigues da Silva and Hoogkamer v. The Netherlands)* ECtHR, 28 June 2011 no. 55597/09 (*Nunez v. Norway*). *Per a contrario* in a case where the case contact was sparse the Court declined to find an infringement of the ECHR: See ECtHR 7 October 2014, no. 15069/08 *(Loy v. Ger).*

for the child's right to have contact with both parents.[40] However, remote contact alone was not enough to conclude that the state has discharged its obligations to secure the right of the child to a relationship with the expelled parent; the Court also assessed whether the state had taken steps to enable direct contact as well.[41] It is noteworthy that the ECtHR did not draw a distinction between primary carer and non-primary carer parents. In *Udeh v. Switzerland,* it considered that the expulsion would seriously compromise the children's relationship with their father, who was visiting them once every two weeks. It found that "it is in the daughters' best interests to grow up with both parents and, as the latter are now divorced, the only way for regular contact to be maintained between the first applicant and his two children is to authorise him to remain in Switzerland, given that the mother could not be expected to follow him to Nigeria with their two children."[42] Yet, no contact at all over a prolonged period of time will most likely lead the Court to conclude that the best interests of the children are not adversely affected by deportation.[43]

Therefore, in the majority of cases where contact between the applicants and their children was seriously jeopardised by the expulsion measure, the Court appeared to place a significant, if not decisive, weight on the right of the child to have contact with both of their children. In these cases the applicants' fault for finding themselves in a 'deportable' situation appears to have been minimal. Rather, it was the authorities' conduct, in particular the lack of coordination between the family and immigration authorities which caused the loss of contact with their children. This lack of coordination and the ensuing impact on children and their parents have been evidenced in ECtHR case law since 1988.[44] The cases analysed in the paragraphs below illustrate the disconnection between family and immigration laws and the ensuing impact for the rights of children.

The first in this line of cases was *Berrehab v. The Netherlands* concerning the envisaged expulsion of a father whose residence permit had been with-

40 ECtHR 1 March 2018, no. 58681/12 (*T.C.E. v. Germany)* and ECtHR 23 October 2018, no. 25593/14 *(Assem Hassan Ali v. Denmark)*.

41 ECtHR 1 March 2018, no. 58681/12 (*T.C.E. v. Germany)*, where the state has enabled the applicant to travel to the host state for several periods of time a year so as to see his child (paras 28 and 30 taken together with para 57).

42 ECtHR 16 April 2013, no. 12020/09 (*Udeh v. Switzerland*), para 52.

43 ECtHR 20 December 2011, no. 6222/10 *(A.H. Khan v. The United Kingdom)*, para 40. It should be noted that ECtHR 23 October 2018, no. 25593/14 *(Assem Hassan Ali v. Denmark)*. appears to be an outlier in the Court's case law. Here the applicant had contact with his children and was separated from his former wives, yet the ECtHR did not carry out a detailed analysis of the impact of deportation on the children. It briefly mentioned that other than financial difficulties there was no obstacle for the children, the youngest of which was 7 years old at the time to visit the applicant in Jordan or to maintain contact with him in other ways (para 62).

44 ECtHR 21 June 1988, no. 10730/84 *(Berrehab v. The Netherlands)*.

drawn on the ground of divorce.[45] At the time of the events, he was seeing his daughter four times a week, however under national law this relationship could not form the basis for a residence permit. The Court did not refer to the best interests of the child, the judgement being adopted before the entry into force of the CRC. Yet, the main reason for finding a violation was that the envisaged expulsion threatened the close ties the very young child had developed with her father.[46]

In the following cases, the ECtHR placed a particular emphasis on the interplay between family law and immigration proceedings which -had it not been for the ECtHR's judgement – would have resulted in the children's separation from one of their parents. *Ciliz v. The Netherlands* is a variation of the situation in *Berrehab.*[47] Mr Ciliz' residence rights had ceased on the ground of his divorce. The family courts refused to set up a formal plan for contact with his son given that the applicant was facing immigration proceedings and possible expulsion. Access was left to be agreed upon between the applicant and his former spouse. At the same time, the immigration authorities found that there was no reason to renew his residence permit since, among others, he had no formal access arrangement in place with his son. Further, he was deported while the proceedings on access were pending and no visa was granted to him to attend such proceedings. Later, access was denied on the ground that he had not seen his son. From the facts, it is visible that the applicant's deportation was the result of the interplay between immigration decisions which underlined that there was no formal access arrangement in place and family law proceedings where no formal access was granted in light of the potential expulsion of the applicant. In practice therefore, the applicant had little contact with his child who was 5 years old when his father was expelled to Turkey. The Court highlighted that "the authorities, through their failure to coordinate the various proceedings touching on the applicant's family rights, have not, therefore acted in a manner which has enabled family ties to be developed".[48] This lack of coordination led the Court to find a violation of Article 8 ECHR. It is to be noted that in this case the Court did not directly mention the child or his right to contact, as the focus is more on the procedural side of Article 8. However, the finding of a violation was clearly based on the right to contact which had been affected through the interplay between the immigration and family law proceedings.

Two later cases decided in 2006 and 2011 respectively can be considered landmark cases in that the best interests of the child were at the core of the Court's judgments. Domestically they illustrate the interplay between family and immigration laws. They also show that the family courts modified custody rights to the detriment of the parent with a precarious immigra-

45 ECtHR 21 June 1988, no. 10730/84 *(Berrehab v. The Netherlands).*
46 ECtHR 21 June 1988, no. 10730/84 *(Berrehab v. The Netherlands)*, para 29.
47 ECtHR 11 July 2000, no 29192/95 *(Ciliz v. The Netherlands).*
48 ECtHR 11 July 2000, no 29192/95 *(Ciliz v. The Netherlands)*, para 71.

tion status solely to accommodate immigration considerations. They have been brought to the ECtHR as immigration cases, however similarly to the *Chavez-Vilcez* case of the CJEU, they are of particular importance for the present dissertation for at least two reasons. On the one hand they show how immigration laws modify the assessment of the best interests of the child by family courts. On the other hand they attest to the potential for harmonisation of substantive law by the European supranational Courts.

The applicants in the first case, *Rodrigues da Silva and Hoogkamer v. The Netherlands* were a mother -who did not hold a valid residence permit- and her daughter.[49] The mother had never been a legal resident in the Netherlands. She only attempted to regularise her status after separating from the child's father. She was denied a residence permit on the basis of the relationship with her daughter as she had never lawfully resided in The Netherlands. At the same time, in the family proceedings, the Dutch national parent was awarded parental responsibility on the ground that the mother was not a legal resident. The courts considered that if the mother had been granted custody she would leave for Brazil with her daughter, thus depriving the latter of the relationship with her Dutch father and grandparents. In practice, at the time of the proceedings in Strasbourg, the child was living with her Dutch grandparents four days a week and with her mother the other three days.

Before the Court, the applicants complained that the refusal to grant Ms Da Silva a residence permit constituted an unjustified interference with their right to family life in that the authorities did not sufficiently take account of the child's interests. Given that the parental responsibility had been vested with the father, the child could not legally leave for Brazil.

The Court agreed that there was no possibility for the applicants to exercise family life elsewhere. Moreover, the Court stressed that this impossibility had been caused by the family courts who granted the father sole parental responsibility on the ground of her mother's immigration status. The Court also took into account that the child had been only three years old at the time of the final domestic decisions and that she had extensive contact with her mother (living with her 3 days a week). Thus, the relationship between the applicants and the right of the child to maintain contact with her mother outweighed the state's interests in preserving the economic well-being of the country.[50] Here, it had been the Dutch family courts, acting on the advice of the Dutch child welfare authorities which had determined the applicant's impossibility to leave the country.

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49 ECtHR, 31 January 2006, no. 50435/99 *(Rodrigues da Silva and Hoogkamer v. The Netherlands).*

50 Other mitigating factors for the first applicant were that she did not have a criminal record and that –even if she had never done so- at some point in time she could have regularised her status. Thus, other than the fact that she had not have a valid residence permit, Ms Rodriguez could not be held liable for the situation she found herself in.

The other case where the child's best interests came to the fore is *Nunez v. Norway*, decided in 2011.[51] As in *Rodrigues da Silva v. The Netherlands*, the applicant in *Nunez* was a mother with two small children who was facing expulsion and an entry ban to Norway. In the domestic proceedings, she had been found guilty of providing false or manifestly misleading information concerning her immigration status. She had two small children born in 2002 and 2003 respectively, and she had separated from her husband when the children were three and two years old respectively. Also, in the ensuing family litigation for custody, the Oslo City Court had granted her former spouse sole parental responsibilities on the main ground that it was unlikely that she would succeed in reversing the expulsion decision. Further, in the immigration proceedings, the Supreme Court by a small majority found that the seriousness of the offences she had committed outweighed the best interests of the children. They also considered that there was nothing in the case file from which it could be inferred that the children could not be well taken care of by their father.

The applicant's complaint to the European Court was that the expulsion decision was contrary to Article 8 ECHR as her breaches of immigration laws could not justify her separation from the two children. As opposed to *Rodrigues da Silva* where the Court analysed the case from the perspective of positive obligations, the ECtHR did not find relevant to determine whether this case was one involving positive or negative obligations. Further, in this case the Court highlighted that had it not been for the best interests of the children, the balance would have weighed in favour of the state, given that the applicant had indeed committed serious immigration offences and had knowingly misled the authorities. However, the children's best interests pointed in a different direction. The relevant factors were that similar to the case of *Rodrigues da Silva*, the applicant had been the children's primary carer and her precarious immigration status was the only reason custody was granted to the father. The Court stressed that it found this factor 'significant'.[52] Also, the Court dismissed as speculative the arguments of the Government that the father undertook before the domestic courts to facilitate contact between the children and their mother. All these factors amounted to exceptional circumstances for the ECtHR which concluded that the Norwegian authorities did not attach sufficient weight to the best interests of the children.

This case is significant as it clarifies that the interests of the children to have a relationship with their primary carer are the driver behind the Court finding a violation of Article 8 ECHR. The Court again acknowledged the problematic aspect of the family courts awarding custody to the other parent on the ground of the applicant's precarious immigration status. The Court stressed on several occasions that the confluence between immigration and family proceedings resulted in the Article 8 violation of the pres-

51 ECtHR, 28 June 2011 no. 55597/09 (*Nunez v. Norway*).

52 ECtHR 28 June 2011 no. 55597/09 (*Nunez v. Norway*), paras 79 and 80.

ent case. It is noteworthy that the Court refused to rely on undertakings given by a private person on contact between children and their mother and placed importance on the role of the state in shaping the relationship between the children and their parents.

Finally, it should also be noted that in its case law the ECtHR has equally dealt with concerns put forth by states that parents may instrumentalise their children to obtain immigration advantages.[53] Of particular relevance here is *Priya v. Denmark,* where the facts indicated that the parents had only formally separated so as to increase the chance of a spouse to remain in Denmark. In dismissing the case as ill-founded the Court reasoned that the couple and children appeared to still live together at the time of the domestic decision, that they had not divorced or indicated that they wished to divorce. The Court therefore analysed this situation from the perspective of the 'family life elsewhere' doctrine and found that there were no obstacles to the family settling in India.

### 10.2.3 Minimum standards in family migration cases: European supranational Courts' case law analysis

Sections 10.2.1 and 10.2.2 above have outlined the contribution of the CJEU and of the ECtHR respectively to setting down (minimum) standards in family migration cases. The question was whether and to what extent the best interests of the child and the right of the child to have contact with both parents should be relevant in migration cases where the primary carer parent would otherwise risk expulsion from that state. As explained throughout this dissertation, when this possibility is absent or allowed only in exceptional situations, (i) it creates power imbalances within the family which may enhance the risk of domestic violence, (ii) may be indicative on its own of domestic violence or, even when there are no other indications of domestic violence (iii) it may amount to a separation of the child from the primary carer.

Moreover, as evidenced by the case law brought to the CJEU and the ECtHR, children of mixed-status families are at a heightened risk of being separated from one of their parents. The case law indicated that domestic authorities used the legal residence status of one parent as an argument in support for depriving the other, non-citizen parent of residence rights.[54] In their observations in the *Chavez-Vilchez* case, the Dutch, Belgian, Danish and British governments did not place any weight on the right of the

53 ECtHR 6 July 2006, no. 13594/03 (*Priya v. Denmark (dec)*); ECtHR 25 March 2003, no. 41226/98 (*I.M. v. The Netherlands (dec.)*); ECtHR 31 October 2002, no. 37295/97 *(Yildiz v. Austria),* para 44.

54 See the states' reasoning in the CJEU 10 May 2017, C-133/15, ECLI:EU:C:2017:354 *(*H.C. Chavez-Vilchez and Others v. Raad van bestuur van de Sociale verzekeringsbank and Others), discussed in Section 10.2.1 above.

child to have contact with both parents. Following their reasoning, parents could be deported as the children had an EU citizen parent. Further, the cases before the ECtHR showed that this has indeed happened as the family courts favoured the child's ties to the country of residence and deprived the immigrant parent of custody rights on the basis of their immigration status. This tendency has been noted in countries outside the European Union and the Council of Europe, specifically in the United States which deals with the highest number of abduction applications (incoming and outgoing worldwide).[55]

Across the European Union, EU national parents and their children are allowed to move, reside and work freely. They are the beneficiaries of the most extensive rights under EU law. Further, the case law of the CJEU is now affirming the right of EU citizen children to extend residence rights to their parents. Under this line of case law, the CJEU requires Member States to allow third country national parents of EU citizen children to reside and work in their territory to enable the children to genuinely enjoy the substance of their rights. In these cases, states are to assess holistically the relationship between the child and the parent and should the dependency test be met, grant the parent the right to reside in their territory on the basis of the relationship with the child. It should be added that, on the basis of the *Bosphorus* doctrine, discussed in Chapter 9 above, failure of a Member State to comply with this line of case law may give rise to a violation of Article 8 of the ECHR. No such case has yet been brought to the ECtHR. However, it has been shown that ECtHR has been willing to incorporate EU law into the human rights guarantees in other areas of law.[56] Moreover, failure to consider the best interests of the child and the child's relationship with the immigrant parent have already been found to be in breach of Article 8 ECHR.[57]

Further, it is important to note that only EU citizen children are beneficiaries of these rights. Non-EU citizen children are not able to extend residence rights to their non-EU parents. In such cases, pursuant to the Family Reunification Directive, an autonomous residence permit only arises after a legal residence period of 5 years.

Nevertheless, all EU Member States are parties to the ECHR, and hence the ECtHR case law is equally applicable. Section 10.2.2 has shown that the ECtHR attaches importance to the parent child relationship even when the parent is not the child's primary carer. The ECtHR has focused specifically on children of divorced parents, and it has recognized the difficulties

55 Concerning the number of child abduction applications see the latest statistical analysis of Lowe/Stevens Global Report 2023; on the relationship between family law and immigration law and the instrumentalization of immigration laws by family courts see Thronson 2010, pp. 253-255; Thronson 2013, p. 660.

56 For a discussion on the Bosphorus doctrine see section 9.2.2 above; on the complementarity between the CJEU and ECtHR see also Sections 9.3 and 9.4 above.

57 See discussion in Section 10.2.2 above.

these children have in maintaining contact with their parents whenever family and immigration laws intersect. Under this case law, states are to consider the child's best interests and the right to have contact with both parents which has a separate dimension in immigration law. Importantly, the ECtHR has also addressed the dissonance between family and migration courts, which would not have been possible outside a supranational adjudication structure.

## 10.3 The European supranational Courts' relevance for the intersection between child abduction and refugee law

Section 5.6.3 of this dissertation has shown that a growing number of child abduction applications are brought concurrently with or after the taking parent and/or the child have been granted refugee status or another form of international protection.[58] Child abduction courts diverge on relevance of the Geneva Convention and the prohibition of refoulement to the Hague Convention proceedings. Differences have equally been noted regarding the necessity to suspend the child abduction proceedings to await the outcome in the parallel asylum cases, or on the outcome of the Hague Convention application, when there is a difference between the taking parent and child(ren) in the form of international protection received. For example, some courts considered that concurrent refugee applications gave rise to a rebuttable presumption against returning the child,[59] other courts ruled that the grant of refugee status resulted in an absolute bar to return,[60] whereas yet others found asylum applications irrelevant for child abduction proceedings.[61] In one instance, a family court assessed a pending asylum claim as evidence for the precarious status of the taking parent in the state of abduction, which in turn became a reason in support of ordering the return of the child.[62] In this case, the concurrent asylum proceedings supported the child's return.

Furthermore, available case law and states' responses to HCCH questionnaires on this topic revealed several points of tension between the two legal frameworks, such as the need for expediency or the burden of proof.

58 It has been highlighted that in the 2023 Hague Conference Questionnaire, 14 out of 21 respondent countries confirmed that they had dealt with parallel refugee applications, see < https://www.hcch.net/en/publications-and-studies/details4/?pid=8519&dtid=33>>, last accessed on 5 May 2023.

59 A.M.R.I. v. K.E.R., 2011 ONCA 417.

60 G v. G [2021] UKSC 9, para 129.

61 As per the response to the 2023 HCCH Questionnaire, available at <https://assets.hcch.net/docs/e8143069-376a-4e5c-a7e2-353a4e080e28.pdf>, last accessed on 5 May 2023.

62 Cour d'Appel Versailles, 2e chambre, 1re section, 24 November 2016, no 16/05302.

The interplay between child abduction and asylum proceedings has yet to receive meaningful attention in academic studies.[63] Existing commentaries focus on the approaches of child abduction courts in Canada and the United States and one commentary covers the recent judgement of the UK Supreme Court.[64]

This section is dedicated to the interplay between the Child Abduction and the Refugee Convention from the perspective of the European supranational Courts. The topics covered reflect the concerns which have emerged from the overview of the national case law in this area.[65] The jurisdiction of both Courts extends to the field of international protection and non-refoulement which could in turn enhance their potential for harmonising divergent approaches of domestic courts across Europe for the benefit of human rights.[66]

### 10.3.1 The status of the principle of non-refoulement

The prohibition against non-refoulement has received widespread recognition across all legislative levels of the EU: it is mentioned in the founding Treaties and the EU Charter; it has been considered a general principle of law and it is equally enshrined in various pieces of secondary laws. [67]

Article 78(1) TFEU provides that the EU shall develop a common asylum policy with a view to ensure protection against non-refoulement in accordance with the Refugee Convention. Article 18 of the EU Charter equally guarantees the right to asylum in accordance with the Refugee Convention. Article 19(2) of the EU Charter embodies the prohibition against non-refoulement. On the basis of the CJEU's case law, it has been argued

63 So far, several scholars have considered this intersection: Bossin/Demirdache 2012; Estin 2015; Loo 2016; Garbolino 2019; Walsh/Atkins 2022.

64 Walsh/Atkins 2022.

65 Section 5.6.3 of this dissertation.

66 The Common European Asylum System is binding for all Member States, with the exception of Denmark and Ireland. Iceland, Liechtenstein, Norway and Switzerland, are members to the European Economic Area (the EEA agreement 1992), hence they all participate in the part of the CEAS regarding the determination of the State responsible for examining applications for asylum lodged in one of the member states, Blöndal 2020, p. 99.

67 As per Article 288 of the TFEU. Within the EU's hierarchy of norms, the first place is occupied by the founding treaties (the Treaty on the European Union and the Treaty on the Functioning of the European Union). Under Article 6(1) of the TEU, the Charter of Fundamental Rights has the same value as the Treaties. After the Treaties and EU Charter, the next place within the EU is occupied by the general principles of law. The general principles of law are not defined within the Treaties and have been largely developed by Union courts on the basis of common traditions of EU Member States. It is agreed that fundamental rights are general principles of EU law. General principles of law are highly relevant in that the EU, through its institutions, must comply with general principles of law when adopting any EU internal act. See Tridimas 2006, p. 50. Next in the hierarchy of norms are the legislative acts adopted following the ordinary legislative procedure: the regulations, directives and decisions (Article 288 TFEU). Legislative acts are followed by delegated acts (Article 290 TFEU) and then by implementing acts (Article 291) TFEU.

that the principle of non-refoulement has acquired the status of general principle of law within the EU legal order.[68] Furthermore, this principle has found its way in EU's secondary legislation.[69]

Within the CoE, the Strasbourg Court has consistently held that the ECHR does not guarantee the right to political asylum or to a residence permit.[70] Nevertheless, already since the 1989 *Soering* judgment, the ECtHR ruled that it is competent to examine if "substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. The establishment of such responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 of the Convention."[71] Even though the Soering judgement did not concern an asylum seeker, the ECtHR as of 1991 has applied the same reasoning to asylum seekers.[72] It has thus been argued that the ECtHR has developed an implicit non-refoulement obligation.[73] Under the ECtHR's settled case law, states have the obligation not to deport, extradite or expel individuals to countries where they would face a real risk of treatment contrary to Article 3 ECHR (right to freedom from torture, inhuman or degrading treatment) or Article 2 ECHR (right to life).

### 10.3.2 Child abduction proceedings after the receipt of refugee status

Once it has been established that non-refoulement occupies an important place in the European human rights architecture, the next step is to determine the impact of the refugee status for child abduction proceedings, from the perspective of the European supranational Courts. From the perspective of national law, it has been shown that child abduction courts are faced with situations where a parent or a child has received protection from immigration authorities in the same country. The child abduction courts

68 Mungianu 2016, p. 115, citing CJEU 21 December 2011 Joined Cases C-411, 493/10, ECLI:EU:C:2011:865 (N.S. and Others/Secretary of State for the Home Department para 109.

69 see among others Recital 3 and 48 of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted; recital 3 and Article 35 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection; Recital 3 of REGULATION (EU) No 604/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

70 ECtHR 18 October 2011, no. 24147/11 *(I. v. the Netherlands* (dec.)), para 43.

71 ECtHR 7 July 1989, no. 14038/88 *(Soering v. The United Kingdom*), para 91.

72 ECtHR 20 March 1991, no. 15576/89 *(Cruz Varas and Others* v. *Sweden).*

73 Hamdan 2016, p. 21.

need to evaluate whether the child can nevertheless return to the country of habitual residence in light of the Child Abduction Convention. *Stricto sensu*, for the purposes of abduction proceedings, family courts evaluate the weight to be given to a decision that a parent/child faces a well-founded fear of persecution or otherwise a risk of ill treatment. It is argued herein that such evaluation should be carried out as a minimum, in light of the case-law of the CJEU and the ECtHR.

At international level, it has been noted that non-refoulement is the expression of the idea that a person should not be sent back to a country where they may face persecution or a serious human rights violation.[74] Commentators have focused extensively on the approach of the European supranational Courts to non-refoulement touching upon aspects such as the grounds for protection, the expansiveness or the limits of their case law, and (in)consistencies with the Refugee Convention.[75]

This literature has only a limited impact here as the intersection between Hague Convention and refugee law is indicative of a different factual scenario. The situations envisaged are those where an immigration authority in a Member State accepts that the parent (and child) are refugees (or beneficiaries of subsidiary protection) and a child abduction application is lodged subsequent to this finding.

The excerpt below, from a contribution criticising the restrictive interpretation of immigration authorities, is illustrative of the issue.

"[…] the daughter told a psychologist that she strictly refused any contact with her father. The court eventually pronounced the divorce, granting a visiting right to the father. He, who had an extensive criminal record, could meet his daughter every week (for 24 hours) and during holidays, without third-party supervision. He used this right to carry out an attempted abduction of his daughter in 2018. This happened while her mother was abroad, directly after the police had advised her to go and see her father and comply with the visiting right. This visit created the direct opportunity for the abduction, after which the father said he would take his daughter to his native village and marry her off at the age of 13. After the mother and daughter fled Albania and the mother applied for asylum in Belgium, the daughter asked her not to go into details about her father's violence towards her. […]"[76]

After their arrival in Belgium, the father filed a complaint […] for international child abduction against his ex-wife."[77] The Belgian family courts had to determine this child abduction application.

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74 Çalı/Costello/Cunningham 2020, p. 356; Within the EU The prohibition of non-refoulement entails an obligation to grant individuals who meet the legal requirements refugee status or subsidiary protection.

75 Costello 2016; Garlick 2015; Ciliberto 2019.

76 Roels 2023, p. 4.

77 Roels 2023.

What is the impact of a positive outcome of the refugee proceedings on the child abduction courts? It should be recalled that some national courts have reasoned that the return obligation under the Hague Convention is different in nature than the non-refoulement obligation under the Geneva Convention and hence they have not considered the refugee proceedings when determining the Hague Convention application.[78]

To date, the CJEU had one recent opportunity to address the intersection between child abduction and refugee proceedings in the case of *A. and B.*[79]

In absence of further relevant case law on the relationship between child abduction and successful refugee applications, insight is drawn from European supranational Courts' case law concerning the intersection between non-refoulement and extradition proceedings. It should be recalled that both child abduction and extradition proceedings are distinct from the refugee determination, and they concern summary proceedings. Both the Luxembourg and the Strasbourg Courts have grappled with these issues in their case law and their approach could be relevant, *mutatis mutandis,* to child abduction cases.

The case of *A. and B.* concerned a mother and child who had been transferred from Sweden to Finland pursuant to a decision adopted in the application of the Dublin III Regulation. After their transfer, the father who remained in Sweden filed a child abduction application. The CJEU was asked to determine, *inter alia* whether the child's removal to Finland was wrongful within the meaning of the Brussels II *bis* Regulation. The CJEU found that compliance with a binding transfer decision by a parent and child is not wrongful removal.[80] It considered that the child's retention was "a mere consequence of the child's administrative status, as determined by enforceable decisions taken by the Member State where the child was habitually resident".[81] This reasoning prompts the conclusion that the CJEU prioritised the provisions of the Dublin Regulation over those of the Brussels II *bis* Regulation. However, albeit not discussed in the judgement, the Advocate General's Opinion in this case clarifies that the Swedish authorities had withdrawn the father's custody rights after the child's departure, which could have rendered moot the Court's judgement.[82] Nevertheless, the Court's omission in attaching any weight to this aspect implies that in similar proceedings, and irrespective of the custody arrangements in force, Dublin transfers do not amount to wrongful removals within the sense of parental child abduction.

78 See Section 5.6.3 of this dissertation.
79 CJEU 2 August 2021, C-262/21 PPU, ECLI:EU:C:2021:64 (A/B).
80 CJEU 2 August 2021, C-262/21 PPU, ECLI:EU:C:2021:64 (A/B), para 49.
81 CJEU 2 August 2021, C-262/21 PPU, ECLI:EU:C:2021:64 (A/B), para 51.
82 CJEU 14 July 2021, C-262/21 PPU, ECLI:EU:C:2021:592 (*A/B),* Opinion of Advocate General, para 20.

Further, the Luxembourg Court has so far decided on one preliminary reference concerning an envisaged extradition from Croatia of a Russian Icelandic national who had been granted refugee status in Iceland.[83] Another preliminary reference is now pending before the CJEU, in a case concerning the expulsion from Germany of a Turkish national who had received refugee status in Italy.[84] In absence of a judgement, the Opinion of the Advocate General Richard de la Tour can offer useful insights.[85]

In the case of *A*, the CJEU set out important principles for the intersection between non-refoulement with extradition proceedings. Here, an Icelandic Russian national had been granted asylum status in Iceland. Subsequently, Russia filed an extradition request with the Croatian authorities where he was present. Importantly, in Iceland the grant of asylum was based precisely on the criminal proceedings which the person concerned was subject to in Russia and which formed the object of the extradition request.[86] The CJEU applied Article 19(2) of the EU Charter and found that Croatia needed to assess whether the extradition posed a real risk to inhuman and degrading treatment for the Icelandic national.[87] On the relevance of the asylum status, the CJEU ruled that it should be treated as a particularly substantial piece of evidence which was all the more relevant considering that both the asylum grant and the extradition requests were based on the same criminal proceedings.[88] The CJEU refrained from holding that the asylum grant in Iceland was binding on Croatia. However, it stressed in particularly strong terms that Croatia must refuse extradition "unless substantial and reliable information demonstrate that the person whose extradition is requested obtained asylum by concealing the fact that he or she was subject to criminal proceedings in his or her country of origin."[89]

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83 CJEU 2 April 2020, C-897/19, ECLI:EU:C:2020:262 (Ruska Federacija/I.N.).

84 CJEU 19 October 2023, C-352/22, ECLI:EU:C:2023:794 (Generalstaatsanwaltschaft Hamm (Demande d'extradition d'un réfugié vers la Turquie), Opinion of the Advocate General Richard de la Tour.

85 CJEU 19 October 2023, C-352/22, ECLI:EU:C:2023:794 (Generalstaatsanwaltschaft Hamm (Demande d'extradition d'un réfugié vers la Turquie), Opinion of the Advocate General Richard de la Tour.

86 CJEU 19 October 2023, C-352/22, ECLI:EU:C:2023:794 (Generalstaatsanwaltschaft Hamm (Demande d'extradition d'un réfugié vers la Turquie), Opinion of the Advocate General Richard de la Tour, para 67.

87 CJEU 19 October 2023, C-352/22, ECLI:EU:C:2023:794 (Generalstaatsanwaltschaft Hamm (Demande d'extradition d'un réfugié vers la Turquie), Opinion of the Advocate General Richard de la Tour, para 64.

88 CJEU 19 October 2023, C-352/22, ECLI:EU:C:2023:794 (Generalstaatsanwaltschaft Hamm (Demande d'extradition d'un réfugié vers la Turquie), Opinion of the Advocate General Richard de la Tour, paras 66, 67.

89 CJEU 19 October 2023, C-352/22, ECLI:EU:C:2023:794 (Generalstaatsanwaltschaft Hamm (Demande d'extradition d'un réfugié vers la Turquie), Opinion of the Advocate General Richard de la Tour, para 68.

A similar case is currently pending before the CJEU. The Advocate General Richard de la Tour in his Opinion favours an interpretation to the effect that asylum status granted in one Member State is not binding on another Member State. Instead, when considering extradition to a third country, the asylum obtained in another Member State must play an important role.[90] The Member State deciding on the extradition request should determine on a case-by-case basis the human rights of the persons concerned, and in particular the rights enshrined under Articles 18 and 19(2) of the EU Charter.[91]

The ECtHR has approached in a similar fashion cases where a successful asylum application was followed by an extradition request.[92] The ECtHR has imposed an obligation on States Parties to take into account the asylum status obtained in another Contracting State to the Geneva Convention.[93] However, this is only a starting point and courts are to examine afresh whether the person may be exposed to an infringement of Article 3 ECHR, if expelled.[94] When assessing that the grant of a refugee status did not amount to an obstacle to execute a European Arrest Warrant, the ECtHR considered the long period (of 10 years) which had elapsed between the successful asylum application and the extradition request as well as the fact that the extradition request concerned a non-political offence.[95]

In addition, both the CJEU and the ECtHR have stressed that assurances of the requesting state, to the effect that the person shall not be subject to inhuman and degrading treatment, are not sufficient.[96] Instead, authorities are to rely on information which is objective, reliable and properly updated.[97]

The case law outlined above sets important guidelines for determining the relevance of refugee status to child abduction applications. To-date, neither

90 CJEU 19 October 2023, C-352/22, ECLI:EU:C:2023:794 (Generalstaatsanwaltschaft Hamm (Demande d'extradition d'un réfugié vers la Turquie), Opinion of the Advocate General Richard de la Tour, para 41.

91 CJEU 19 October 2023, C-352/22, ECLI:EU:C:2023:794 (Generalstaatsanwaltschaft Hamm (Demande d'extradition d'un réfugié vers la Turquie), Opinion of the Advocate General Richard de la Tour, para 43.

92 ECtHR 25 June 2021 nos. 40324/16 and 12623/17, (*Bivolaru and Moldovan v. France)*; ECtHR 25 March 2014, no. 59297/12 *(M.G. v. Bulgaria)*; *Abdolkhani et Karimnia v. Turkey*, no 30471/08, 22 septembre 2009, paras 8, 9 and 82.

93 ECtHR 25 March 2014, no. 59297/12 *(M.G. v. Bulgaria)*, para 88.

94 ECtHR 25 March 2014, no. 59297/12 *(M.G. v. Bulgaria),* para 88.

95 ECtHR 25 June 2016, nos. 40324/16 and 12623/17 (*Bivolaru and Moldovan v. France*), para 139.

96 ECtHR 25 March 2014, no. 59297/12 *(M.G. v. Bulgaria)*, para 93; CJEU 19 October 2023, C-352/22, ECLI:EU:C:2023:794 (Generalstaatsanwaltschaft Hamm (Demande d'extradition d'un réfugié vers la Turquie), Opinion of the Advocate General Richard de la Tour, para 65.

97 CJEU 19 October 2023, C-352/22, ECLI:EU:C:2023:794 (Generalstaatsanwaltschaft Hamm (Demande d'extradition d'un réfugié vers la Turquie), Opinion of the Advocate General Richard de la Tour, para 65.

Court has considered that a successful asylum application in one State is binding on the authorities of another State. However, the refugee status weighs heavily in determining the scope of non-refoulement. In the case of child abduction, child abduction courts are to give substantial weight to a favourable decision for international protection. This weight increases where there is an overlap in scope between the two proceedings.[98] If for example the refugee status has been granted on account of domestic violence and domestic violence is equally raised as an exception to return, child abduction courts must follow the refugee authorities.[99] As an exception, it is not necessary to follow the refugee authorities where asylum has been obtained through concealment[100] or if a long period of time between the two proceedings has elapsed.[101]

Notwithstanding the above, it should be highlighted that all the aforementioned case law analysed the relevance of refugee status granted in one state for the purposes of proceedings taking place in another state. Such situations have not (yet) been identified in child abduction cases. The case law review carried out in Section 5.6.3 indicated that the conflict was between family and immigration authorities within the same country. It follows that the grant of refugee status by the authorities in the same country should weigh even heavier absent the cross border element. Last, and also supporting the argument in favour of attaching significant weight to a determination of refugee status, it should be noted that child abduction and extradition proceedings have different policy goals. Whereas abduction focuses on the best interests of the child, prevention of forum shopping and comity, extradition cases have as primary objective the prevention of impunity for persons who have committed a criminal offence.[102] Thus, the refugee status should weigh even heavier in child abduction cases where, as has been argued in this dissertation comity should not outweigh individual children's rights.

Finally, it should be noted that the analysis above focused on the impact of the grant of refugee status or subsidiary protection to pending abduction proceedings. The analysis did not evaluate the value of the principle of non-refoulement for child abduction courts which has been briefly addressed

98 As it appears from CJEU 19 October 2023, C-352/22, ECLI:EU:C:2023:794 (Generalstaatsanwaltschaft Hamm (Demande d'extradition d'un réfugié vers la Turquie), Opinion of the Advocate General Richard de la Tour, para 67.

99 As it appears from CJEU 19 October 2023, C-352/22, ECLI:EU:C:2023:794 (Generalstaatsanwaltschaft Hamm (Demande d'extradition d'un réfugié vers la Turquie), Opinion of the Advocate General Richard de la Tour, para 68.

100 As it appears from CJEU 19 October 2023, C-352/22, ECLI:EU:C:2023:794 (Generalstaatsanwaltschaft Hamm (Demande d'extradition d'un réfugié vers la Turquie), Opinion of the Advocate General Richard de la Tour, para 68.

101 As it appears from ECtHR 25 June 2016, nos. 40324/16 and 12623/17 (*Bivolaru and Moldovan v. France*), para 138.

102 CJEU 19 October 2023, C-352/22, ECLI:EU:C:2023:794 (Generalstaatsanwaltschaft Hamm (Demande d'extradition d'un réfugié vers la Turquie), Opinion of the Advocate General Richard de la Tour, para 69.

in Section 4.3.3. in the context of the exceptions to return under the Child Abduction Convention. Indeed, the right to non-refoulement can be seen from a child-rights lens and this right is equally applicable to child abduction proceedings, irrespective of concurrent asylum claims.[103] Furthermore, as mentioned in Section 10.3.1. child abduction courts should equally follow the EU Charter provisions and Article 3 of the ECtHR. In the specific context of child abduction, it has been argued that the ECtHR should reframe the grave risk of harm in child abduction cases under Article 3, rather than Article 8 ECHR.[104] These considerations are important in their own right and have been addressed in this dissertation; they are nevertheless distinct to the issue analysed herein.

### 10.3.3 The recipient of protection

In some cases, domestic courts refused to consider an asylum claim on the ground that the beneficiary of protection was the parent rather than the child who had only been named as a dependant in the application for international protection.[105] First, it should be noted that when the parent has already been granted status, that parent is in an objective impossibility to return and therefore the return of the child will result in the separation from the parent. In such cases, family courts should adopt a child rights-based approach to the question of parent child separation.

Second, it is important to highlight that existing studies show that children cannot always apply for independent protection status.[106] Pursuant to article 7 (3) of the Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (the "Procedures Directive" or "PD"),[107] Member States are bound to ensure that children have the right to lodge an asylum application in their own name only if they have the *legal capacity* to do so under national law. For children who do not possess such legal capacity, Member States are bound to guarantee a child's right to make an asylum application through their legal representative. It is further left to Member States to determine the cases when a child can make an application on their

103 On the principle of non-refoulement from the perspective of the CRC Committee, see also Klaassen/Rodriguez, The Committee on the Rights of the Child on female genital mutilation and non-refoulement, 2018, available at <<leidenlawblog.nl>>, last accessed on 14 June 2024.

104 Robinson 2023, see also Section 8.4. discussing the case law of the ECtHR in relation to the child's rigfht to be protected from violence.

105 This was the practice of the UK Supreme Court before the judgement in the case of *G v. G* [2021] UKSC 9, which removed this requirement. (see discussion in Section 5.6.3).

106 Following the latest report of EASO, in AT, DE, ES, FR, HU, LV, SE and SK the application for international protection has to be filed by a child's parent, whereas in FI, EE, IT, LT, NO, the application can be lodged by the child. (see EASO Report on Asylum Procedures for Children, 2019, p. 26.

107 OJ L 180, 29.6.2013, p. 60–95.

own behalf.[108] Consequently, EU law does not require that Member States provide for an independent right of asylum for accompanied children.

The issue of asylum applications by family members within the Member States formed the subject of a query circulated by the European Commission on 29 May 2017.[109] Among the 22 responding Member States it was apparent that the rule was to have accompanied children included in their parents' application.[110] In terms of the decisions, some Member States issue separate decisions for each family member,[111] where others issue joint decisions where the child is included in the parent's application.[112] In some cases it was expressly mentioned that in exceptional circumstances, children could put forward separate reasons than their parents and in these cases a separate decision will be issued for the child.[113] The responses also revealed that Member States tend to grant the same status to all members of the family applying for asylum on the basis of the principle of family unity. This approach in the EU Member States appears to be consistent with that mentioned by Pobjoy in his description of accompanied children's cases in countries such as the United Kingdom, Canada and the United States.[114] He stresses that in these jurisdictions the child's right to an independent refugee claim tends to be overlooked when such child is accompanied by a family member.[115] Authorities prefer to grant the child the same status as the parent by invoking the principle of family unity. He further records that even though a child might have an independent right to asylum, given that these jurisdictions do not provide for the possibility of a parent to obtain derivative status from that of the child, parents are the principal asylum seekers while their children are included in the application as dependants.[116] Such approach is apparently taken so as to avoid situations where a child is granted refugee status but the parent is not granted such status to the effect that the child would either choose to stay without the parent or the child would have to leave with the parent to a country where he has a legitimate fear of persecution.[117] In the same vein the UNHCR in its guidelines for international protection highlights that accompanied children may be perceived as part of the family unit rather than as individuals with

108 Article 7(5)(a) Procedures Directive.

109 EMN Ad-Hoc Query on immediate family members applying for asylum at the same time, Requested by SK EMN NCP on 29th May 2017, available at https://www.emnitalyncp.it/wp-content/uploads/2018/02/053_sk_on_immediate_family_members_applying_for_asylum_at_the_same_time.pdf accessed on 23 December 2023.

110 This was so in Belgium, Croatia, Cyprus, Hungary, Italy, Lithuania, Latvia, Luxemburg, Malta, the Netherlands, Poland, Slovakia, Slovenia.

111 Austria, Cyprus, Netherlands, Poland, Slovenia, Estonia, France, Germany, Malta.

112 Belgium, Croatia, Hungary, Italy, Latvia, Lithuania, Luxemburg.

113 Estonia, Finland, France, Germany, Malta, United Kingdom.

114 Pobjoy 2017, p. 49 et following.

115 Pobjoy 2017, p. 49.

116 Pobjoy 2017, p. 51.

117 Pobjoy 2017, p.51.

their own interests. [118] Their claims are assessed individually, mainly when they are unaccompanied rather than when accompanied by their families.[119]

In light of the above, it appears that courts' distinction in outcomes in child abduction proceedings depending on the beneficiary of protection is suitable only if national law allows accompanied children to file an independent asylum application and provided that there is evidence of such a practice in the respective jurisdiction.

### 10.3.4 The effect of an asylum application

Other than the recent case of the British Supreme Court, it appears that none of the family courts deciding on the Hague Convention petitions considered necessary to suspend abduction proceedings pending the determination of refugee status.[120] This Section shall assess whether this approach is consistent with EU law and the case law of the ECtHR.

Under EU law, procedural matters related to the asylum application, such as access to the procedure, rights of the applicants to interpretation, guarantees, obligations for the applicants, remedies, timelines, etc are regulated by the Procedures Directive. The CJEU has assessed the legal effects of a return decision and the necessity of an appeal with suspensive effect in preliminary references under Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.[121]

Pursuant to Article 9(1) of the Procedures Directive, applicants are entitled to remain in the Member State until a determination is made at first instance. The right to stay pending the asylum procedure does not apply in two cases. The first is when an applicant has lodged a subsequent application merely in order to delay or frustrate the enforcement of a decision which would result in their imminent removal.[122] Member States may by virtue of Article 40(4) PD introduce a provision in their national law to the effect that authorities are only required to examine such new application if the applicant was "through no fault of his or her own, incapable of assert-

118 UNHCR Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, 22 December 2009, HCR/GIP/09/08, para. 2.

119 UNHCR Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, 22 December 2009, HCR/GIP/09/08, para. 2.

120 See Section 5.6.3.2 of this Dissertation.

121 *OJ L 348, 24.12.2008, p. 98–107*, see CJEU 18 December 2014, C-562/13, ECLI:EU:C:2014:2453 (Centre public d'action sociale d'Ottignies-Louvain-La-Neuve/Moussa Abdida); CJEU 19 June 2018, C-181/16, ECLI:EU:C:2018:465 (Sadikou Gnandi/État belge); CJEU 30 September 2020, C-402/19, ECLI:EU:C:2020:759 (LM/Centre public d'action sociale de Seraing).

122 Article 41 (a) PD.

ing" the new elements required by such a new application. Within the same exception, the right to remain pending the examination of the asylum claim at first instance does not apply where the applicant has lodged another application after the initial application has been declared inadmissible.[123] The other exception mentioned under Article 9(2) of the Procedures Directive allows Member States to surrender an applicant to another Member State pursuant to its obligations under the European Arrest Warrant or otherwise to a third country or to international criminal courts or tribunals. To the extent the envisaged extradition may breach the principle of non-refoulement it is submitted here that the principles discussed in Section 10.3.1 apply mutatis mutandis.

As for the appeal procedure, pursuant to Article 46(5) PD, the general rule is that applicants are entitled to remain in the territory of the Member States until the time-limit for their exercise of the right to an effective remedy has expired, and if such right has been exercised they are entitled to remain pending the outcome of the remedy. Article 46(6) includes several exceptions to this rule, to be decided upon in court. Exceptions to the right to remain pending appeal proceedings include situations where applications were manifestly unfounded, vexatious, discontinued or inadmissible.

The CJEU has interpreted the suspensive effects of a return decision in light of Articles 19(2) and 47 of the EU Charter.[124] It has established that the notion of an effective remedy under the EU Charter affords applicants the right of a remedy with automatic suspensive effect before at least one judicial body.[125] From the perspective of the CJEU it was important that persons exercising their right to an effective remedy were allowed to remain within the jurisdiction during the determination of their appeal.[126] The CJEU has also assessed the dependence of children on their parents in removal cases.[127] In a case concerning the envisaged removal of a parent, the ECtHR mandated that national authorities assess the relationship of dependency between that parent and their (adult) child. The dependency of a child on their parent could thus result in a breach of non-refoulement for the child in case of the parent's removal.[128] Consequently, the right to non-refoulement set out under Article 19(2) of the EU Charter should guarantee to the parent a right to appeal with suspensive effect against the removal decision.[129]

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123 Article 41 (b) PD.

124 CJEU 19 June 2018, C-181/16, ECLI:EU:C:2018:465 (Sadikou Gnandi/État belge); CJEU 30 September 2020, C-402/19, ECLI:EU:C:2020:759 (LM/Centre public d'action sociale de Seraing).

125 CJEU 19 June 2018, C-181/16, ECLI:EU:C:2018:465 (Sadikou Gnandi/État belge), para 58.

126 C-239/14, Tall, 17 December 2015, para 56.

127 CJEU 30 September 2020, C-402/19, ECLI:EU:C:2020:759 (LM/Centre public d'action sociale de Seraing).

128 CJEU 30 September 2020, C-402/19, ECLI:EU:C:2020:759 (LM/Centre public d'action sociale de Seraing), paras 37, 42, 50.

129 CJEU 30 September 2020, C-402/19, ECLI:EU:C:2020:759 (LM/Centre public d'action sociale de Seraing), para 43.

Under the ECHR, the same issues have been analysed under Articles 2 or 3 alone or in conjunction with Article 13 ECHR (the right to an effective remedy).[130] The ECtHR has held that the notion of an effective remedy for the purposes of non-refoulement obligations requires an "independent and rigorous scrutiny" of any complaint made by a person in such a situation, and, secondly, "the possibility of *suspending [emphasis added]* the implementation of the measure impugned."[131]

Consequently, under the ECtHR's case law a remedy for applicants at risk of expulsion is effective if it has an automatic suspensive effect of the deportation.[132] The Court has not dealt with the question of whether applicants for international protection have the right to stay in the country where they request protection during the first instance process. Yet, as stated above, the Court has affirmed that applicants should be entitled to challenge the deportation and such a challenge -in order to qualify as an effective remedy – should have an automatic suspensive effect. All the more thus should an applicant have the right to stay while their initial claim for protection is being dealt with. Furthermore, when it comes to the effectiveness of the remedy, the Court held that discretionary remedies, or other possibilities for the authorities to grant suspensive effect, do not meet the condition of effectiveness under the Convention due to their uncertainty for the applicants.[133]

### 10.3.5 Length of the proceedings

Family courts vested with Child Abduction proceedings are concerned that the duration of the asylum claims will negatively influence the decision-making in child abduction cases. Indeed, as per the Child Abduction Convention, the case is to be resolved within 6 weeks. A similar timeline is set under Brussels II *ter* Regulation. The rationale behind the Child Abduction Convention is that the abductor uses the passage of time in their favour to create an irreversible situation where the child cannot return to the state of habitual residence.

Concerning asylum proceedings, Article 31(3) of the Procedures Directive provides that Member States are to conclude the examination of the case at first instance within six months from the date of lodging of the application. There are several possibilities to extend this period with a further 9 months (article 3 (3)(a) to (c) and 31(4)PD), but in any case the period should not last longer than 21 months from the date of lodging the application (Article 31(4) PD). Also, it should be noted that children, regardless of whether they are accompanied or not, are to be considered vulnerable

130 It should be noted that Article 6 ECHR does not apply to the expulsion of aliens (ECtHR 5 October 2000, no. 39652/98 *(Maaouia v. France (GC))*, para 41).
131 ECtHR, 4 November 2014, no. 29217/12 (*Tarakhel v. Switzerland)*, para 126.
132 For example, ECtHR 5 February 2002, no. 51564/99 (*Conka v. Belgium*), paras 79, 81.
133 Spijkerboer 2009.

within the meaning of Article 21 of the Reception Conditions Directive. Therefore, applications including children may be prioritised in accordance with Article 31(7) of the PD. Prioritisation under Article 31(7) PD should be distinguished from acceleration of the examination procedure within the meaning of Article 31(7), the latter applying to several distinct circumstances where there is a high likelihood of rejection.[134] As shown above, it should further be noted that the applicants have the right to appeal first instance decisions and such a right to appeal has suspensive effect. The Procedures Directive nevertheless does not provide a timeline for the resolution of the case on appeal. Under Article 46(10) PD this is for the Member States to lay down in their national legislation. Following a report published by the European Council on Refugees and Exiles (the "ECRE"), not all Member States have introduced maximum deadlines for examining appeals.[135] Of those countries having introduced such deadlines, they vary from one month in Poland to 15 months in Austria.[136] Further, the same report points out that in practice proceedings on appeal can last up to two years in some countries.[137] In addition, in the context of asylum it has been pointed out that speediness of the proceedings can sometimes negatively impact on the applicants' rights to access the procedure and to have an effective remedy, therefore authorities should carefully balance these rights so as to achieve an optimum length of proceedings.[138]

Similar to the question of suspensive effect, given the lack of applicability of Article 6 ECHR to expulsions, the ECtHR has dealt with the question of length of proceedings under Article 13 of the Convention. However, in asylum cases the complaint was not that the proceedings leading to the determination of protection status had been excessively long, but rather that the right to an effective remedy had been violated on account of excessively short proceedings. *De Souza Ribeiro v. France* is a case in point. The decision in that case had been taken within less than 24 hours and he had been already deported within that time frame. The Court held:

> "the haste with which the removal order was executed had the effect of rendering the available remedies ineffective in practice and therefore inaccessible. While the Court is aware of the importance of swift access to a remedy, speed should not go so far as to constitute an obstacle or unjustified hindrance to making use of it, or take priority over its practical effectiveness."

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134 cases where the examination procedure may be accelerated are those where for example the applicant is from a safe country of origin, the applicant has misled the authorities, the applicant has destroyed or withheld facts, etc. Article 31 (8) (a) to (j).

135 ECRE report: The length of asylum procedures in Europe, October 2016, available at https://www.ecre.org/wp-content/uploads/2016/10/AIDA-Brief-DurationProcedures.pdf, accessed on 19 June 2018.

136 ECRE report 2016, p. 9.

137 ECRE report 2016, referring to countries such as Italy, Spain and Cyprus, p. 10.

138 ECRE report 2016, p. 1.

In the same vein, the Court has condemned priority procedures where applicants had to file their complete asylum application within 5 days and where the timeline for preparation of the appeal was of 48 hours. Conversely, the Court has accepted that the effectiveness of a remedy may be impaired by long delays in the procedure.[139]

Consequently, it does appear that in order to discharge with the requirements of the ECtHR, domestic authorities should determine asylum claims taking into account both the time needed for the applicants to prepare their cases as well as that the overall length of the procedure should not be excessive. However, there have not been enough cases on these points so as to assess with more certainty what would constitute an excessive delay or a too short time for preparation of the case and appeal.

### 10.3.6 Burden of proof and evidence necessary of a real risk of harm

The case law of both the CJEU and the ECtHR has addressed the question of the type of evidence on which states may rely when assessing whether the state of return is capable of offering adequate protection upon return. In addition, the ECtHR has also developed an extensive body of case law on the burden of proof in asylum cases. This line of case law can equally be instructive for child abduction applications which have to deal with similar questions, albeit in a different context.

First, concerning the burden of proof, the ECtHR considers that a state's responsibility is engaged "where substantial grounds have been shown for believing that the person concerned, if deported, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country."[140] While it is for an applicant to show that such a real risk exists, in order to accept or refute this proposition, in addition to the evidence submitted before the national authorities, the ECtHR will also look into reliable reports of international organisations on the situation in the country of origin, or reports issued by national authorities of other contracting states.[141] A frequent feature in expulsion cases is the issue of credibility since applicants for international protection have few if any documents to prove their case.[142] For this reason the Court gives the applicants "the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support thereof."[143] Once an applicant has established that a serious risk of treatment contrary to Article 3 existed, it is for the government to prove that the application is nevertheless ill-founded.[144]

139 ECtHR 2 February 2012, no. 9152/09 *(I.M. v. France).*
140 ECtHR 4 November 2014, no. 29217/12 (*Tarakhel v. Switzerland), para* 93.
141 See for eg. ECtHR 10 September 2015, no. 4601/14 *(R.H. v. Sweden).*
142 ECtHR 5 September 2013, no 886/11 (*K.A.B. v. Sweden)*, para 70.
143 ECtHR 10 September 2015, no. 4601/14 *(R.H. v. Sweden)*, para 58.
144 Spijkerboer 2009, p. 62.

While the ECtHR has so far not dealt with the issue of burden of proof in cases of child applicants, it should be highlighted that cases involving children raise particular issues in relation to the burden of proof in that children may find it more difficult to prove that they are at risk of persecution. In these cases, it has been recommended that children should be dealt with greater care and the benefit of the doubt rule and concessions regarding the burden of proof, should be particularly applicable to them.[145]

Similarly, the CJEU has considered that state declarations and the accession of the state where the person is to be returned to international treaties guaranteeing respect for fundamental rights are not in themselves sufficient for assessing that adequate protection against ill-treatment exists in that state.[146] The CJEU has imposed an obligation on Member States to rely on evidence which is "objective, reliable, specific and properly updated".[147] In addition, it has expressly outlined that such information may be obtained from "judgments of international courts, such as judgments of the European Court of Human Rights, judgments of courts of the requesting third State, and also decisions, reports and other documents produced by bodies of the Council of Europe or under the aegis of the United Nations."[148]

## 10.4 Conclusions

This chapter had a different nature: it focused on public law matters. Section 10.2 addressed the contribution of the CJEU and the ECtHR to providing minimum standards of protection across states within their jurisdiction. The inquiry covered the minimum standards of protection for children with parents having an immigration background. This Section has shown that state authorities use children's rights to serve immigration goals. It was also shown that, until the rulings of the two Courts, the weight of the right of the child to have contact with both parents differed depending on the authority deciding the matter. Such an asymmetry had the result that children of immigrant parents were denied the right to contact with those parents solely on the ground of the immigration status of their parents. These discussions evidence the instrumentalisation of children's rights for other policy goals. They also echo the existing debates at the drafting time of the CRC, when states were willing to accept the rights of children only if they did not affect their immigration policies.[149] One question remains: why are

145 Pobjoy 2017, p. 99.

146 CJEU 6 September 2016, C-182/15, ECLI:EU:C:2016:630 (Aleksei Petruhhin/Latvijas Republikas Ģenerālprokuratūra), para 57; CJEU 2 April 2020, C-897/19, ECLI:EU:C:2020:262 (Ruska Federacija/I.N.), para 65.

147 CJEU 2 April 2020, C-897/19, ECLI:EU:C:2020:262 (Ruska Federacija/I.N.), para 65.

148 CJEU 6 September 2016, C-182/15, ECLI:EU:C:2016:630 (Aleksei Petruhhin/Latvijas Republikas Ģenerālprokuratūra), paras 55-59; CJEU 2 April 2020, C-897/19, ECLI:EU:C:2020:262 (Ruska Federacija/I.N.), para 65.

149 See Section 3.3.1 above.

minimum standards of protection in immigration law important for child abduction cases? The answer in short is: in absence of such standards the Convention's goal of returning the child for a fair custody determination remains devoid of substance. If the Convention's aim is to serve children's rights, children's rights cannot be used against the children the Convention is supposed to serve. Moreover, return decisions to a country where a parent does not have a minimum level of immigration protection are decisions *about* the child because they will separate the child from the taking parent. They are not decisions *about the best place* to adjudicate the custody dispute as suggested by Eekelaar.[150] Therefore a closer examination of the parent child relationship is necessary, as discussed in the Preliminary Conclusions (Chapter 6).

Second Section 10.3 addressed the relevance of the European supranational Courts at the intersection between child abduction and refugee law. It was shown that given their constitutional nature, the CJEU and ECtHR are capable of offering a unified response to such cases across states within their jurisdiction. The answers to the relevant questions analysed in this section are the following. Return orders under the Child Abduction Convention can amount to a breach of the non-refoulement principle if the parent and/ or the child have received asylum status or are beneficiaries of subsidiary protection. The same applies if the return is ordered while the child and/ or the parent have appealed the asylum decision. If the taking parent is the only recipient of protection, child abduction courts are to treat such protection as an *objective impossibility* to return to the country of habitual residence. Overall, it is the responsibility of the authorities (child abduction and administrative/ immigration) to devise protocols to work together in these cases. Such protocols should be guided by the rights of children. However, simply stating that the Child Abduction Convention serves the best interests of the child is not sufficient and it falls short of a child rights-based approach.

150 Eekelaar 2015.

# 11 Conclusions

The Child Abduction Convention proposes a simple solution to a complex problem: the return of the child to the country of habitual residence where courts will determine fairly custody and contact rights. The Convention was adopted in the light of the best interests of the child. Children's rights have played and continue to play an important role in justifying the policy considerations of the Convention. Since 1980 to the present day, national and international courts deciding on child abduction applications routinely refer to children's rights in their judgments. Despite these references, the meaning of children rights within the parental child abduction sphere remains obscure.

Further, since the entry into force of the Child Abduction Convention, the legal and factual landscape in which parental removals/retentions of children occur has changed dramatically. Legally, as of 1990 the rights of children should be construed in light of the CRC – as the only international human rights convention dedicated specifically to children. Factually, the reach of the Child Abduction Convention has extended far beyond what was originally envisaged by its drafters. Rights of custody rights and habitual residence have been interpreted extensively by national courts.[1] These interpretations were coupled with changes in family laws across the Global North, whereby the child's right to have contact with both parents is now understood to require the physical proximity between both parents and the child(ren), even after the parents' separation.[2]

The Child Abduction Convention will only become applicable if a child has crossed international borders. The Child Abduction Convention however is disconnected from immigration laws, the public law discipline which is most closely associated with peoples' crossing borders. Compared to family laws, immigration places less attention to the child being in close physical proximity to their parents. Immigration laws have different objectives which point to different outcomes compared to family laws. Immigration law focuses on controlling and restricting the entry and residence of aliens within a territory. Family law requires that parents, regardless of their status, remain within a territory to care for their children, irrespective of their immigration status. This creates different push and pull factors for individuals which, due to the disconnection between family and migration laws, affect children and their family members unevenly.

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1 Sections 4.3.2.1 and 4.3.2.2 of this dissertation.

2 Section 5.4. of this dissertation.

The underlying aim of this dissertation was to offer an understanding of the Child Abduction Convention in the broader global context in which it operates. Context as understood herein is defined by three elements (i) the rights of children as understood in international law, (ii) the new sociological paradigms within which the Child Abduction Convention operates and (iii) the migratory element inherent in children crossing borders. The dissertation followed the *interactions methodology* positioning children's rights as the focal branch. The first part was dedicated to analysing the emergence of children's rights and their conceptualization under the CRC (Chapters 2 and 3). The second part was dedicated to (i) analysing the Child Abduction Convention, (ii) the relevance of a child rights-based approach to this instrument and (iii) determining how the immigration context has manifested within child abduction applications and the ensuing relevance of a child rights-based approach to abduction cases with immigration components (Chapters 4 and 5). Chapter 5 zoomed in to the most pressing debates surrounding parental child abduction: the issue of primary carers and that of domestic violence. The determination of immigration issues was based on an analysis of domestic case law available on the website of the HCCH, existing academic literature as well as from responses of national authorities in questionnaires submitted by the HCCH. This overview showed that immigration concerns, albeit distinct, should be understood together with issues of domestic violence and primary carer abductions.

The research carried out in parts I and II followed from an overarching research sub-question:

> *How can a child rights-based approach inform parental child abductions in general and specifically the parental child abductions with immigration components?*

Parts I and II identified certain disconnects between the Child Abduction Convention and children's rights on the one hand and between the Child Abduction Convention, children's rights and immigration laws on the other hand. It was hypothesised that an underlying reason for such disconnect is the lack of an international monitoring mechanism with competences in addressing all the elements of the context in which this Convention operates: i.e. child abduction, children's rights and immigration laws. The European supranational system is unique worldwide due to the competences of the two supranational Courts in addressing all these elements. Given their overarching mandate, the aim of Part III of this dissertation was to determine how the European supranational Courts can respond to the challenges brought by the intersection between children's rights, child abduction and immigration laws. Part III answered the following research question:

> *What is the role of the European supranational courts in ensuring that the national courts adopt a child rights-based approach to child abduction cases in general, and to those with immigration components in particular?*

When analysing the child abduction case law of the two European supranational Courts, in addition to the three core rights of children, Chapters 7 and 8 included an overview of these Courts' approach violence against children in abduction cases and the relevance of children's rights to the topic of primary carer abductions. The choice to include these two additional elements was driven by the outcome of the research in Chapter 5 where it was shown that the application of the Child Abduction Convention has been criticised particularly in these two respective areas.

Together, the research carried out in Parts I, II and III aims at laying down a decision-making framework for judges tasked with ruling on child abduction applications. The decision-making framework is addressed to judges as the interpretation of the Child Abduction Convention has evolved primarily through the case law of courts. In this increasingly complex world, courts carry out seemingly contradictory tasks: that of respecting children's rights while at the same time remaining faithful to the letter of the Child Abduction Convention. The main research question is therefore asked with the complexities of decision-making in child abduction cases in mind:

> *How could domestic courts within the European Union adopt a child rights-based approach to child abduction cases in general and to those cases with immigration components in particular?*

## 11.1 The first sub-research question: a child rights-based approach to parental child abduction

### 11.1.1 The foundations of a child rights-based approach

Children's rights as a separate discipline is a relatively new contender on the international arena. This is true, even if the societies' preoccupation with protecting children long predates their acknowledgment as right-holders in 1989, with the adoption of CRC. Before the CRC, it was primarily children's need for protection which justified some of the early laws on children's rights. Subsequently, the liberation movement argued that children should have rights in the same way as adults. These two opposing stances, one focusing on protection, and the other on autonomy coexisted when the CRC was drafted. The parents and the state are central to both arguments as they can be seen both as inhibitors or enhancers of children's rights. It is thus the triangle parent-child-state which makes children's rights unique. It is generally accepted that the CRC is an attempt to resolve the dilemma of protection versus participation through a developmental approach, under

which the balance between protection and autonomy shifts progressively toward the latter as the child grows in age and maturity.[3]

Within the CRC, the rights of children are inextricably linked to the rights of their parents. Of the 39 Articles laying down substantive rights, no less than 30 Articles mention the child's family, parents, guardians or caregivers.[4] Nevertheless, the CRC sets some important limitations on the rights of parents, specifically in Articles 5 and 12. Under Article 5, the 'evolving capacities' are at the centre of the triangular relationship between parent-child-state. The state has the duty to ensure that the "more the child himself or herself knows […] the more the parent[s] […] have to transform direction and guidance into reminders and advice and later to an exchange on an equal footing".[5] Article 12 on the child's right to be heard is generally credited with bringing about the paradigmatic shift from children as objects of protection to children as rights holders.[6] This notwithstanding, the breadth of Article 12 is rather modest in that it only requires States to ensure the right to express views freely and to have those views given due weight in accordance with the age and maturity of the child.

Children's rights law is thus unique in that the position of children as rights-holders is at the same time distinct but intimately linked with their caregivers. Children's rights law cannot be understood by isolating the rights of children from their caregivers, but rather through a *collaborative* conception of the relationship between the state and family as regards children's upbringing."[7]

The principles of a rights-based approach may be drawn from all international human rights instruments; the CRC represents the primary but not exclusive source from which the principles of a human rights-based approach for children can be derived.[8] The CRC Committee has used the term rights-based in order to shift the focus from protection rights to participatory rights for children. The same view has been shared by commentators who see participation as a key feature of a rights-based approach.[9] In the context of children, it should be noted that participation is modified but does represent a rejection of the previous approaches focusing solely on their welfare.

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3 Smolin 2003, p. 975; Rap/Schmidt/Liefaard, 2020, p. 4.

4 The CRC is divided into two parts, the first part including the definition of the child (Article 1) followed by 39 Articles laying down various rights. Article 41 – which is the last Article of the substantive part – does not concern a right, but the relationship of the rights within the CRC with other provisions of national and international law. Hence, there are 39 provisions laying down various substantive rights for children.

5 General Comment no 12 (2009): The right of the child to be heard, CRC/C/CG/12, 20 July 2009 (GC 12), para 84.

6 Mayall 2013, p. 35.

7 Tobin 2013, p. 426.

8 Tobin 2016, pp. 67-68.

9 See among others Tobin 2016; Lundy/McEvoy 2012.

This dissertation has used Tobin's rights-based model to judicial decision-making.[10] The same approach has been endorsed by the CRC Committee, primarily in its General Comment no 14 and by Krutzinna in a recent contribution.[11]

Tobin's view of a rights-based model implies a process where judges consider (i) the wishes of the child; (ii) the relevance of other rights under the CRC; (iii) the particular circumstances of the child; and (d) any available empirical evidence which may be of relevance.[12] Brief references to the rights of children are not sufficient to meet such an approach.[13] Nor are truncated references to some rights of children, or rhetorical affirmations pertaining to – for example- society's interest in protecting minors.[14] Last but not least, judges should determine the actual scope and nature of the rights in question and balance them against any competing considerations.[15]

For Tobin, a rights-based approach to judicial decision-making includes four aspects: (i) the conceptualization stage; (ii) the procedures used; (iii) the meaning given to the rights in question and (iv) the reasoning, i.e. how the rights at stake were balanced in the context of the specific case. Under the *conceptualization* stage it is important to identify the children's rights at stake.[16] The *procedures* used refers to all the means taken in the process of litigation to ensure children's effective participation and appropriate protection: such as appointing a guardian *ad litem* or the administration of evidence in a child friendly way, etc. The *meaning* given to the rights in question requires adaptation of the litigation process in a way that is particularly fit for children taking into account their specific position: thus the right to be free from inhuman and degrading treatment may have a different meaning for children than it has for adults. Last but not least, the substantive *reasoning* of courts refers to how they balance competing rights.[17] Importantly, balancing does not entail that the rights of children trump all other rights, but rather that all of the competing rights are identified and given appropriate consideration.[18] Tobin accepts that there may be circumstances where other rights or interests will have priority over those of children, and such an outcome could very well fulfil the conditions of a rights-based approach provided that the aforementioned five conditions are met.

Under Chapter 2 it was identified that a rights-based approach requires courts to conceptualise rights and ascribe them concrete meaning. In light of this, Chapter 3 has analysed extensively three core rights of children

10 This is elaborated upon in Chapter 2.
11 Krutzinna 2022.
12 Tobin 2009, p. 592.
13 Fortin 2006, p. 301.
14 Tobin 2006, pp 598-600.
15 Tobin 2006, p. 601.
16 Tobin 2006, pp 604-605.
17 Tobin 2009, p. 612.
18 Tobin 2009, p. 615.

which inevitably must be determined in any post-separation parenting dispute: the best interests of the child, the right to have contact with both parents and the right to be heard. Other rights of the child may become applicable in different contexts, and a rights-based approach calls for the inclusion of such other rights in the analysis.[19] Of these, the right of the child to be protected from violence is of particular importance to the present dissertation. The concept of parental alienation has been developed in close connection with the right of the child to be free from violence and the right to have contact with both parents. Parental alienation allegations are important to note as part of the wider context of post parenting separation disputes. From a child-rights perspective, parental alienation allegations do not dispense courts from conceptualising and giving concrete meaning to three core children rights laid out in Chapter 3 of this dissertation.

The best interests of the child is at the same time most obscure and the most utilised notion in post separation parenting disputes and in child abduction proceedings alike. So as to remove potential biases from decision-making, courts should explain *how* they have understood the best interests of the child in concrete cases. Such a proposition is also supported by the CRC Committee in its General Comment no 14. The Committee indicates that: "States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests, what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases."[20]

Further, the right of the child to have contact with both parents is equally important in post separation parenting disputes. From the negotiations for the adoption of Articles 9 and 10 of the CRC it is visible that the tension between immigration and family laws was present already at the drafting stages of the CRC. Delegations agreed that children should have the right to maintain contact with both parents. Yet, they were less willing to accept such a right when they perceived that it may encroach upon their powers to regulate immigration. Despite these tensions, it is telling that ultimately references to nationality and/or legal residence were eliminated from the final drafts of the CRC. Article 9(3) of the CRC proclaims the right of the child to have contact with both parents whereas Article 10(2) CRC affirms the same rights for the "child whose parents reside in different States". A textual analysis of these provisions indicates that Article 10(2) CRC is only incident when the parents *already* reside in different countries.

19 For example, Kalverboer et al 2017, have developed a best interest of the child model comprising 14 factors which should be taken into account in cases involving children in migration. While this source may be used as an inspiration by decision makers in child abduction cases, it has not been considered fully applicable here given the more limited possibilities to carry out a full best interests assessment under the Child Abduction Convention, as discussed in Chapter 4 of the dissertation.

20 GC No. 14, para 6(3).

In turn, Article 9(3) CRC is applicable to children and parents, irrespective of their nationality and legal or illegal residence status, who reside in the same country at a given time. This distinction is important in practice as commentators, on the basis of the *travaux préparatoires* and the actual text of the provisions, accept that the provisions of Article 9(3) CRC confer more extensive rights to children than those of Article 10(2) CRC.[21]

The right to be heard included under Article 12 of the CRC was meant to counterbalance other rights in the Convention such as the best interests which historically was perceived as a vehicle meant to secure the protection of children. The CRC Committee in its General Comment no 12 has set out important guidance for states and decision-makers in implementing this right for children. The obligations of states under Article 12 are complex and for the Committee it is important not only that the hearing of the child takes place; but that the hearing is *effective*. As a minimum, the Committee emphasised that all children should have the right to express their views. While preference is given for direct contact with the decision maker, indirect contact is also a viable alternative. Giving the voice of children 'due weight', means that the more 'mature' a child is the more weight should the voice carry and that in any event children should be able to influence the outcomes in their particular cases. Here, there is an obvious link between Article 12 and Article 5 of the Convention.[22] There is no requirement for a child's opinion to be decisive, however it should have an impact on the decision.

Consequently, a child rights-based approach is mainly a procedural tool for courts. This approach considers the particularities of children's position where discourses about rights are intertwined with discourses around children, parents are the state. Children's rights need to be individualised in the decision-making, but individualisation does not mean that there is a disconnection between the rights of children and their parents.[23] The individualisation should take account of all rights of the CRC, and consider their interdependence.

### 11.1.2 Applying a child rights framework to parental child abduction

Chapter 4 has analysed at length the mechanism of the Child Abduction Convention. This analysis shall not be reiterated here. It is however important to mention that at a first glance this Convention is incompatible

21 These aspects are discussed in Chapter III, Section 3.3 of this dissertation.

22 For a discussion on this link see also Chapter II, Section 2.3.2 of this dissertation.

23 For an example on how the rights of children have been included to develop a best interests decision-making model to cases of migration see: Kalverboer et. al. 2017. It should be noted however that this model presupposes a full best interests assessment contrary to the more limited type of assessment which should be carried out in child abduction proceedings.

with the rights-based approach mentioned above. This is because the Child Abduction Convention does not allow courts to pre-judge the merits of the custody dispute, whereas the right-based approach arguably calls for a more in-depth assessment of the rights of children. *Prima facie*, the Child Abduction Convention exposes a contradiction between the rights of children in general over the rights of individual children. Proponents of the Convention have argued that the rights of children -seen as a group- require that courts sacrifice the rights of individual children in the decision-making process.[24] Nevertheless, more recent contributions, including the View of the CRC Committee in an individual communication, have disputed the adequacy of such an approach from the perspective of the CRC.[25]

Eekelaar, when theorising on the relationship between children's rights and child abduction, has proposed that the latter is about the best place to decide on the rights of the child. In his view, child abduction courts take decisions which are *indirectly* affecting children; they are not *per se* deciding on children's rights.[26] Eekelaar also mentions a decision about the deportation of a parent among those that are only *indirectly* affecting a child.[27]

This dissertation argues that this distinction between decisions directly and indirectly affecting the child is not supported by the factual circumstances of children from mixed-status families. Eekelaar for example, when discussing a situation of a parent facing deportation due to insufficient financial resources, qualifies this case as one *indirectly* affecting the child especially since the child had another parent living in the United Kingdom.[28] If this argument is accepted it simply means that family courts will become immigration enforcers. Once a child carer has been deported, courts will simply grant custody to the parent remaining in the country and the child will lose contact with the deported parent, irrespective of the relationship between them.[29] Thus, the parent with legal/stronger immigration status becomes the key decision-maker before family courts. Section 5.5 discusses the interplay between immigration and family laws and shows how the power imbalances created by immigration law can have a negative effect on children from mixed-status families.

Returning to the Child Abduction Convention and the rights of children, Chapter 4 has argued that a child rights-based approach to the Convention is not only possible, but also required by the principle of harmonious interpretation of treaties under international law.

Such an approach does not mean that child abduction courts undertake a merits-based evaluation of custody. However, it does mean that courts

24 For further references, see Section 4.5.3 of this dissertation.
25 Tobin et al, 2019; *Communication No. 121/2020 N.E.R.Á. on behalf of J.M. v. Chile,* para 8.4; Skelton 2023, p.293 referring to Tobin et al. 2019, see also Section 4.5. of this dissertation.
26 Eekelaar 2015, p. 12.
27 Eekelaar 2015, p. 20.
28 Eekelaar 2015, p. 20.
29 This has indeed happened on certain occasions as discussed in Chapter 10 of this dissertation.

will need to show how children's rights have been conceptualised, which procedures were used, the meaning ascribed to rights and the balancing exercise. In other words, return orders in the name of the best interests of the child without an identification of the elements of the best interests of the child, do not reflect a rights-based approach. Chapter 4 has argued that the children's voices should become more prominent in child abduction cases, even outside the limited context of Article 13(2) of the Child Abduction Convention. Children's voices should be included in determining several questions of fact of the Convention, including the grave risk of harm exception, habitual residence or whether custody rights were actually exercised. Such an approach would ensure that return orders comply with both the policy objectives of the Convention and with the interests of the particular child.

Furthermore, while indeed considerations about the right of the child to have contact with the left-behind parent play a significant role at policy level, questions about separation between the child and the taking parent should also be taken seriously into consideration. This is all the more important as now the taking parents are in most cases also the primary carers of the children.[30] No significant attention appears to have been given to the impact the separation from the taking parent may have on the child and to the circumstances which could justify a non-return order on this ground. Clearly, reasons for not including these considerations relate to the fact that child abduction should be sanctioned and the Convention is also meant as having a deterrent effect for potential abductions. These considerations, valid as they may be, fail to take into account situations where the taking parent is in an objective impossibility to return and which necessarily will result in the separation from the child.[31] The recent case stemming from the CRC Committee and discussed in section 4.5.2 has equally brought to the fore these discussions. Here the CRC Committee has confirmed that child abduction courts are to take into account arguable allegations of a risk of harm and that the policy considerations of the Convention do not trump the requirement that courts assess the rights of the individual child on a case by case basis.

### 11.1.3 Parental child abduction with immigration components: the relevance of children rights

Chapter 5 delved deeper into the contemporary dilemmas posed by the Child Abduction Convention. Here the two of the most prominent debates were presented -that of primary carer abductions and of domestic violence. Domestic violence is an issue affecting children as well, and through a child rights-based approach courts could identify and balance the impact of violence on children. However, this impact should not only be assessed

30 Lowe/Stevens, Global Report 2023.

31 See for eg discussion on the case law of the ECtHR, Chapter 8.

by reference to physical violence; it has been demonstrated that children could be the victims of psychological violence and coercive control. In this Chapter it was shown that debates in substantive family laws concerning domestic violence and the care-taking roles have been mirrored in the child abduction case law and literature. This Chapter went further to analyse how immigration has been discussed in substantive family law scholarship. On the basis of the literature and case law analysis undertaken in Section 5.6 it was argued that immigration has not yet had any meaningful impact on child abduction scholarship and case law. Section 5.6 analysed how immigration considerations were brought within domestic child abduction proceedings, on the basis of domestic case law published by the HCCH, references in literature and questionnaires of the HCCH. This Chapter showed that immigration laws blur the lines between decisions concerning children directly or those affecting them indirectly. Immigration laws may place parents in an objective impossibility to return and thus the parent child separation becomes imminent. Issues of parent child separation due to immigration laws in the country of habitual residence warrant serious consideration by child abduction courts. Here, it was suggested that courts should first assess (i) the arguability of allegations and (ii) the relationship of care between the parent and the child. The closer the relationship, the closer the child abduction courts should weigh the question of parent child separation. Further, the evaluation of the parent-child relationship should be carried out from the child's perspective, taking into account the views of the child on the relationship with both parents. The second step is to determine if return exposes the child to a grave risk of harm. This step shall be undertaken if there are arguable allegations of an objective impossibility to return and there is a close parent-child bond with the taking parent. Thus, in cases where the left behind parent has been the child's main carer, immigration considerations raised by the taking parent may warrant less detailed attention from the perspective of children's rights as the child will return to a parent with whom they have a close bond.

Further, the materials analysed in Chapter 5.6 revealed that immigration considerations are brought in different contexts before domestic authorities. They (i) may be indicative of domestic violence, (ii) they may reveal an objective impossibility of the parent to return and/or (iii) they may indicate that the system in the country of habitual residence is not capable of protecting the child upon return. It is for domestic courts to assess on a case-by-case basis whether any of the circumstances mentioned under points (i) to (iii) above are met.

Immigration considerations can thus play an important role both in determining whether there is a grave risk of harm to the child and in assessing the capacity of the system in the country of habitual residence.

For the determination of the grave risk of harm, immigration considerations can be indicative of domestic violence and power imbalances. This can happen when for example the legal system in the country of habitual residence conditions the right of the taking parent to live in that country

on the relationship with the left-behind parent. Restrictions on the right to live in the country and the possibility to obtain legal employment can also amount to an objective impossibility to return to the country of habitual residence.

Immigration considerations are equally relevant when deciding on the capacity of the system to protect the child upon return. In this dissertation it has been argued that when immigration-based defences have been made, child abduction courts are under an obligation to carry out a closer review of the capacity of the system in the country of habitual residence to protect the child. Immigration should be seen together with other reasons brought as exceptions to return, rather than isolated and disconnected from other reasons in support of the the child not being returned. For example, if there are indications of domestic violence, coupled with immigration-based restrictions on the right to reside in the country of habitual residence, return should not be ordered on the assumption that the child and parent will be protected in the child's country of habitual residence. Also, whenever the parent and the child have applied or have obtained asylum status return child abduction courts should accept that the parent is in an objective impossibility to return and that the authorities in the country of habitual residence are not capable of offering adequate protection. Both these situations preclude any discussions on undertakings from the left-behind parent: no undertakings are suitable in these circumstances.

Furthermore, it is accepted that child abduction proceedings do not determine the allocation of custody. Even if the return of the child is refused, the courts in the country of habitual residence remain competent to adjudicate the merits of the custody dispute. Pending these proceedings, the authorities in the country of abduction could secure the right to contact of the child with the left-behind parent. The child custody decision can then be recognised in the country where the child is present. This mechanism, primarily applicable between countries which have ratified the 1996 Child Protection Convention, has been under-discussed and under-utilised. In Chapter 4, it was proposed that the 1996 Child Protection Convention has the potential to offer a more comprehensive protection of human rights than the very limited Child Abduction Convention.[32] This proposition was based on several considerations. First, this Convention allows the child and one parent to remain in one country while proceedings on the substance are pending in another country. Presuming that the child may remain in the country where (s)he is, the application of the 1996 Convention avoids uprooting the child on repeated occasions. The 1996 Convention also offers the possibility to enforce contact rights for the duration of contentious proceedings (for

32 It should be noted that within the EU the 1996 Child Protection Convention has been superseded by the Brussels II *ter* Regulation, and prior to the entry into force of this Regulation by the Brussels II *bis*. Nevertheless, the 1996 Child Protection Convention remains applicable in proceedings involving a state party to this Convention which is not at the same time a member of the European Union.

example under Articles 11 and 12). In addition, the 1996 Convention includes a cooperation mechanism between courts aimed at deciding the best-placed State to determine the best interests of the child (Articles 8 and 9). Finally, the 1996 Convention's non-recognition system reflects the standard public policy exceptions of private international law instruments which have the capacity to assess the procedural fairness for the child and parents as well as other wider human rights considerations. Overall, it was argued that the complexities of globalisation call for more nuanced solutions to complex problems and the 1996 Child Protection Convention could be one tool in offering such solutions. Nevertheless, to date, scholars and practitioners alike have focused extensively on the Child Abduction Convention to the detriment of the 1996 Child Protection Convention, which as argued herein, is capable to responding to some of the challenges of globalisation in a way that the Child Abduction Convention cannot.

## 11.2 The second sub-research question: The European supranational Courts, child abduction, immigration and children's rights

### 11.2.1 The rights-based approach to child abduction and the European supranational Courts

The jurisdiction of the CJEU and ECtHR extends to child abduction. The competence of the CJEU is determined by the Brussels II *ter* Regulation, whereas the ECtHR has interpreted the guarantees of the Hague Convention within the text of Article 8 (primarily) and Article 6 of the ECHR.

#### *11.2.1.1 A rights-based approach within the European Union*

Within the European Union, the Brussels II *ter* Regulation applies to all EU Member States, with the exception of Denmark.[33] This Regulation goes further than the Child Abduction Convention in several respects. From the perspective of children's rights this is most evident in Article 21 of the Regulation which mandates Member States to provide children who are capable of forming their views with a genuine and effective opportunity to express their views and to give due weight to such views. Prior to the entry into force of the Brussels II t*er* Regulation, Article 11(2) of the Brussels II *bis* mandated states to give children the opportunity to be heard, unless it may be deemed inappropriate in light of their age and maturity. This dissertation argued in Section 7.4.3.4 that the provisions of the Regulation (both in the first version and in the recast) are more extensive than those of the Hague Convention and create stronger obligations for Member States of

33 In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark, annexed to the TEU and TFEU, Denmark is not taking part in the adoption of the Brussels II *ter* Regulation.

the EU compared to States Parties to the Hague Convention. As Trimmings has shown in a comparative research dating back to 2013, in England and Wales the Brussels II *bis* Regulation had resulted in the application of the child's right to be heard across all child abduction proceedings, not just the intra-European ones.[34]

Further, at a systemic level, the Brussels II *ter* Regulation integrates child abduction proceedings into wider custody determinations and gives Member States some possibilities, albeit on an exceptional basis, to suspend the enforcement of abduction proceedings if the child would otherwise be exposed to a grave risk of harm. Similarly, the text of this Regulation has overhauled the second chance proceedings and now the child may, also exceptionally, remain in a jurisdiction following abduction while proceedings on the merits of the custody are pending in the country of habitual residence. These possibilities, albeit limited, allow domestic courts to assess the situation of the individual child, and to conduct a rights-based analysis.

The CJEU is the supranational Court which can interpret, with binding force, the provisions of the Regulation. The CJEU has so far declined to adopt an individualised approach to children's rights in abduction proceedings. This interpretation has arguably been constrained by the text of the Regulation which favours comity and mutual trust. However, the CJEU's approach to child abduction should also be seen in light of other summary proceedings such as the European Arrest Warrant and the Dublin Regulation, where this Court has equally favoured a systems approach to the detriment of an individualised assessment. Here, and perhaps arguably under the influence of the ECtHR, the CJEU has left some room to individual human rights, compared its case law under the Brussels Regulations.[35] For example, the CJEU has accepted that Member States may consider the individual circumstances of the person subject to a Dublin transfer to determine whether they face a real risk of inhuman or degrading treatment.[36] In addition, and also in the asylum context, the CJEU was willing to read into the text of the Dublin Regulation an obligation for Member States to process

34 Trimmings 2013, p.245. It should be also added that this dissertation has not analysed the concrete impact of the Brussels Regulations on Member States. In other words no conclusion is drawn as to how children are being heard in practice in Member States. Section 4.3.3 has also included research on the application of Article 13(2) of the Hague Convention at national level where it has been shown how European domestic courts approach the hearing of children. Furthermore, Section 7.4.3.4 referred to research on the same topic in relation to the Brussels II Regulation. However, to date no comparative studies have been identified assessing the impact of Article 11(2) Brussels II bis Regulation at domestic level across several jurisdictions. Such studies may exist for individual jurisdictions; however, an overview of such studies has not been included in this dissertation.

35 For an overview of the CJEU's approach in Dublin and EAW cases, see section 9.2.1 of the dissertation.

36 CJEU 16 February 2017, C-578/16 PPU, ECLI:EU:T:2017:590 (C.K. and Others v. Republika Slovenija); see also Section 9.2.1.

asylum applications of unaccompanied minors in their country of presence rather than in the country of first entry.[37]

The CJEU has not undertaken such an approach to preliminary references brought under the Brussels II Regulation. It has ascribed to and reinforced the philosophy of the Regulation whereby the best interests of the child are a matter of substance to be ultimately addressed by the courts of the child's habitual residence. It has also expanded the application of Article 11(8) of the Regulation to non-final return orders issued by the authorities in the state of habitual residence.[38] It should however be noted that the exceptions to return the child under the Child Abduction Convention, and the possibilities for an individualised assessment of rights contained therein, remained intact after the adoption of the Brussel II *bis* and *ter* Regulation.

The CJEU's approach in itself is not contrary to the Child Abduction Convention, given that the Brussels Regulation only adds to this instrument, rather than modifying the return mechanism. It could also be said that the lack of an individualised approach to children's rights reflects the competences and type of jurisdiction of this Court, which as discussed in Sections 7.2 and 9.1 has a different nature to the ECtHR .

Nevertheless, when assessed together with the ECtHR, this dissertation argues that the jurisdictions of the two Courts are complementary and that they can contribute, in different ways, to the development of a child rights-based approach to child abduction.

Returning to the CJEU, it should be also stated that this Court has the legal mandate to enhance certain rights of children in cross border abduction proceedings, should it be seized with preliminary references on the topic. For example, under Article 21 of the Brussels II *ter* Regulation, Member States retain discretion to determine *how* children will be heard. Through preliminary references, the CJEU may be given the opportunity to clarify questions such as the notion of a 'child capable of forming their views' or 'effective opportunity to express views', or 'appropriate body'. Should this arise, it is to be hoped that the CJEU will adopt a position compatible with that of Article 12 CRC, as interpreted by the CRC Committee and detailed in Chapter 3 of this dissertation.

#### *11.2.1.2 A rights-based approach before the ECtHR*

The jurisdiction of the ECtHR has a different nature. This Court focuses exclusively on individual human rights. The extensive case law of the Strasbourg Court has shown the difficulties of balancing comity with individual rights in child abduction cases. Such difficulties have been reconciled through the standard adopted since 2013 when the ECtHR delivered the

37 CJEU 6 June 2013, C-648/11, ECLI:EU:C:2013:367 (The Queen on the application of MA, BT, DA v. Secretary of State for the Home Department).

38 CJEU 1 July 2010, C-211/10, ECLI:EU:C:2010:400 (Povse/Alpago), paras 62, 67; for criticism to this approach Beaumont et al, 2016.

judgement in the case of *X v. Latvia*. Following *X v. Latvia*, domestic courts must take into account arguable allegations of a grave risk of harm to the child and provide a reasoned decision. Such a standard is *prima facie* compatible with a child rights-based approach in that it requires courts to contextualise and give meaning to the relevant rights. It also requires domestic courts to balance the rights at stake and give reasoned decisions. The same standard has also been adopted by the CRC Committee.[39]Within the field of children's rights, it remains important however to discourage an over-focus on child welfare which has been considered as an impairment to discussions on rights. It is thus necessary that an adequate balance between protection and participation is achieved. The overview of the ECtHR's case law indicates that the Court has elaborated extensively on the content – both procedurally and substantively – of the best interests of the child and of the right to maintain contact with both parents. However, this dissertation has argued that the ECtHR has been less successful in integrating other rights of the child, such as the right to be heard and to be free from violence in its analyses. In particular, it has not consistently approached the summary best interests' evaluation in the light of these two other rights.

Concerning the right to be heard, the ECtHR has taken divergent approaches. At times, it has expressly criticised domestic authorities for hearing children below the national legal ages for doing so or for excessively relying on children's views.[40] Other times, the right of the child to express their views has played a prominent role.[41] It should be stressed that a rights-based approach does not entail that children's views are decisive, however, courts must give them due weight. A child's rights-based approach mandates that courts show *how* the voices of children have been taken into account and give reasons, which are not exclusively related to the age of the child, when they attach little or no weight to children's views. Thus, it is not the outcome but the process that matters. Nevertheless, the ECtHR has expressly criticised courts for considering the views of young children or it has accepted that young children were not heard on account of their ages. It was argued here that the ECtHR could set out guidelines for the way courts should take into account children's views in abduction proceedings. The Court's procedural approach to rights, which is evident in its case law of recent years, allows the Strasbourg Court to incorporate the CRC guarantees for children within its Article 8 case law. A rights-based model and the CRC Committee's General Comment No 12 could serve as useful tools for mainstreaming children's right to be heard in abduction proceedings before the ECtHR. Such an approach would in turn ensure a harmonious interpretation of international law in the sense of the VLCT.

39 Section 4.5.2 of this dissertation.

40 ECtHR 1 July 2014, no. 54443/10 (*Blaga v. Romania*).

41 ECtHR 1 February 2018, no 51312/16 (*M.K.v Greece*); ECtHR 7 February 2023, no. 39298/20 (*Ciocirlan v. Romania* (dec)); ECtHR 15 June 2021, no 17665/17 (*Y.S. and O.S. v. Russia*).

Conversely, the Court's lack of consistent engagement with the children's right to be heard in abduction proceedings raises questions as to the instrumentalization of their views to support particular outcomes. It appears that overall, the Court tended to refer to children's views in stronger terms when these views supported its findings as opposed to situations pointing in the opposite direction.[42]

Further, the child's right to be protected from harm has equally received contradictory responses from the ECtHR. It should be recalled that the Court has incorporated the right of the child to grow up in a safe environment into the elements of the best interests analysis.[43] In abduction proceedings, this right has been raised as an objection to return on several grounds. First, it was submitted that separation from the primary carer amounted to harm to the child.[44] Second, it was argued that the child was exposed to harm due to violence from a private party, usually the left-behind parent.[45] Third, exposure to violence was the result of the situation in the country of habitual residence.[46]

In the first situation, the ECtHR has ruled that an objective impossibility to return of the taking parent may amount to a grave risk of harm to a child. Overall, the Court assessed the relationship of care between the child and their caregivers, looking closer at the objective impossibility to return criterion when the person facing such an impossibility was the child's primary carer. This approach is consistent with both the Hague Convention and with a rights-based approach. Questions remain as to the threshold for finding that an objective impossibility to return existed. Too high of a threshold renders the criterion moot and conversely, too low of a threshold risks running contrary to the return mechanism. The ECtHR uses the principle of effectiveness to assess such situations, meaning that the child's actual situation upon return is relevant. It requires domestic courts to administer evidence on the risk of harm to the child and whenever such evidence has been presented to them, to take it into account in their reasoning. Moreover, the Court has accepted that return should be ordered whenever the system in the country of habitual residence can offer adequate protection upon return. The capacity of the system to protect the child is equally important

42 For different findings in this sense see Mol 2023, p. 315-348. It should be noted that Mol's overview concerns several family law proceedings, of which only 15 child abduction cases. Also, the end date of her review is 2017 (p. 132) and therefore many of the cases analysed here were not include. Furthermore, the average age in child abduction cases is 6 years old (see Chapter 4 of this dissertation), and Mol also concludes that age is an important factor in the analysis of the ECtHR.

43 ECtHR 8 January 2009, no 41615/07 (*Neulinger and Shuruk v. Switzerland* (Chamber)), para 139.

44 ECtHR 6 December 2007, 39388/05 (*Maumousseau and Washington v. France*), ECtHR10 July 2012, 4320/11 (*B. v. Belgium*), ECtHR 15 May 2012, no. 13420/12, (*M.R. and L.R. v. Estonia (dec)).*

45 ECtHR 7 March 2013, 10131/11 *(Raw and others v. France)*;cECtHR 1 July 2014, no. 54443/10 (*Blaga v. Romania*); ECtHR 21 May 2019, no. 49450/17 (*O.C.I. v. Romania)*, ECtHR 1 April 2021, no 16202/14 *(M.V. v. Poland)*, ECtHR 17 March 2022, no. 80606/17 *(Moga v. Poland).*

46 ECtHR 15 June 2021, no 17665/17 (*Y.S. and O.S. v. Russia*).

and it has been argued here, that similar types of evidence as required in other summary proceedings – such as extraditions or non-refoulement-should be used to determine the capacity of the system to protect the child upon return. In assessing evidence however, in particular where domestic violence allegations were raised, the Court has accepted undertakings from the left-behind parent, despite their problematic nature and the risk of reinforcing dependency of the taking parent on the left-behind parent.

Second, and arguably the most problematic cases from the perspective of the right of the child to be free from violence are those where it was submitted that children's exposure to harm was triggered by the conduct of a private person. Such cases raised allegations of neglect by the left-behind parent[47] or corporal punishment.[48] *O.C.I. v. Romania* is the only instance where the ECtHR aligned its findings in child abduction with its own case law on corporal punishment and with the CRC Committee. Here, the Court has affirmed outright its endorsement of a complete ban against corporal punishment, and it has rejected vague references to the capacity of the system to protect children. However, in the other cases no weight has been placed on the allegations of violence. This happened despite the abuse having been documented before domestic courts and when the children refused to return on this account.[49]

Finally, in one case the ECtHR accepted that return would expose the child to risks due to a situation of ongoing military violence in the country of habitual residence.[50] Here the Court took a similar stance to the examination of the violence as in extradition or expulsion cases, relying on available reports from civil society organisations.

Consequently, in several respects the ECtHR could further align its case law with a child rights-based approach. Furthermore, as it has been submitted elsewhere, the child's right to be free from violence could equally be assessed under Article 3 of the ECHR, as a form of inhuman and degrading treatment.[51] To-date the Court has consistently declined to examine abduction cases under Article 3 ECHR. Such an approach has the benefit of a consistent application of human rights across interim proceedings.[52] Also, it could contribute to an interpretation of harm which takes into account the specificity of children.

Children's rights require adapting the discourse of rights in a way that meets their special position.[53] This dissertation has analysed extensively these adaptations in light of the three core rights of children. The right of the

47 ECtHR 7 March 2013, no 10131/11 *(Raw and others v. France)*.
48 ECtHR 1 July 2014, no. 54443/10 (*Blaga v. Romania*); ECtHR 21 May 2019, no. 49450/17 (*O.C.I. v. Romania)*, ECtHR 1 April 2021, no 16202/14 *(M.V. v. Poland)*, ECtHR 17 March 2022, no. 80606/17 *(Moga v. Poland)*.
49 ECtHR 7 March 2013, no 10131/11 *(Raw and others v. France)*.
50 ECtHR 15 June 2021, no 17665/17 (*Y.S. and O.S. v. Russia*).
51 Robinson 2023.
52 Robinson 2023.
53 See chapter 2 of this dissertation.

child to be protected from harm has also been analysed as it emerged from the ECtHR case law. On the latter, it has been proposed that 'harm' should be defined from a child's perspective. An overview of ECtHR's case law indicates that the Court is yet to take this approach.

In short, the Court is commendable for bringing an individualised assessment of children's rights within the comity oriented framework of the Child Abduction Convention. As shown above, in some respects, further alignment with a rights-based decision-making model is necessary.

*11.2.1.3 The relationship between the two supranational Courts*

In addition to the position of the two supranational Courts seen as separate entities, Chapter 9 has addressed their interaction. As states are bound by their case law simultaneously, it was considered important to determine whether their different approaches are irreconcilable for national domestic authorities. This chapter has found that, quite on the contrary, taken together the two Courts have so far reinforced each other in child abduction cases. The ECtHR has read the provisions of Brussels II *bis* Regulation into the guarantees of Article 8 ECHR. Through its case law, it has urged domestic courts to interpret the EU's overriding return mechanism in a spirit consistent with the rights of children. For example, it has found a violation of Article 8 as the domestic courts have not taken due account of the situation of the child upon return when issuing the overriding return order.[54] It has also mandated courts to consider the capacity of the system to protect the child before refusing the return on Article 13(1)(b) HC grounds.[55]

The interaction of the two Courts has the potential of ensuring a more robust protection of the rights of children across the European Union. The ECtHR's *Bosphorus* doctrine is a useful tool in achieving harmonisation between the two supranational Courts. This doctrine is not applicable if applicants submit their complaints against the states which have discretion in implementing the Brussels II *ter* Regulation. Admittedly, the interaction between the two Courts reveals a complex mechanism which requires further dissemination of knowledge at national level to ensure a better application in practice. Until then, there is a risk that the overriding return mechanism of the EU exposes children to a grave risk of harm, if national courts use it in disregard of the Brussels II *ter* Regulation. At the moment, the ECtHR is the only authority legally competent to ensure that it is applied in accordance with the rights of children, yet it can only do so if applicants file individual complaints on this ground.

Overall, the two Courts have set important standards for child abduction cases across their respective jurisdictions. Their case law has added elements to the notion of a rights-based approach which could be further

54 ECtHR 12 July 2011, no. 14737/09 (*Šneersone and Kampanella v. Italy*).
55 ECtHR 13 June 2023, no. 57202/21 *(Kukavika v. Bulgaria)*.

implemented at domestic level. At the same time both Courts could further benefit from cross-fertilization with the child-specific provisions of the CRC, in line with the recommendations provided herein.

### 11.2.2 Child abduction with immigration components from the perspective of the European supranational Courts

The supranational European Courts have competences to decide both on child abduction cases, *stricto senso*, and to ensure that human rights permeate states' immigration policies and laws.[56] From this perspective their potential is unique at two levels. On the one hand they can trigger a child rights-based application of the Hague Convention. On the other hand, in so far as immigration considerations are concerned, they lay down rules which are mandatory for child abduction courts and they ensure, in a wider sense, the capacity of the system to protect the child by laying down minimum human rights standards in immigration cases. The relevance of immigration considerations at these different levels is addressed in turn below.

#### *11.2.2.1 Direct impact within child abduction proceedings*

The inquiry in this section focuses on how immigration considerations have been brought before the CJEU and the ECtHR, respectively. So far neither Court has dealt extensively with the interrelation between child abduction and immigration within child abduction proceedings. The CJEU has addressed on one occasion a situation where abduction proceedings had been initiated following the child's removal in furtherance of the Dublin III Regulation.[57] The CJEU considered that the retention was "a mere consequence of the child's administrative status, as determined by enforceable decisions taken by the Member State where the child was habitually resident".[58] Consequently, from the perspective of the CJEU, immigration rules had priority over child abduction proceedings, in that the immigration rules attested to the lawfulness of the removal.

The ECtHR, on the other hand, has made some references to the immigration status of the parent in its case law. These references are important for determining whether such status is at all relevant to the Court's assessment. For example, in the case of *V.P. v. Russia*, the ECtHR accepted that the immigration status of a parent was a relevant factor in the assessment of whether that parent was in an objective impossibility to return. Also, in the

56 This dissertation has discussed the respective competences of each Court in Sections 7.2, 8,2;8.3; 9.2, 10.2 and 10.3. In so far as the CJEU and child abduction is concerned, it has been shown that its jurisdiction is delineated by the Brussels II *ter* Regulation and it concerns the interpretation of this Regulation. The ECtHR in turn has decided on child abduction cases in light of Article 8 ECtHR.

57 CJEU 2 August 2021, C-262/21 PPU, ECLI:EU:C:2021:640 (A./B.).

58 CJEU 2 August 2021, C-262/21 PPU, ECLI:EU:C:2021:640 (A./B.), para 51.

case of *Satanovska and Rodges v. Ukraine* a violation of Article 8 ECHR was found on the ground that the domestic courts did not analyse the mother's contention that she could not follow her son due several reasons, including entry visa restrictions.[59] The dissenting judges in *X. v. Latvia* used immigration to support the contention that the parent could return to the country of habitual residence.[60] In that case the parent had the citizenship of the country of habitual residence, hence the argument was that no objective impossibility to return existed.

These brief references to immigration in the ECtHR's case law support the conclusion that the immigration status of a parent is a factor to be taken into account in determining whether that parent is in an objective impossibility to return. Such restrictions could thus form arguable allegations of a grave risk of harm to the child.

However, in the recent case *Verhoeven v. France*, analysed in Section 8.3.3.2 of this dissertation, the ECtHR took a step back in its assessment of the relevance of immigration considerations.[61] Despite its previous case law where it indicated that immigration status was a relevant factor, in *Verhoeven*, the ECtHR left the matter entirely to the domestic courts. In that case, it had been established before the French courts that the taking parent would be denied parental responsibilities over the child only on the ground of not having Japanese citizenship. It had also been demonstrated that the parent would not be able to enforce visitation rights through the Japanese authorities. Thus, the parent's immigration status would be the key element in the custody determination, regardless of any considerations concerning the parent child relationship, or parenting capacities. The ECtHR's stance was fully deferential to the domestic authorities, without considering whether their reasoning reflected a consideration of the individual situation of the child, or broad affirmations concerning the return mechanism of the Child Abduction Convention. Neither the ECtHR, nor the French courts linked the immigration considerations to the domestic violence allegations and the ensuing power imbalance. Despite ample objective evidence (from the Public Ministry, French Parliament and European Parliament) indicating that the applicant would not be able to reside in Japan, the French Cassation Court reasoned, and the ECtHR accepted that she did not substantiate her allegations. In addition, the ECtHR accepted that the ratification by France of the Abduction Convention without reservations, precluded domestic courts from an individualised assessment. Such an acceptance disregards the relevance of the exceptions to the Child Abduction Convention which have been designed for individual situations. Moreover, it should be stated here that this judgment has been analysed in this dissertation solely in relation to Article 13(1)(b) grave risk of harm. It is apparent however that such

59 ECtHR 28 January 2021, no 12354/19, (*Satanovska and Rodges v. Ukraine)*, para 89.

60 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC))*, joint dissenting opinion at para 9.

61 ECtHR 28 March 2024, no. 19664/20 (*Verhoeven v. France*).

a case could raise broader issues under Article 20 of the Child Abduction Convention both from the perspective of breaching the right of the child to have contact with both parents as well as from the breach of the right to a fair trial for the taking parent -the latter falls however outside the scope of this dissertation. Concerning the right to have contact with both parents, it should equally be noted that Japan has made a reservation to Articles 9 and 10 to the CRC on the ground that it does not understand these Articles to affect their immigration laws.[62] To the extent that the right to have contact with both parents is included at constitutional level in France, the right to have contact with both parents could have led to the application of the exception provided under Article 20 HC. This did not form the object of analysis either in France or before the ECtHR.

At the moment, this judgment is an outlier in the Court's child abduction case law, and it is to be hoped that the ECtHR will contextualise more carefully immigration considerations in future child abduction cases.

The overview of the few cases including immigration exceptions also indicates that many questions remain open. Among them, two related aspects could be mentioned: the proof the applicants should bring to discharge of the burden of proof and the type of evidence required. Even if it is accepted that the party opposing the return bears the burden to prove the allegations, the threshold for discharging of such a burden is still subject to interpretation. Divergences between the Court's judges have arisen in this respect. For example, in the case of *X v. Latvia*, the majority considered that the applicant had discharged of her burden of proof by referring to the left behind parent's criminal conviction. The ECtHR criticized the domestic court for not further looking into the allegations of the criminal convictions of the left behind parent.[63] The dissenting judges criticised this approach considering that the applicant should have produced evidence, arguably the left behind parent's criminal record to support her allegations.[64] In practice, it is highly unlikely that a private party could obtain another party's criminal record. Hence, should the Court have accepted the line of reasoning of the dissenting judges, the burden of proof may have become an insurmountable for the party raising the defence. Such concerns are particularly relevant in cross border contexts where evidence is arguably even more difficult to produce. Cooperation between Central Authorities – as the Court indicated in *X v. Latvia* -would be suitable avenue for balancing individual rights with the Child Abduction Convention.

62 Japan's reservation to the CRC is discussed in Section 3.3.1 of the dissertation.

63 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC)), para 116; dissenting opinion para 9; see also Section 8.3.1.4.*

64 ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC)), para 116; dissenting opinion para 10.*

*11.2.2.2 Indirect impact in light of minimum standards of protection*

In addition to direct references to immigration within child abduction proceedings, the two Courts have had an important role in ensuring that a minimum level of substantive harmonisation of human rights in immigration proceedings exists in the country of habitual residence. In private international law more in general it has been considered that a minimum level of substantive law consensus is a precondition for ensuring that specific persons are protected.[65] This dissertation argues that, for cases where it is submitted that immigration laws result in the parent child separation, the lack of a minimum level of human rights protection in immigration law can result in a grave risk of harm to the child. Outside the European Union, courts are to assess on a case-by-case basis whether such minimum level of protection was reached, in light of the criteria discussed in the Preliminary Conclusions. Within the European Union, the task is arguably rendered easier as the two Courts have driven changes in national immigration laws as it has been discussed in Chapter 10. Clearly, questions remain if states have not (yet) implemented the judgments of the Courts or the relevant EU law, as the case may be. The actual implementation in domestic law of EU law and of the case law of the CJEU and the ECtHR is beyond the scope of this dissertation.

This section discusses the Courts' immigration case law which is relevant to deciding child abduction cases with immigration components. It is first interesting to note that the two Courts had to deal with similar tensions as those identified at a global level in Section 5.5. For example, the ECtHR has dealt with situations where national family courts have used a parent's precarious immigration status to withdraw that parent's custody rights.[66] Also, the CJEU has addressed states' arguments that the relationship of care between a child and their parents is not a relevant consideration in immigration law.[67] Even more, states supported immigration policies contributing to power imbalances by arguing that a potential expulsion of a parent is justified whenever a child had another parent with the right to reside in that jurisdiction.[68]

From the perspective of minimum standards, both the CJEU and the ECtHR require that immigration authorities consider the right of the child to have contact with both parents when deciding on a parent's immigration status. The CJEU emphasises the right of EU citizen children to enjoy the substance of their rights under EU law. Under EU law the right of EU citizen children to have contact with both their parents is stronger than that of

65 Van Den Eeckhout 2008, p. 113.

66 ECtHR, 31 January 2006, no. 50435/99 *(Rodrigues da Silva and Hoogkamer v. The Netherlands)*; ECtHR, 28 June 2011 no. 55597/09 (*Nunez v. Norway*).

67 CJEU 10 May 2017, C-133/15, ECLI:EU:C:2017:354 (H.C. Chavez-Vilchez and Others v. Raad van bestuur van de Sociale verzekeringsbank and Others).

68 CJEU 10 May 2017, C-133/15, ECLI:EU:C:2017:354 (H.C. Chavez-Vilchez and Others v. Raad van bestuur van de Sociale verzekeringsbank and Others), States' Observations, discussed in Section 10.2.1.

non-EU citizen children. Such a shortcoming is remedied however, if states have adequately implemented the ECtHR immigration case law discussed in Chapter 10.

Consequently, for child abduction cases with immigration components, family courts should make a distinction in assessment between on the one hand intra EU child abduction cases and on the other hand cases where a child is to be sent outside the European Union or Council of Europe, as the case may be. To the extent states have implemented the line of cases discussed in Chapter 10, it is submitted that intra-EU/Council of Europe abduction cases offer children the minimum level of protection and courts can rely on the capacity of the EU/Council of Europe Member State to offer adequate protection. These states are presumed to offer the requisite immigration protection to the child and the parent, especially if the child is an EU citizen. This presumption can be rebutted by evidence showing a failure to implement the aforementioned jurisprudence. Conversely, a stricter scrutiny should be adopted where the country of habitual residence is outside the EU/Council of Europe. Here, the assessment should focus closer on the parent child relationship and the grave risk of harm to the child resulting from the immigration position of the parent. The criteria for assessment have been discussed in Section 11.1.3 and shall not be reiterated here.

*11.2.2.3 Parent/child separation and asylum claims*

Child abduction cases and asylum claims can be analysed from two different perspectives.

One aspect concerns the link between the grave risk of harm exception under Article 13(1)(b) of the Child Abduction Convention and the principle of non-refoulement as laid down under international law. Under this angle, the scope of analysis is the extent to which child abduction courts should give effect to non-refoulement obligation, irrespective of any pending proceedings for international protection. Indeed, protection against non-refoulement is not restricted to asylum cases, and it essentially provides that nobody should be expelled where there is a risk of being subject to ill treatment.[69] For children, it is possible to adopt a child rights-based perspective to the protection against non-refoulement and the Views of the CRC Committee have reflected this approach.[70] A recent contribution has also proposed that the ECtHR assesses the grave risk of harm to the child in child abduction cases under Article 3, rather than Article 8.[71] From this perspective, it could be argued that the grave risk of harm exception should be construed in light of the right to non refoulement. Such course

69 See also Section 10.3.1 of this dissertation.

70 Klaassen/Rodriguez, The Committee on the Rights of the Child on female genital mutilation and non-refoulement, 2018, available at <<leidenlawblog.nl>>, last accessed on 14 June 2024.

71 Robinson 2023.

of action would bring the child abduction practice closer to the case law on international protection.

Another aspect concerns the impact that asylum proceedings pending or decided in the same country may have on the decision-making by child abduction courts. This question is different, in that it does not deal with the principle of non-refoulement *per se*, but rather with the value that such a determination stemming from different authorities may have on the child abduction proceedings. Here, it has been argued that human rights are transversal and family courts deciding on abduction proceedings should equally follow the relevant case law of the ECtHR and the CJEU in this field.

Chapter 10 has shown that the grant of asylum status is different from the obligation of non-refoulement. However, the refugee status weighs heavily in determining the scope of non-refoulement. In the case of child abduction, child abduction courts are to give substantial weight to a favourable decision for international protection. This weight increases where there is an overlap in scope between the two proceedings.[72] If for example the refugee status has been granted on account of domestic violence and domestic violence is equally raised as an exception to return, child abduction courts must follow the refugee authorities.[73] As an exception, it is not necessary to follow the refugee authorities where asylum has been obtained through concealment,[74] or if a long period of time between the two proceedings has elapsed.[75]

Furthermore, the right to non-refoulement set out under Article 19(2) of the EU Charter should guarantee to the parent a right to appeal with suspensive effect against the removal decision.[76] Similarly, under the ECtHR's case law a remedy for applicants at risk of expulsion is effective if it has an automatic suspensive effect of the deportation.[77] Furthermore, when it comes to the effectiveness of the remedy, the Strasbourg Court held that discretionary remedies, or other possibilities for the authorities to grant suspensive effect do not meet the condition of effectiveness under the Convention due to their uncertainty for the applicants.[78]

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72 As it appears from 19 October 2023, C-352/22, ECLI:EU:C:2023:794 (Generalstaatsanwaltschaft Hamm (Demande d'extradition d'un réfugié vers la Turquie), Opinion of the Advocate General Richard de la Tour para 67.

73 As it appears from 19 October 2023, C-352/22, ECLI:EU:C:2023:794 (Generalstaatsanwaltschaft Hamm (Demande d'extradition d'un réfugié vers la Turquie), Opinion of the Advocate General Richard de la Tour, para 68.

74 As it appears from 19 October 2023, C-352/22, ECLI:EU:C:2023:794 (Generalstaatsanwaltschaft Hamm (Demande d'extradition d'un réfugié vers la Turquie), Opinion of the Advocate General Richard de la Tour, para 68.

75 ECtHR 25 June 2016, nos. 40324/16 and 12623/17 (*Bivolaru and Moldovan v. France*), para 138.

76 CJEU 30 September 2020, C-402/19, ECLI:EU:C:2020:759 (LM/Centre public d'action sociale de Seraing), para 43.

77 ECtHR 5 February 2002, no. 51564/99 (*Conka v. Belgium*).

78 Spijkerboer 2009, Subsidiarity and Aquability: the ECHR case law on judicial review in asylum cases, 2009 (journal).

In addition, both the CJEU and the ECtHR have stressed that assurances of the requesting state to the effect that the person shall not be subject to inhuman and degrading treatment are not sufficient.[79] Instead, authorities are to rely on information which is objective, reliable and properly updated.[80]

In this dissertation it is argued that a parent's receipt of refugee protection, or situations where appeals to immigration decisions are pending should result in a finding of child abduction courts that the state of habitual residence cannot offer adequate protection to the child. In such cases child abduction courts should refrain from carrying out an additional assessment in that sense, or from seeking assurances from the authorities in that state or from accepting undertakings or mirror orders from the left-behind parent. Instead, courts should assess the parent child relationship. Return can only be envisaged where the parent is not the child's primary carer, or it is found that the child wishes to return to the country of habitual residence or has otherwise a demonstrated strong relationship with the left-behind parent. Put differently, in these cases, the child abduction application should be decided on the basis of the factual finding that a return order will sever the child's relationship with the taking parent.

## 11.3 The decision-making framework: a rights-based approach to primary carer abductions with immigration components

The ultimate aim of this dissertation was to propose a decision-making framework, which integrates both children's rights and European human rights law to child abduction cases with immigration components that come before the European Union's domestic courts. Figures no. 1 to 5 below outline such a decision-making framework along three consecutive steps that decision makers should follow in child abduction cases. This framework is addressed to domestic courts competent to adjudicate on child abduction applications. The figures below also highlight the specific factual or legal concepts where children's rights could play a role in the decision. The decision-making framework focuses on child abduction cases with immigration considerations. However, as explained throughout this dissertation it could be adapted to reflect other factual or legal aspects arising in child abduction cases.

79 ECtHR 25 March 2014, no. 59297/12 *(M.G. v. Bulgaria)*, para 93; CJEU C-352/22, A. Generalstaatsanwaltschaft Hamm, para 65.

80 CJEU 19 October 2023, C-352/22, ECLI:EU:C:2023:794 (Generalstaatsanwaltschaft Hamm (Demande d'extradition d'un réfugié vers la Turquie), Opinion of the Advocate General Richard de la Tour, para 65.

*Step I – Wrongful removal*
Firstly, domestic judges need to determine whether a removal/retention was wrongful. Under Article 3 of the Child Abduction Convention a removal/retention is wrongful subject to two cumulative conditions. One the one hand it should be established that the child had their habitual residence in one country and on the other hand the child's removal/retention must have breached the custody rights of the left-behind parent.

As shown in Figure No. 3 and elaborated upon in Chapter 4 of this dissertation, children's rights can and should play a role in the determination of habitual residence[81]. Custody in turn, is a legal concept to be established in light of the laws of the country of habitual residence. Except when courts follow the inchoate rights approach, Children's rights do not play a role in a court's assessment of custody rights.

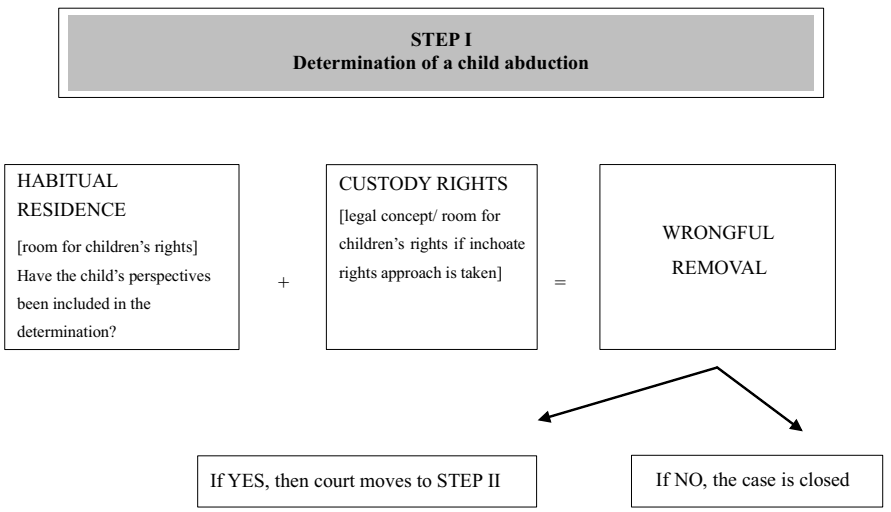


*Figure no. 3: STEP I – Determination of a child abduction*

*Step II -- Grave risk of harm to the child/intolerable situation*
Once a court is satisfied that the removal/retention was wrongful, the next step is to analyse whether any of the exceptions to the Convention apply. The Convention lays down five such exceptions to the child's return. Children's rights may play a role in all of them. However, in practice and in the academic literature, the grave risk of harm exception has received the most dedicated attention. Also, primary carer parents have raised this exception to argue that a separation from the child will amount to a grave risk of harm for them. For this reason, Figure no. 4 below only expands on the grave risk of harm exception. Figure no. 4 outlines the questions that should be asked by

81 Sections 4.3.2.1 and 4.5.3.

domestic courts to assess whether there are arguable allegations that the child will be exposed to a grave risk of harm upon return. These are all questions to be asked in case immigration issues have been raised. The answer to the questions in the left hand column taken together with a demonstrated close parent-child bond amount to arguable allegations of a grave risk of harm.

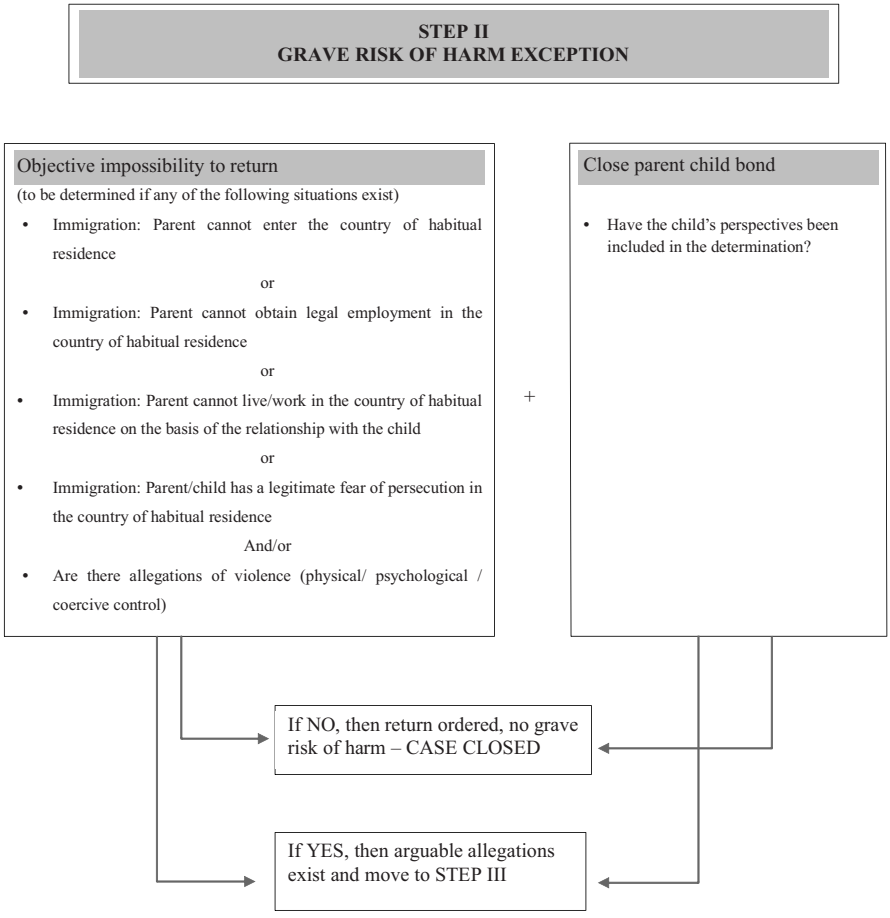


*Figure no. 4: STEP II – Grave risk of harm to the child/intolerable situation*

*Step III – Capacity of the system to protect the child upon return*

A finding of arguable allegations of a grave risk of harm, triggers the incidence of Step III. The 'capacity of the system to protect' refers to the system in the child's country of habitual residence. Here, domestic courts in one country need to assess whether the system in another country is capable of protecting the child upon return. Figure no. 5 outlines the four possible immigration-related situations which may come to courts and the questions which should be answered to find that the system can or cannot protect the child upon return. These are questions that have to be determined by the

domestic courts on the basis of evidence, and the return of the child should only be ordered subject to a positive finding that the system is indeed capable to protect. In many cases the authorities in the country deciding on child abduction will have to cooperate with the authorities in the country of habitual residence to determine the questions presented in Figure no. 5.

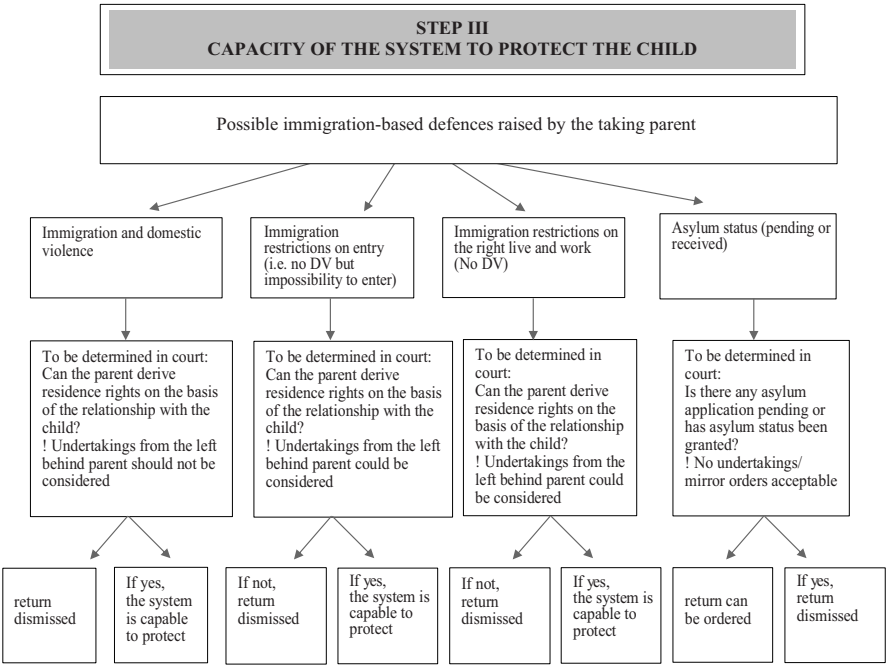


*Figure no 5: STEP III – Capacity of the system to protect the child upon return*

It is for each legal system to determine, from an evidence point of view, the approach to answering these questions and the evidence required to be satisfied that the parent can/cannot derive residence rights on the basis of the relationship with the child. Guarantees from the state of habitual residence that the parent will obtain residence rights may be accepted, provided that they are sufficiently concrete and do not simply reflect the discretionary powers of the state of habitual residence in deciding on these matters.[82] It is argued herein that Article 7 of the Child Abduction Convention, should equally apply and encourage cooperation between Central Authorities for determining the parent's immigration status upon return and obtaining necessary assurances, as the case may be.

82 For a broader discussion on how immigration law impacts on family relations, see Section 5.5 of this dissertation.

## 11.4 Reflections and recommendations

This dissertation proposed that children's rights should guide the interpretation of the Child Abduction Convention. For this, the meaning and origin of children's rights has been discussed at length. Despite numerous references to children's rights in court judgments concerning child abduction, upon a closer inspection it appeared that these references have been consistently used to support policy aims, such as comity between nations, rather than individual children's rights. A child rights-based approach can contribute to detangling between the individual human rights of children and other competing interests in child abduction cases.

Significant difficulties in the child abduction context have been encountered where the child was removed by their primary carer and where that carer claimed to be in an objective impossibility to return. These factual scenarios substantially challenge the premise of the Child Abduction Convention and should arguably push judges and decision-makers into carrying out a closer review of the exceptions to return. Immigration defences equally feed into the same exceptions and should be considered as part of the context within which the Child Abduction Convention operates. Overall, it has been argued throughout this dissertation that human rights should guide the interpretation of the Child Abduction Convention. Such an approach prevents that this instrument is used to reinforce children's vulnerabilities.

At the same time, it was argued here that the number of returned children is not in itself a measure of the Convention's success. Rather, the success of the Convention lies in the courts' applying both the guarantees of the Convention as well as its exceptions in the spirit of children's rights. This instrument permits both the return and the refusal to return, and a refusal to return, if justified, attests to the success of the Child Abduction Convention just as much as a return order does.

Immigration-based defences are indicative of systemic flaws. In practice they have fragmented and often contradictory responses across legal disciplines. The interaction between immigration and family laws exposes children from mixed-status families to human rights violations which are directly connected to their or their parents' immigration status. Child abduction courts need to consider these fragmented responses in their decision-making; failure to do so will only increase children's vulnerabilities, rather than serving their best interests.

Recommendations for domestic actors (courts and Central Authorities):

- Children's rights in abduction cases should be contextualised; identified and balanced.
- Courts should explain the meaning they ascribe to children's rights in abduction context. For example, how does the return serve the best interests of the child? What are the elements of the best interests of the child which have been taken into account?

- Children should be heard in all Child Abduction cases, and not only when requested by one adult party. The hearing of children should comply with the substantive and procedural guarantees laid down by the CRC Committee in General Comment No. 12.
- Immigration-based defences should not be treated as a private-law matter between parties: they can only be resolved, if at all, though inter-state cross-border cooperation.
- The cooperation between Central Authorities should extend beyond facilitating the return of the child; it should ensure the *safe* return of the child.
- Immigration law and domestic violence experts should be included as part of the staff of Central Authorities.

Recommendations for The Hague Conference of International Law:
- Monitoring of cases post abduction is important in ensuring that the rights of children are respected.
- Shift the focus from the Child Abduction Convention to improvement of cross-border contact.
- Focus on new technologies for hearing children via remote tools.
- Focus on how the new developments in remote hearings and/or remote adjudication could be used to decide custody cross-country without the child having to return to the country of habitual residence.

Recommendations for the ECtHR/CJEU:
- Mainstream children's rights across child abduction proceedings. Children's rights should not have a different meaning depending on the identity of the person bringing the complaint.
- Mainstream the standing/representation of children before the European Court of Human Rights; the risk of subjugating the rights of children to other interests should guide the process.
- Children's rights should guide the interpretation of the Child Abduction Convention.

Recommendations for further research:
- In Europe, little attention has been dedicated in research to the influence of various immigration considerations (understood in their wide sense) on family courts decisions and post-separation parenting. More research in this area is needed.
- In the same vein, little attention has been dedicated to cross border contact and the exercise of parental responsibilities cross border or on the practical application of the 1996 Child Protection Convention/Brussels II *ter*. Research in this area could focus on the perspectives of the Central Authorities or on those of children and/or parents.
- Research into preventing child abduction should focus on the wider context and systemic problems. This could include comparative research into how family law approaches habitual residence as opposed to social security law or immigration laws and the practical implications thereof.

- Similarly to domestic violence, research into child abduction should look into this phenomenon as a manifestation of systemic inequalities, rather than a private dispute between parties.

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# Summary


## Migration, Abduction and Children's Rights

*The relevance of children's rights and the European supranational system to child abduction cases with immigration components*

The term *international child abduction* was coined by the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (the 'Child Abduction Convention'). It refers to a situation where a child is taken away from one country (country of habitual residence) to another country, in breach of custody rights. Parental child abduction also occurs when a child leaves legally, but they are retained in breach of custody rights. The Child Abduction Convention requires that domestic authorities in the country where the child is located order the child's return to the country of habitual residence so that the latter authorities decide fairly on custody and contact rights.

The Child Abduction Convention was adopted 9 years before the United Nations Convention on the Rights of the Child (the 'CRC'), which is the most comprehensive instrument concerning children's rights. In the 44 years since its adoption the legal sociological context in which the Child Abduction Convention operates has significantly changed.

This dissertation assesses how children's rights could inform the interpretation of the Child Abduction Convention, taking into account some of the contemporary changes and challenges within which this Convention operates. The changes and challenges envisaged here are the expansion of the Convention's reach through a broad understanding of custody, coupled with a change in the profile of the abductor and the issue of domestic violence as a defence to return. For example, the Convention now functions against a shift in approaches to the separation of parents, away from a focus on the mother as the centre of children's lives after divorce towards an emphasis of continuity of contact between the child and both parents after parental separation. The interpretation of 'custody rights' under the Child Abduction Convention has also changed and it is now widely accepted that the return mechanism will be triggered whenever one parent can veto a child's relocation with the other parent. This will apply irrespective of the living arrangements of the child. Further, available data indicates that the abductors are mainly mothers who are at the same time the primary carers of their children. Many of them argue that domestic violence from the other parent prompted them to flee with their children to a safe space.

Subsequently, this dissertation analyses how immigration-based defences have been brought before child abduction courts, and the role children's rights could play in analysing such defences, considering the contemporary changes and challenges mentioned above. The focus on immigration has been chosen given that the Abduction Convention only applies in an international context, whenever a child has crossed national borders. Also, the immigration considerations brought as defences to return challenge the policy objectives of the Child Abduction Convention and its underlying assumptions. Moreover, some of the dynamics present in child abduction cases reflect migratory trends. For example, 50 years ago, migration was seen as a once in a lifetime event whereas nowadays people relocate internationally multiple times over the course of their lifetimes. These dynamics are also reflected in the child abduction context where people wish to return home or have resided for short periods in the country deemed the child's country of habitual residence. Indeed, from the perspective of private international law, it has been considered that a child's habitual residence can change in a day, provided that the child's parents jointly choose to move to another country. Consequently, the expansion of the reach of the Child Abduction Convention in the name of children's rights can be contrasted with the more rigid approach in immigration law where children's rights are assessed more narrowly.

Against the background outlined above, this dissertation has reviewed the relevance of the two European supranational Courts in adopting a child rights-based approach to child abduction cases in general, and child abduction cases with immigration components, in particular. To date these European supranational Courts offer the most robust human rights protection of international courts and are considered the constitutional pillars of Europe. They function within different frameworks and have different adjudicatory powers, however they have competence in cross border cases related to parental responsibilities and child abduction on the one hand and families and migration on the other hand. They are both bound to observe the human rights of children. Consequently, this dissertation has reviewed whether they can offset some of the tensions posed due to the interaction between child abduction and children's rights in general and the interaction between child abduction, children's rights and immigration in particular.

The dissertation has 9 substantive chapters divided in three parts as follows:

*Part I – The Children's Rights Framework*
Chapters 2 and 3 develop the children's rights framework. Here, it is shown that the CRC attempts to reconcile two seemingly opposing views of children: one focusing on their autonomy and another grounded on children's need for protection. The parents and the state are central to both views as they can be seen either as inhibitors or as enhancers of children's rights. Children's rights are understood from a developmental perspective within

the CRC: the balance shifts from protection to autonomy as the child grows in age and maturity.

The rights-based approach to children's rights builds on existing academic literature and the General Comments of the United Nations Committee on the Rights of the Child. Chapter 2 proposes that a rights-based approach entails consideration of the following: (i) the wishes of the child; (ii) the relevance of other rights under the CRC; (iii) the particular circumstances of the child; and (iv) any available empirical evidence which may be of relevance. Decision-making should (i) identify how rights have been conceptualised; (ii) the procedures used; (iii) the meaning given to the rights in question and (iv) how children's rights were balanced against other potentially competing rights. While this approach is primarily procedural, Chapter 3 further focuses on the interpretation under the CRC of three rights of children which always play a role in parental separation cases: the best interests of the child, the right to be heard and the right to have contact with both parents. These rights are analysed first separately and then together so as to show both their specific features as well as their interconnectedness.

*Part II – The Child Abduction Framework*

Chapters 4 and 5 focus on child abduction and children's rights. Chapter 4 analyses the Child Abduction Convention and juxtaposes this analysis with the rights-based framework developed in Part I. Subsequently, Chapter 5 introduces two of the most important criticisms to the Child Abduction Convention from the perspective of human rights: one focuses on domestic violence and the other on the topic of primary carer abductions. This chapter examines the discussions surrounding domestic violence and parental responsibilities in national contexts and how these debates have permeated the child abduction field. For contextualising immigration, Chapter 5 looks into academic studies analysing the impact of immigration on families and family law proceedings. These studies discuss the intersection between immigration and domestic violence and highlight the power imbalance caused by immigration on family dynamics. Then, on the basis of domestic case law available on the international child abduction database (INCADAT), responses to questionnaires submitted by the Hague Conference for International Law (HCCH) and academic literature, Chapter 5 identifies the types of immigration considerations brought as defences to return in child abduction proceedings. On the basis of these materials, immigration considerations are divided into two main categories: (i) restrictions on entry or stay in a country and (ii) (concurrent) asylum claims. The Chapter concludes that immigration considerations have received much less dedicated attention in academic works focused on child abduction compared to domestic violence and primary carer abductions. This has happened despite existing works showing the intersection between domestic violence and immigration on the one hand and the ensuing power imbalances it creates. Also, available case law suggests that the immigration, domestic

violence and primary carer abductions are different factors which are often brought together as defences to return in child abduction proceedings. The preliminary conclusions discuss the overall findings of Parts I and II. These conclusions focus on how children's rights can permeate child abduction proceedings, and the relevance of children's rights for child abduction cases with immigration considerations.

*Part III – The European supranational Framework*

The analysis in Parts I and II informs the research into the case law of the two European supranational Courts. Chapters 7 and 8 present an exhaustive overview of the child abduction case law of the Court of Justice of the European Union (the CJEU) and the European Court of Human Rights (the ECtHR). The case law is analysed in the context of the jurisdiction of each Court and considering the limitations of their mandate. In so far as children's rights are concerned, in addition to the three core rights identified in Chapter 3, the case law is analysed by reference to the right of the child to be free from violence, separation from their primary carers and immigration considerations: the three areas discussed in Chapter 5. For each of the Courts, the chapters address the extent to which they have adopted a rights-based approach to children's rights in their case law, along the criteria identified in Chapter 2.

Chapter 9 compares the jurisdiction of the two Courts and offers some reflections on how they interact in this field.

Subsequently, Chapter 10 looks at the broader perspective and it discusses the jurisdiction of the two Courts in family immigration matters identified in Chapter 5. The scope of the analysis is informed by the type of immigration proceedings which have been brought before domestic courts and identified earlier in Chapter 5. Further, the analysis is undertaken on the basis of the emerging consensus in the field of child abduction that children should be returned to their country of habitual residence even if a grave risk of harm has been determined, provided that the system has the capacity to protect the child upon return. Chapter 10 investigates the standards that the two Courts have set in immigration law when it comes to the capacity of system to protect the child. The same Chapter discusses the relevance of pending asylum claims to child abduction cases from the perspective of EU and ECtHR law. The migration case law of the two Courts also indicates the approach of domestic family courts to parental separation cases whenever one of the parents had a precarious immigration status. The interventions of many countries in the case of *Chavez Vilchez* pending at the time before the CJEU, indicates that in a national context, domestic authorities tend to instrumentalise children's rights by arguing that the mere presence of one of the parents in the territory of one state meant that the child's right to have contact with both parents had been observed. Also, the case law of the ECtHR exposed situations where family courts allocated parental responsibilities on the basis of the immigration status of a parent. The analysis carried out in Chapter 10 reveals that both the CJEU

and the ECtHR have rejected these types of approaches. These Courts have analysed the best interests of the child and the child's right to have contact with both parents in migration cases, in light of the principle of effectiveness. Furthermore, Chapter 10 analysed the supranational Courts' case law on international protection in light of the issues which have been brought before domestic family courts deciding on child abduction cases. The analysis of the supranational Courts' case law addresses the relevance for child abduction courts of pending or favourable domestic decisions granting a child or a parent asylum or subsidiary protection. The wider discussion on the relevance of the principle of non-refoulement for child abduction proceedings, even outside a formal application for international protection, was not addressed in this chapter as it can be seen as overlapping with the scope of Article 13 or 20 of the Child Abduction Convention.

Chapter 10 concluded that the case law of the two Courts has the capacity to harmonise approaches of domestic courts while also ensuring adequate protection for children's rights. From the perspective of immigration law, implementation of EU and ECtHR law would ensure that separated parents have the right to reside in the child's country of habitual residence in order to be able to effectively exercise their family life with their child. This in turn means that the EU Member States have in principle the capacity to protect the child upon return from the perspective of immigration laws. This conclusion is subject to the Member States actual implementation of relevant EU law and CJEU and ECtHR case law. Also, a stricter scrutiny is required whenever the country of habitual residence is a third state. Further, Chapter 10 argues that pending or decided asylum cases should result in a finding of child abduction courts that the state of habitual residence cannot offer adequate protection to the child upon return.

*Conclusions*

The conclusions set out in Chapter 11 outline the main findings of the dissertation. Chapter 11 also proposes a decision-making framework to child abduction cases focusing on the role children's rights and immigration considerations may play. The decision-making framework follows a procedural approach; it does not focus on the outcome, nor does it discuss the substance of rights. It does however outline the areas of the Child Abduction Convention where children's rights may play a role and how immigration considerations could be weighed when raised as exceptions to return in child abduction proceedings. The decision-making framework proposes that the closer the parent child bond the closer should courts pay attention to the immigration considerations brought as defences to return. This proposition is based on the argument that the child's right to have contact with both parents deserves particular attention especially when it comes to immigration which poses a real risk of separation of the child from their carer.

# Samenvatting

## Migratie, ontvoering en kinderrechten

*Het belang van kinderrechten en het Europese supranationale systeem in kinderontvoeringszaken met immigratiecomponenten*

De term *internationale kinderontvoering* werd geïntroduceerd door het Verdrag van 25 oktober 1980 betreffende de burgerrechtelijke aspecten van internationale ontvoering van kinderen (het 'Kinderontvoeringsverdrag'). Het verwijst naar een situatie waarin een kind zonder toestemming van de andere ouder wordt meegenomen van het ene land (het land waar het kind zijn gewone verblijfplaats had) naar een ander land, in strijd met het gezagsrecht. Ouderlijke kinderontvoering vindt ook plaats wanneer een kind legaal vertrekt, maar vervolgens in strijd met het gezagsrecht wordt vastgehouden. Het Kinderontvoeringsverdrag verplicht de autoriteiten in het land waar het kind zich bevindt om de terugkeer van het kind naar het land van gewone verblijfplaats te bevelen, zodat de bevoegde autoriteiten daar eerlijk kunnen beslissen over het gezag en contactrechten.

Het Kinderontvoeringsverdrag werd negen jaar vóór het Verdrag inzake de Rechten van het Kind (het 'IVRK') – het meest uitgebreide instrument op het gebied van kinderrechten – aangenomen. In de 44 jaar sinds de invoering is de juridische en sociologische context waarin het Kinderontvoeringsverdrag opereert aanzienlijk veranderd.

Dit proefschrift onderzoekt hoe kinderrechten kunnen bijdragen aan de interpretatie van het Kinderontvoeringsverdrag, met inachtneming van hedendaagse veranderingen en uitdagingen waarmee dit verdrag te maken heeft. De voornaamste veranderingen en uitdagingen omvatten de uitbreiding van de reikwijdte van het verdrag door een brede interpretatie van het gezagsrecht, de verandering in het profiel van de ontvoerder en de rol van huiselijk geweld als verweer tegen terugkeer. Zo functioneert het verdrag tegenwoordig bijvoorbeeld tegen de achtergrond van een veranderende benadering van de scheiding van ouders, waarbij de nadruk na scheiding niet langer op de moeder als centrale figuur in het leven van het kind ligt, maar eerder op de continuïteit van het contact tussen het kind en beide ouders. Daarnaast is de interpretatie van 'gezagsrechten' onder het Kinderontvoeringsverdrag veranderd. Het is nu breed geaccepteerd dat de terugkeerprocedure in gang wordt gezet zodra één ouder een veto

uitspreekt tegen de verhuizing van het kind naar de andere ouder, ongeacht de woonomstandigheden van het kind. Verder tonen de beschikbare data dat de meeste ontvoerders moeders zijn, die tegelijkertijd de primaire verzorgers van de kinderen zijn. Veel van hen beweren dat huiselijk geweld door de andere ouder hen ertoe heeft aangezet met hun kinderen naar een veilige plek te vluchten.

Vervolgens analyseert dit proefschrift hoe immigratie-gerelateerde verweren in kinderontvoeringszaken naar voren zijn gebracht en welke rol kinderrechten kunnen spelen bij de beoordeling van dergelijke verweren, rekening houdend met eerdergenoemde hedendaagse veranderingen en uitdagingen. De focus op immigratie is gekozen omdat het Kinderontvoeringsverdrag uitsluitend van toepassing is in een internationale context, waarbij een kind landsgrenzen heeft overschreden.

Ook staan immigratie-gerelateerde verweren tegen terugkeer vaak haaks op de beleidsdoelstellingen en onderliggende aannames van het Kinderontvoeringsverdrag. Sterker nog, een deel van de dynamiek in kinderontvoeringszaken weerspiegelt migratietrends. Vijftig jaar geleden was migratie bijvoorbeeld een 'once in a life time event' terwijl mensen tegenwoordig vaak meermalen in de loop van hun leven internationaal verhuizen.

Deze dynamiek komt ook tot uiting in de context van de kinderontvoering, waarbij mensen naar huis willen terugkeren of voor korte perioden hebben verbleven in het land dat wordt beschouwd als het land waar het kind zijn gewone verblijfplaats heeft. Vanuit het oogpunt van het internationaal privaatrecht wordt er immers vanuit gegaan dat de gewone verblijfplaats van een kind in één dag tijd kan veranderen, op voorwaarde dat de ouders van het kind er gezamenlijk voor kiezen naar een ander land te verhuizen. Bijgevolg staat de uitbreiding van het bereik van het Kinderontvoeringsverdrag in naam van de rechten van het kind in contrast met de meer rigide benadering in de immigratiewetgeving, waar kinderrechten beperkter worden beoordeeld.

Tegen de hierboven geschetste achtergrond is in dit proefschrift de relevantie van de twee Europese supranationale hoven beoordeeld in het hanteren van een op kinderrechten gebaseerde benadering van kinderontvoeringszaken in het algemeen, en – in het bijzonder – kinderontvoeringszaken met immigratiecomponenten. Tot op heden bieden deze Europese supranationale hoven de meest robuuste mensenrechtenbescherming van alle internationale hoven en worden ze beschouwd als de constitutionele pijlers van Europa. Alhoewel ze binnen verschillende kaders functioneren en verschillende rechterlijke bevoegdheden hebben, zijn zij bevoegd in grensoverschrijdende zaken die verband houden met ouderlijke verantwoordelijkheden en kinderontvoering enerzijds en gezinnen en migratie anderzijds. Beiden zijn gebonden de mensenrechten van kinderen in acht te nemen. Daarom is in dit proefschrift bekeken of ze een deel van de spannin-

gen, die ontstaat door de interactie tussen kinderontvoering en de rechten van het kind in het algemeen en de interactie tussen kinderontvoering, kinderrechten en immigratie in het bijzonder, kunnen compenseren.

Het proefschrift heeft 9 inhoudelijke hoofdstukken die als volgt in drie delen zijn verdeeld:

Het proefschrift bestaat uit negen inhoudelijke hoofdstukken, verdeeld over drie delen:

*Deel I – Het kader voor de rechten van het kind*
In de hoofdstukken 2 en 3 wordt het kader voor de rechten van het kind uitgewerkt. Hier wordt aangetoond dat het IVRK probeert twee schijnbaar tegengestelde opvattingen over kinderen met elkaar te verzoenen: een die zich richt op hun autonomie en een andere die gebaseerd is op de behoefte van kinderen aan bescherming. De ouders en de staat staan centraal in beide opvattingen, omdat ze ofwel kunnen worden gezien als remmer dan wel als versterker van kinderrechten. Kinderrechten worden binnen het IVRK begrepen vanuit een ontwikkelingsperspectief: de balans verschuift van bescherming naar autonomie naarmate het kind ouder en volwassener wordt.

De op rechten gebaseerde benadering van kinderrechten bouwt voort op bestaande academische literatuur en de 'General Comments' van het Kinderrechtencomité van de Verenigde Naties. Hoofdstuk 2 stelt voor dat een op rechten gebaseerde benadering inhoudt dat rekening wordt gehouden met het volgende: (i) de wensen van het kind; (ii) de relevantie van andere rechten onder het IVRK; (iii) de bijzondere omstandigheden van het kind; en (iv) al het beschikbare empirische bewijs dat van belang kan zijn. In de besluitvorming moet (i) worden aangegeven wat het concept van de betreffende rechten is; ii) de gebruikte procedures; (iii) de betekenis die aan de rechten in kwestie werd gegeven en (iv) hoe de rechten van het kind zijn gewogen tegenover andere potentieel concurrerende rechten. Hoewel deze benadering in de eerste plaats procedureel is, richt hoofdstuk 3 zich verder op de interpretatie in het kader van het IVRK van drie rechten van het kind die altijd een rol spelen in echtscheidingszaken: het belang van het kind, het recht om te worden gehoord en het recht om contact te hebben met beide ouders. Deze rechten worden eerst afzonderlijk en vervolgens samen geanalyseerd om zowel hun specifieke kenmerken als hun onderlinge verwevenheid aan te tonen.

*Deel II – Het kader voor kinderontvoering*
Hoofdstukken 4 en 5 richten zich op kinderontvoering en kinderrechten. Hoofdstuk 4 analyseert het Kinderontvoeringsverdrag en plaatst deze analyse naast het op rechten gebaseerde kader dat in deel I is ontwikkeld. Vervolgens introduceert hoofdstuk 5 twee van de belangrijkste kritiekpunten op het Kinderontvoeringsverdrag vanuit het perspectief van mensenrech-

ten: het ene richt zich op huiselijk geweld en het andere op ontvoeringen door primaire verzorgers. Dit hoofdstuk onderzoekt de discussies rond huiselijk geweld en ouderlijke verantwoordelijkheden in nationale contexten en hoe deze debatten zijn doorgedrongen tot het veld van de kinderontvoering. Om immigratie in de juiste context te plaatsen, wordt in hoofdstuk 5 ingegaan op academische studies die de impact van immigratie op families en familierechtelijke procedures analyseren. Deze studies bespreken het snijvlak tussen immigratie en huiselijk geweld en benadrukken de machtsongelijkheid, veroorzaakt door immigratie, op de gezinsdynamiek. Vervolgens worden in hoofdstuk 5, op basis van de nationale jurisprudentie die beschikbaar is in de internationale databank voor kinderontvoering (INCADAT), de antwoorden op vragenlijsten van de Haagse Conferentie voor Internationaal Recht (HCCH) en de academische literatuur, de verschillende soorten immigratieoverwegingen geïdentificeerd die als verweer tegen terugkeer in kinderontvoeringsprocedures worden aangevoerd. Op basis van dit materiaal worden immigratieoverwegingen onderverdeeld in twee hoofdcategorieën: (i) beperkingen op binnenkomst of verblijf in een land en (ii) (gelijktijdige) asielaanvragen. Het hoofdstuk concludeert dat immigratieoverwegingen veel minder aandacht hebben gekregen in academische werken die gericht zijn op kinderontvoering in vergelijking met huiselijk geweld en ontvoeringen door primaire verzorgers. Dat, terwijl er wel degelijk werken zijn die deze kruising – tussen huiselijk geweld en immigratie aan de ene kant en de daaruit voortvloeiende machtsonevenwichtigheden die het creëert anderzijds – aantonen. Ook suggereert de beschikbare jurisprudentie dat immigratie, huiselijk geweld en ontvoering door primaire verzorgers verschillende factoren zijn die vaak worden samengebracht als verdediging tegen terugkeer in kinderontvoeringsprocedures. In de voorlopige conclusies worden de algemene bevindingen van de delen I en II besproken. Deze conclusies richten zich op de vraag hoe kinderrechten kunnen doordringen in kinderontvoeringsprocedures en op de relevantie van kinderrechten voor kinderontvoeringszaken met immigratieoverwegingen.

*Deel III – Het Europese supranationale kader*

De analyse in deel I en II vormt de basis voor het onderzoek naar de jurisprudentie van de twee Europese supranationale hoven. De hoofdstukken 7 en 8 geven een uitputtend overzicht van de jurisprudentie over kinderontvoering van het Hof van Justitie van de Europese Unie (het HvJ-EU) en het Europees Hof voor de Rechten van de Mens (EHRM). De jurisprudentie wordt geanalyseerd in de context van de bevoegdheid van elk hof en rekening houdend met de beperkingen van hun bevoegdheid. Wat de rechten van het kind betreft, wordt de jurisprudentie, naast de drie kernrechten die in hoofdstuk 3 zijn geïdentificeerd, geanalyseerd aan de hand van het recht van het kind om vrij te zijn van geweld, de scheiding van zijn primaire verzorgers en immigratieoverwegingen: de drie gebieden die in hoofdstuk 5 worden besproken. Voor elk van de hoven gaan de hoofdstukken in op de

mate waarin zij in hun jurisprudentie een op rechten gebaseerde benadering van de rechten van het kind hebben gehanteerd, volgens de in hoofdstuk 2 genoemde criteria.

Hoofdstuk 9 vergelijkt de bevoegdheid van de twee hoven en biedt enkele reflecties over hun interactie op dit gebied.

Vervolgens wordt in hoofdstuk 10 gekeken naar het bredere perspectief en wordt de bevoegdheid van de twee hoven besproken voor zaken op het gebied van gezinsimmigratie die in hoofdstuk 5 zijn geïdentificeerd. De reikwijdte van de analyse wordt bepaald door het soort immigratieprocedures dat bij de nationale rechtbanken aanhangig is gemaakt en eerder in hoofdstuk 5 is geïdentificeerd. Verder wordt de analyse uitgevoerd op basis van de groeiende consensus op het gebied van kinderontvoering dat kinderen moeten worden teruggestuurd naar het land waar ze hun gewone verblijfplaats hebben, zelfs als er een ernstig risico op schade is vastgesteld, op voorwaarde dat het systeem in staat is om het kind bij terugkeer te beschermen. Hoofdstuk 10 onderzoekt de normen die de twee hoven hebben vastgesteld in het immigratierecht als het gaat om het vermogen van het systeem om het kind te beschermen. In hetzelfde hoofdstuk wordt ingegaan op de relevantie van hangende asielaanvragen voor kinderontvoeringszaken vanuit het perspectief van het EU- en EHRM-recht. Uit de migratierechtspraak van de twee hoven blijkt ook hoe de nationale familierechtbanken omgaan met (echt)scheidingszaken wanneer een van de ouders een precaire immigratiestatus heeft. De interventies van vele landen in de zaak *Chavez Vilchez,* die jaren terug bij het HvJ-EU, indiceren dat nationale autoriteiten in een nationale context de neiging hebben om de rechten van het kind te instrumentaliseren door te stellen dat de loutere aanwezigheid van één van de ouders op het grondgebied van een staat betekent dat het recht van het kind om contact met beide ouders te hebben, wordt geëerbiedigd. Ook bracht de jurisprudentie van het EHRM situaties aan het licht waarin familierechtbanken ouderlijke verantwoordelijkheden toekenden op basis van de immigratiestatus van één ouder. Uit de analyse in hoofdstuk 10 blijkt dat zowel het HvJ-EU als het EHRM dit soort benaderingen hebben afgewezen. Deze rechtbanken hebben het belang van het kind en het recht van het kind op contact met beide ouders in migratiezaken geanalyseerd in het licht van het effectiviteitsbeginsel. Voorts is in hoofdstuk 10 de jurisprudentie van de supranationale hoven inzake internationale bescherming geanalyseerd in het licht van de kwesties die zijn voorgelegd aan nationale familierechtbanken die uitspraak doen in kinderontvoeringszaken. De analyse van de jurisprudentie van de supranationale hoven gaat in op de relevantie voor kinderontvoeringsrechtbanken van hangende of gunstige nationale beslissingen waarbij een kind of een ouder asiel of subsidiaire bescherming wordt verleend. De bredere discussie over de relevantie van het beginsel van non-refoulement voor kinderontvoeringsprocedures, zelfs buiten een formeel verzoek om internationale bescherming, kwam in dit hoofdstuk niet aan de orde, aangezien deze kan worden beschouwd

als overlappend met het toepassingsgebied van artikel 13 of 20 van het Kinderontvoeringsverdrag.

In hoofdstuk 10 werd geconcludeerd dat de jurisprudentie van de twee hoven de benaderingen van nationale rechterlijke instanties kan harmoniseren en tegelijkertijd een adequate bescherming van de rechten van het kind kan waarborgen. Vanuit het oogpunt van het immigratierecht zou de toepassing van het EU- en EHRM-recht ervoor zorgen dat gescheiden ouders het recht hebben om in het land van de gewone verblijfplaats van het kind te verblijven om het gezinsleven met hun kind daadwerkelijk te kunnen uitoefenen. Dit betekent op zijn beurt dat de EU-lidstaten in principe de bevoegdheid hebben om het kind bij terugkeer te beschermen vanuit het oogpunt van de immigratiewetgeving. Deze conclusie is afhankelijk van de daadwerkelijke uitvoering door de lidstaten van het relevante EU-recht en de jurisprudentie van het HvJ-EU en het EHRM. Ook is een strengere controle vereist wanneer het land waar de gewone verblijfplaats zich bevindt een derde land is. Verder stelt hoofdstuk 10 dat aanhangige of besliste asielzaken zouden moeten leiden tot de bevinding door kinderontvoeringsrechtbanken dat de staat van de gewone verblijfplaats het kind bij terugkeer geen adequate bescherming kan bieden.

*Conclusies*

De conclusies in hoofdstuk 11 schetsen de belangrijkste bevindingen van het proefschrift. Hoofdstuk 11 stelt ook een besluitvormingskader voor kinderontvoeringszaken voor, waarbij de nadruk ligt op de rol die kinderrechten en immigratieoverwegingen kunnen spelen. Het besluitvormingskader volgt een procedurele benadering; het richt zich niet op de uitkomst en gaat ook niet in op de inhoud van de rechten. Het schetst echter wel de gebieden van het Kinderontvoeringsverdrag waar de rechten van het kind een rol kunnen spelen en hoe immigratieoverwegingen kunnen worden meegewogen wanneer deze worden opgeworpen als uitzonderingen op terugkeer in kinderontvoeringsprocedures. Het besluitvormingskader stelt voor dat hoe nauwer de band tussen de ouder en het kind is, hoe nauwer rechtbanken aandacht moeten besteden aan de immigratieoverwegingen die als verdediging tegen terugkeer worden ingebracht. Deze bewering is gebaseerd op het argument dat het recht van het kind om contact te hebben met beide ouders bijzondere aandacht verdient, in het bijzonder als het gaat om immigratie, aangezien dit een reëel risico van een scheiding van het kind met zijn verzorger met zich brengt.

# Curriculum Vitae

Simona Florescu (Romania, 1981) is a human rights lawyer. In 2003, she has obtained her bachelor degree from the Romanian American University, in Bucharest Romania. In 2004 Simona received an LLM degree in Comparative Constitutional Law from the Central European University seated at the time in Budapest, Hungary. Simona has also completed another LLM in European Union law from Radboud University, Nijmegen Netherlands in 2013.

In 2014, Simona started as a PhD fellow at the Leiden Child Law Department of Leiden University. She continued teaching and researching at the Child Law Department until 2020.

Simona is a licensed attorney at law with the Bucharest Bar Association. Between 2008 to 2012 she has worked as a case lawyer with the Registry of the European Court of Human Rights. Since 2021 Simona has been involved in coordinating strategic litigation cases for persons with intellectual and psychosocial disabilities for Validity Foundation, seated in Budapest, Hungary.

In the range of books published by the Meijers Research Institute and Graduate School of Leiden Law School, Leiden University, the following titles were published in 2024 and 2025

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The 1980 Hague Convention on the Civil Aspects of International Child Abduction applies to cross-border removals or retentions of children in breach of custody rights. This Convention operates against an ever changing national and international landscape. Sociologically, the profile of the 'abductor' and the justification for removing or retaining children abroad have changed. Different legal disciplines regulate disputes over child custody and international movements, the two events which trigger an international child abduction. In family law, the preference for joint parental responsibilities means that children are expected to live in close physical proximity to both of their parents even after parental separation. Immigration regimes attribute less weight to human and children's rights. The different dynamics of family and immigration laws affect in particular children from mixed-status families.

This dissertation analyses the impact of children's rights on the interpretation of the Child Abduction Convention. The focus is on the role children's rights may play in challenging areas of the Convention, and in particular in the context of immigration-based defences to the child's return. This dissertation further analyses the approaches of the Court of Justice of the European Union and the European Court of Human Rights to the individual children's rights in parental child abduction cases in general and to those with immigration components in particular.

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