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The Netherlands

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.

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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

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 XXIst 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 Convention²¹ 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.

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/Koskeniemi 2007, para 413.

33 United Nations. International Law Commission. Study Group/Koskeniemi 2007, para 413.

34 United Nations. International Law Commission. Study Group/Koskeniemi 2007, para 33.

35 United Nations. International Law Commission. Study Group/Koskeniemi 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 & Vandenhoe (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.

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 Kingdom⁴⁹ 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 Community 2019/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/ukxi/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 law⁵⁹. 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:

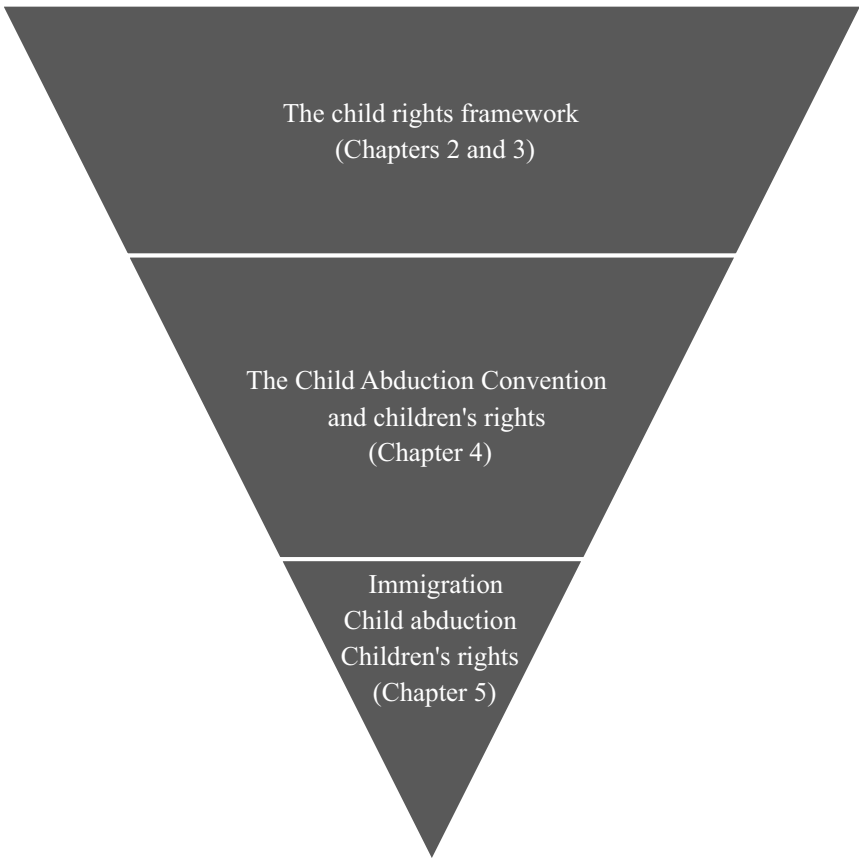


Figure no 1: Outline Part I and Part II of the dissertation

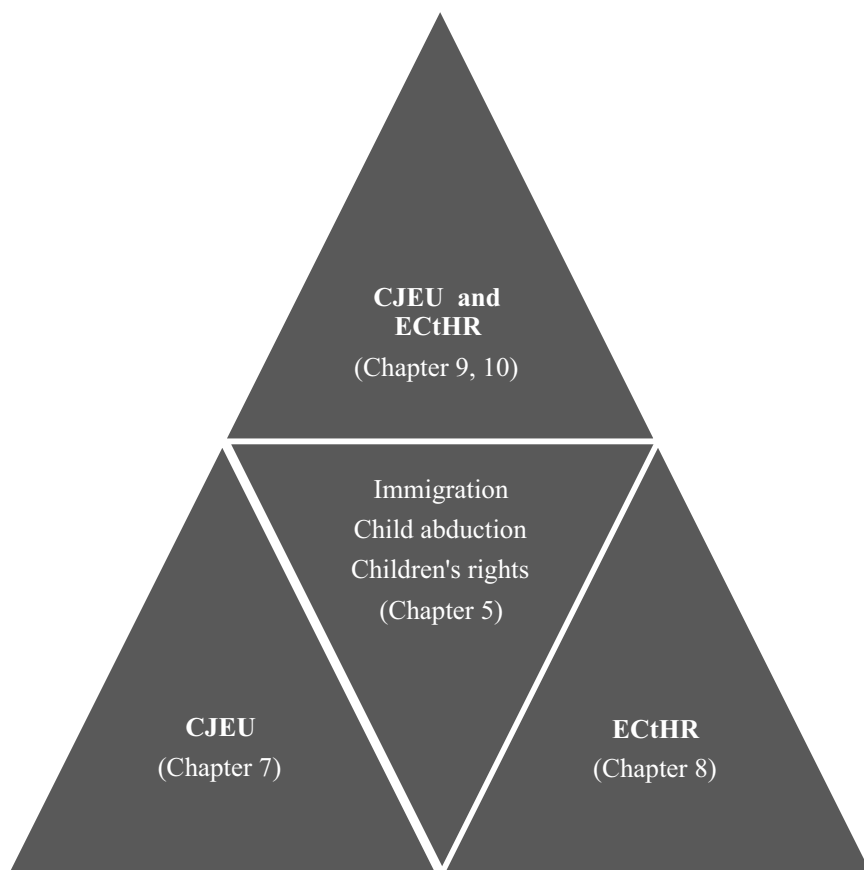


Figure no 2: Outline Part III of the dissertation

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.