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

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*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,

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 orders 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.