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.

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.

---

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.

---

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]

---

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.

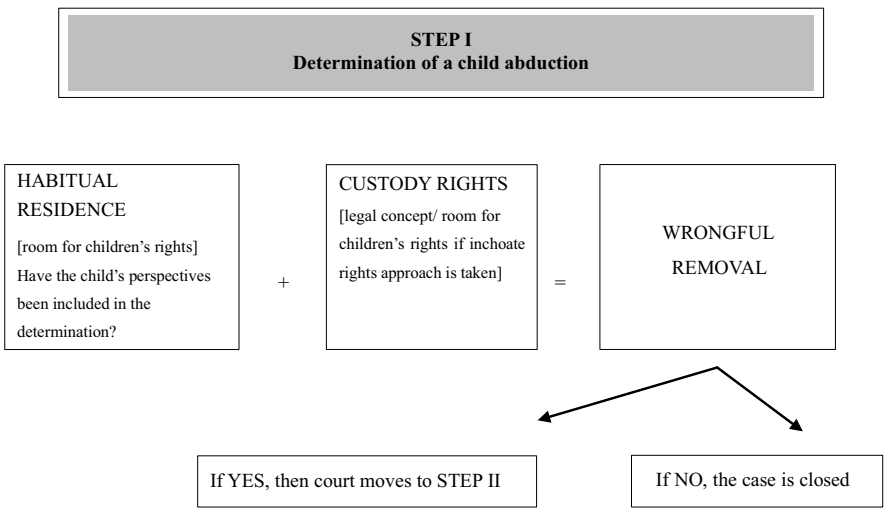

Figure no. 3: STEP I – Determination of a child abduction

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.

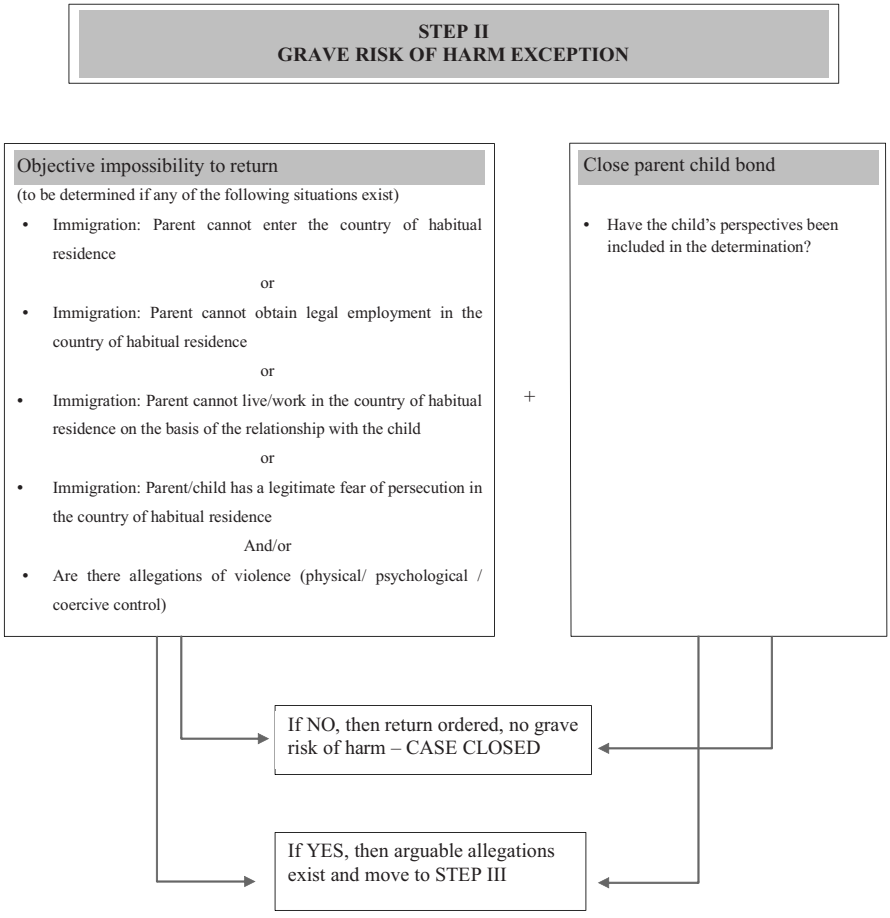

Figure no. 4: STEP II – Grave risk of harm to the child/intolerable situation

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.

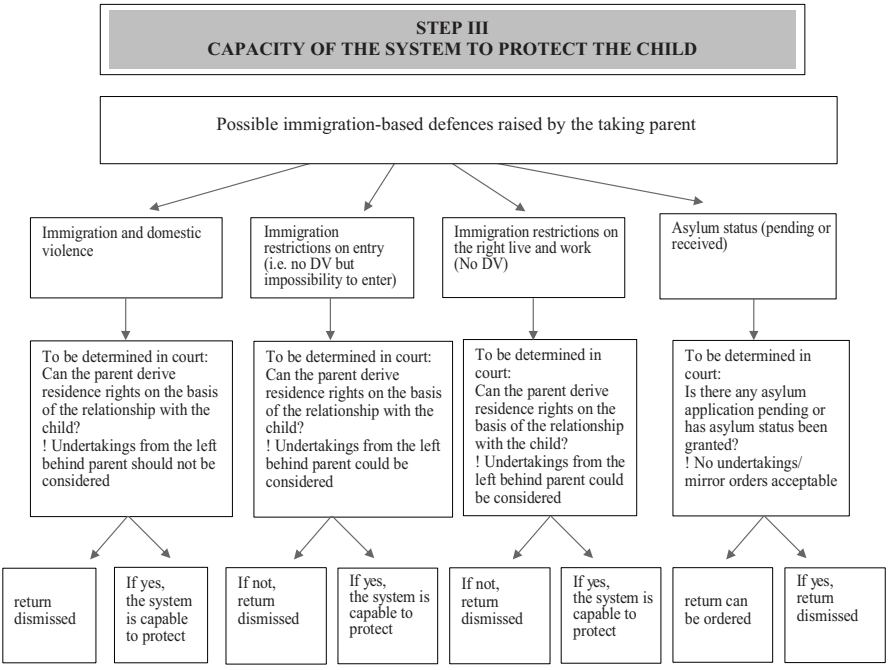

Figure no 5: STEP III – Capacity of the system to protect the child upon return

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.