

STUDY  
for the JURI committee



# Children On the Move: A Private International Law Perspective

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**DIRECTORATE GENERAL FOR INTERNAL POLICIES**  
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**CONSTITUTIONAL AFFAIRS**

**LEGAL AFFAIRS**

**CHILDREN ON THE MOVE:**  
**A PRIVATE INTERNATIONAL LAW**  
**PERSPECTIVE**

**STUDY**

**Abstract**

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee, will be presented during a Workshop dedicated to potential and challenges of private international law in the current migratory context. The **child's** best interests are a primary consideration under international and EU law. EU migration and private international law frameworks regulate child protection, but in an uncoordinated way: the Dublin III and Brussels IIa Regulations are neither aligned nor applied coherently. This should change. In particular, the rules and mechanisms of Brussels IIa should be used to enhance the protection of migrant children. These include rules on jurisdiction to take protective measures, on applicable law, and on recognition and enforcement of protective measures, and mechanisms for cross-border cooperation between authorities.

## **ABOUT THE PUBLICATION**

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## LIST OF ABBREVIATIONS

- Brussels IIa** Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No 1347/2000
- Brussels IIa Recast** Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and matters of parental responsibility, and on international child abduction (recast) of 30 June 2016, COM (2016) 411.
- CA** Central Authority
- CEAS** Common European Asylum System
- CJEU** Court of Justice of the European Union
- Dublin Regulation** Regulation No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person
- Dublin Regulation Recast** Proposal for a Regulation of the European Parliament and the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) COM(2016)270 final.
- ECHR** European Convention of Human Rights
- EU** European Union
- 1980 Hague Convention** Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction
- 1996 Hague Convention** Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children
- MS(s)** Member State(s) of the European Union

**PIL** Private International Law

**UNCRC** United Nations Convention on the Rights of the Child



## EXECUTIVE SUMMARY

### Background

The United Nations Convention on the Rights of the Child, as well as the EU Charter on Fundamental Rights, state clearly that the child's best interests must be a primary consideration in all cases concerning children. The scope of this commitment is not limited to EU citizens, but should apply to *all* children, whatever their citizenship (including stateless children) and residence status. Migrant children should, as a matter of principle, not be treated differently than other children.

The recent increase of migration has not been limited to adults. Many children are on the move as well: some travel with their parents, others leave on their own or become separated from their parents, family members or relatives along the route; some claim asylum, others do not. Some who do claim asylum see their application rejected.

Unaccompanied and separated children are entitled to particular protection under international and EU law (specifically the Dublin Regulation). At the same time international and EU law (1996 Hague Child Protection Convention and Brussels IIa Regulation) regulate which State's authorities have the power to take measures on child protection and which law is applicable.

The division of tasks among Member States for the protection of these children under migration law, including asylum law, on the one hand and measures of protection in civil law on the other is not well aligned. First, the distribution of jurisdictions among Member States is different. Second, the authorities that are responsible for migration matters and for civil matters differ. The cooperation mechanisms at an EU level for migration law (through the CEAS/Dublin units) and for civil law (through Central Authorities under Brussels IIa and the 1996 Hague Convention) are unrelated. Third, the recognition of personal status (such as minority) and of family relations (parentage or marriage) is a civil law issue, which is essential for migration rights. Fourth, measures of child protection (such as the appointment of guardians for purposes of asylum procedures) and recognition of care arrangements from other States operate as separate legal questions.

The interface between the CEAS and cooperation in civil matters (or Private International Law) is thus ignored or underestimated.

This study on "Children on the move: A private international law perspective" was requested by the Committee on Legal Affairs to be presented during a workshop, dedicated to the potential and challenges of PIL in the current migratory context.

### Aim

The purpose of this research paper is to:

- emphasize the interface between migration law and private international law in relation to unaccompanied and separated foreign or migrant children;
- point out the importance of aligning the rules of migration law and private international law;
- encourage the different Member States' authorities working in these areas to cooperate, especially to protect children and safeguard their best interests; this will also reduce the risk of children disappearing or being exploited or trafficked;
- encourage the EU and its Member States to use the mechanisms provided in Brussels IIa for the application of the Dublin Regulation;

- encourage the EU to frame its policies in regard to migrant children in terms of durable solutions that are in the **child's** best interest, including integration in a Member State, return to the country of origin, resettlement or reunification with family members in a Member State or in a third country;
- encourage the EU and its Member States to establish and intensify cooperation with third States to enhance unaccompanied migrant children protection from those States.

In developing this study, the authors drew on their expertise in the field of PIL and migration law, relevant literature and case law in the area and a limited number of very recent interviews with the National Red Cross Services, Guardianship Services, Central Authorities and asylum and migration authorities in Belgium, France, Germany, Italy and the Netherlands to further identify the interplay between the two sets of rules.

The recommendations have a two-fold objective. First, they present action points for the EU (and more specifically for the European Parliament), including promoting uniform and effective practices among MSs regarding the interpretation and application of existing instruments. Secondly, they call for further research in the field. A summary of their recommendations appears in the "Key Findings" at the beginning of each chapter.

## GENERAL INFORMATION: PRIVATE INTERNATIONAL LAW AND CHILDREN ON THE MOVE

### Protection of children as a general mainstream aim of all EU rules and policies

Protection of children – to be organised in light of the **child's** best interest– has been a general aim of the EU since the Lisbon Treaty. It has since then been a mainstream part in all EU legislation and policies. Since 2010 it has become one of the EU Commission's **major aims** also in regard to asylum and migration law.<sup>2</sup>

This research paper focuses on unaccompanied and separated foreign children. The same researchers have conducted a related study on "Private international law in a context of increasing international mobility: challenges and potential" where a broader approach is taken.

Private International Law (PIL) – i.e. the field of law dealing with the three key issues of: **a)** international jurisdiction (which court?); **b)** applicable law (which law?); **c)** recognition and enforcement of foreign acts and decisions (what legal effects in systems other than the forum?) – can and should provide additional means of promoting this goal. Until now migration law and PIL have been viewed as separate sets of law, and little attention – if any – has been given to the possible interactions between the two fields of law. The purpose of the present study is to investigate how PIL tools may serve the **child's** best interests with regard to migration law, including refugee and asylum law (protection of children as refugees under the 1951 Refugee Convention or by way of subsidiary protection under complementary EU law), in accordance with the EU Charter of Fundamental Rights (especially Article 24), the ECHR (especially Article 8), and the UNCRC.

### Brief overview of the main PIL instruments for the protection of children's rights within the EU and the international legal system

When considering the possible interactions of PIL tools in the field of child protection with migration law, including refugee and asylum law, a number of different PIL instruments come into consideration. Different actors may intervene. The main instrument enacted by the EU is Regulation No 2201/2003, hereinafter "**Brussels IIa**",<sup>3</sup> currently under review. As this Regulation has a general scope of application, it will form the primary focus of this study. Besides this instrument, consideration shall also be given to possible interactions with the 1996 Hague Convention on the Protection of Children<sup>4</sup> - a Convention that binds all the 28 EU MSs, plus another 18 States, among which Morocco and Turkey - and the 1980 Hague Convention on International Abduction of Children. While these two Conventions, together with the Regulation, are the common frame of PIL tools within the European arena, the 1993 Hague Convention on Inter-country Adoption and, though with less practical impact, the 1980

<sup>2</sup> See Action Plan for Unaccompanied Minors (2010-2014), COM(2010) 213 final; European Agenda for Migration, COM(2015)240 final; Communication on the state of play of its implementation, COM(2016)85 final; and most recently, The Protection of Children in Migration, COM(2017)211 final.

<sup>3</sup> Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000. The Regulation is in force in all EU Member States, with the exception of Denmark.

<sup>4</sup> Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. The Convention is now in force among all EU Member States. The following third States are also bound by this Convention: Albania, Armenia, Australia, Cuba, Dominican Republic, Ecuador, Georgia, Lesotho, Monaco, Montenegro, Morocco, Norway, Russia, Serbia, Switzerland, Turkey, Ukraine and Uruguay. It has been signed, but not yet ratified, by Argentina, Canada and the United States of America. See the full status table of the Convention at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=70>.

European Convention on Custody of Children (the so-called Luxembourg Convention), as well as **the 1996 European Convention on the Exercise of Children's Rights**, are equally relevant.<sup>5</sup>

## Definitions

Being a "**child**" or a "**minor**" is part of **one's** personal status. For purposes of migration law, persons below the age of 18 are considered "children" or "minors" and have a right to special protection<sup>6</sup>. This age limit is not subject to a PIL rule referring to the law applicable to the **person's** status.

This paper focuses on "**unaccompanied children**", while also paying attention to "**separated**" children. A child is unaccompanied for the purposes of the Dublin Regulation if he or she is not accompanied by "an adult responsible for him or her, whether by law or by the practice of the Member State (MS) concerned, and for as long as he or she is not effectively taken into the care of such an adult" (Article 2j). Separated children are children "who have been separated from both parents, or from their previous legal or customary primary care-giver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members"<sup>7</sup>. These definitions rely on the concept of parental responsibility, which is governed in all MSs by the same conflict-of-law rules – and therefore by the same applicable law –, since all MSs are party to the 1996 Hague Convention (which in most cases designates the law of the place of **the child's** habitual residence: see 1.4 below).

## Structure of the study

This study is divided into three chapters.

**Chapter one** considers the interactions between PIL and migration law, especially regarding jurisdiction and applicable law. In light of the specific needs of children on the move, it examines the criteria used in PIL for determining the competent court and the applicable law concerning child protection under civil law. The crucial role of the Brussels IIa Regulation as the general PIL tool is highlighted. This chapter identifies several application problems and their practical consequences. As both Brussels IIa and the CEAS are currently under revision, recommendations are made in order to better articulate the two sets of rules. This chapter also takes into account the need to protect those children who do not claim asylum. The **overarching objective to better protect the child's best interests requires the child's** migratory status to be coordinated with an appropriate and durable solution to be provided under civil law.

**Chapter two** is dedicated to cooperation between national authorities, which is of crucial importance for the protection of children on the move, whether they claim asylum or not. Cooperation mechanisms exist under migration law and under civil law (PIL), but the national authorities involved under the two sets of rules are not the same. The protection of children on the move requires a better coordination of all of them. This chapter examines cooperation among MSs, for which EU instruments already exist but have to be better coordinated, as well as cooperation between MSs and third countries, where well-operating international conventions on the protection of children are in place, in particular the 1996 Hague Child

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<sup>5</sup> European Convention on recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, done in Luxembourg on 20 May 1980; European Convention of on the Exercise of Children's Rights, done in Strasbourg on 25 January 1996.

<sup>6</sup> See art. 2(i) Dublin Regulation and art. 2(f) Family reunification Directive, to which other EU instruments refer.

<sup>7</sup> United Nations Committee on the Rights of the Child, General Comment N° 6, (2005), *Treatment of unaccompanied and separated children outside their country of origin*, para 8.

Protection Convention. Its ratification by third countries has to be further promoted, in order to enlarge the number of countries bound by them.

**Chapter three** deals with major crosscutting issues, which are relevant for the effective protection of all migrant children. Migration law relies on civil law concepts determining the **child's** personal and family status, such as parentage, child marriage, parental responsibility, guardianship and proof of minority. PIL provides the rules for recognition of foreign status, family ties and foster care arrangements, including the recognition of foreign civil status documents. This chapter examines the operation of these PIL rules under migration law, for instance for the purpose of family reunification, the determination of the responsible MS under the CEAS, the appointment of a guardian during migration law proceedings, etc. The study provides examples from several MSs highlighting the challenges of PIL in the current migratory context.

Each Chapter is preceded by Key Findings.

## 1. INTERACTIONS BETWEEN PRIVATE INTERNATIONAL LAW AND MIGRATION LAW

### KEY FINDINGS

- Children protection is a general EU aim, to be mainstreamed in all EU rules and policies. It is also, traditionally, a key objective of many PIL instruments binding EU Member States. It is additionally today at the forefront of the crucial field of migration and asylum law and policies. The interaction between PIL and migration (including asylum) law and policies requires urgent attention.
- The Brussels IIa Regulation (Brussels IIa), in particular, has a broad scope of application and plays a crucial role in the protection of children also in the field of migration and asylum law and policies. Its role in this regard should be made more explicit.
- Brussels IIa and the CEAS instruments should be better coordinated to ensure respect for the **child's** best interests from the perspective of international protection both under migration law and under civil law.

In particular:

- in the context of the revision of Brussels IIa, attention should be paid to the needs of unaccompanied minors, and to the special rules set in the frame of CEAS instruments.

- in the context of the revision of CEAS instruments, attention should be paid to the instruments available for the protection of children under civil law, in particular Brussels IIa and the 1996 Hague Convention.

- Cross-references should be inserted in the relevant instruments (in Brussels IIa and in CEAS instruments), to highlight their interaction.

- Central Authorities and courts should be sensitized to the specificities of unaccompanied minors and realize that, e.g., the appointment of a guardian with a view to protecting the child in asylum and migration procedures, such as Dublin transfers, is different from appointing a guardian with a view to providing more permanent protection under civil law to a child.
- **The proposal of the Draft Report of the EP's Committee on Civil Liberties, Justice and Home Affairs on the Dublin recast to delete the reference to the place where the minor first has lodged his or her application is to be approved.**
- **The Commission's call for child protective measures to be taken at the hotspots, irrespective of whether children are applicants for international protection or not, is to be supported.**
- **The proposal of the Draft Report of the EP's Committee on Legal Affairs on the Brussels IIa recast to amend its Art. 56 (which will become Art. 65.1 – see also Recital 50) in order to extend the application of the placement procedure to placements "with family members" is to be supported.**

A preliminary issue that arises when dealing with migrant children, whether eligible for asylum or not, is to determine in which Member State (MS) their legal position should be assessed. This issue is dealt with both under the Dublin Regulation and the Brussels IIa Regulation. The two instruments envisage separate provisions, resulting sometimes in overlaps. The first Regulation considers the issue from the specific viewpoint of asylum seekers and covers minors' rights and protection throughout the asylum procedure; the second instrument covers all

general acts of protection under civil law, such as taking into custody and appointing a guardian, but does not deal with any decisions on the right of asylum and migration. Although inserted in different contexts, the two sets of rules should be consistent with each other. Brussels IIa aims at governing all protective measures in relation to children. It should therefore be seen as an instrument of general application (1.1).

In order to find a better coordination between Brussels IIa and Dublin, the two Regulations will be examined separately hereinafter (1.1 to 1.3; 1.5). The law applicable to parental responsibility is determined in all MSs by the 1996 Hague Convention (1.4).

In the context of the current refugee crisis, it is important though not to oversee the group of migrant children – accompanied or not – who have not applied and/or do not qualify for protection (refugee or subsidiary protection status), or whose asylum claim has been rejected. This group of children includes children that come to Europe for economic reasons. Their protection is not linked to the CEAS and has to be considered specifically (1.6).

### 1.1. Brussels IIa Regulation as the general PIL tool

Together with Brussels I Regulation, Brussels IIa Regulation is one of the two cornerstones of the European Judicial Area, a tool which should be examined first, not only because of its general scope of application in regard to children protection, but also because, over the years, it has been given a wide and far-reaching interpretation, in regard to both its material and personal scope of application.

First of all, Brussels IIa uses the term "**court**" when imposing State's obligations and divisions of tasks (such as for jurisdiction). However, this term covers a broader category than is apparent at first sight: it includes "all the authorities in the Member States with jurisdiction in the matters falling within the scope of this Regulation".<sup>8</sup> Therefore, any authority taking measures concerning parental responsibility over children is bound by the rules set out in the Regulation. In the Proposal for the Recast of Brussels IIa,<sup>9</sup> the Commission systematically replaced the word "court" by "authority" to make this clearer. This language poses difficulties with regard to issues such as seizing a "court" and *lis pendens*; therefore, the Commission might revert to the old ruling. Notwithstanding the wording the final text shall have, there is a common understanding that the notion of authorities covers a rather broad category.

In the second place, when looking at the scope of application of Brussels IIa (formally referring to "parental responsibility"), it is worth clarifying that **issues concerning migrant children, including unaccompanied children**, are actually encompassed by this legal instrument. Recital 10 makes an exception only for issues of immigration in the narrow sense, by stating that the Regulation "is not intended to apply to matters relating to [...] decisions on the right of asylum and on immigration". Specific mention of migrant children is made in Article 13(2), which establishes a ground for jurisdiction based on presence in case of refugee or internationally displaced children. Moreover, the CJEU has since long repeatedly made clear that the scope of this Regulation should be construed as referring to "all measures for the protection of minors", including the ones taken by public/administrative authorities<sup>10</sup>.

<sup>8</sup> Article 2(1) Brussels IIa.

<sup>9</sup> Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) of 30 June 2016, COM(2016) 411.

<sup>10</sup> Measures such as placing the child into childcare facilities or in an institution providing therapeutic and educational care, also when situated in a different Member State, and irrespective of the fact that they are taken by a judicial or an administrative authority undoubtedly fall within the Brussels IIa Regulation. See CJEU: case C-435/06, *C* of 27 November 2007 (ECLI:EU:C:2007:714); case *A* of 2 April 2009 (ECLI:EU:C:2009:225) and *Health Service Executive* of 26 April 2012 (ECLI:EU:C:2012:255).

Therefore, there is no doubt that Brussels IIa applies to the protection and representation of children, even in the context of migration and asylum.

In fact, the scope of Brussels IIa comes very close to the one of the 1996 Hague Convention, which is more clearly drafted in regard to "measures for the protection of children". The scope of application of the Regulation should be modelled on the Convention and its Explanatory Report: Article 4j excludes from the Convention "decisions on the right of asylum and on immigration". **Paul Lagarde explained this exclusion in these terms:** "These are decisions which derive from the sovereign power of States. Only decisions on these matters are excluded: in other words, the granting of asylum or of a residence permit. The protection and representation of children who are applying for asylum or for a residence permit fall, to **the contrary, within the scope of the Convention**"<sup>11</sup>. This justification is equally valid for Brussels IIa and should be clearly stated within the Regulation.<sup>12</sup>

## **1.2. Jurisdictional rules provided in the Brussels IIa Regulation and in the 1996 Hague Convention**

### 1.2.1. Habitual residence

It is well known that Brussels IIa (and the 1996 Hague Convention) adopts the criterion of **habitual residence** as the main connecting factor in all matters related to children. It is generally admitted that this criterion conveys the principle of **the child's** best interests in procedural matters<sup>13</sup>, as it expresses the principle of proximity and efficiency, allowing for the "natural" court to hear the child, investigate efficiently the circumstances of the case and decide it promptly. It should also be recalled that in all cases affecting children, time is of the essence.

However, in regard to displaced children, this ground of jurisdiction can no longer be applied with reference to their home country, due to the fact that they had to leave their country. On the other hand, migrant children are in need of protection well before they acquire habitual residence in a new State, being especially vulnerable.

On the one hand, a refugee child that has just reached a MS cannot be considered as having a habitual residence there, because of the lack of the necessary stability the notion implies. On the other hand, courts have assumed a habitual residence, even before the asylum procedure was successfully completed, in cases where the child was determined to stay in the country and had remained there for about 6 or 8 months.<sup>14</sup> In Germany, for instance, in order to stretch the application of the Brussels IIa Regulation, authorities tend to interpret the **child's** habitual residence quite generously, and when a child comes to Germany in order to remain there, German authorities often just assume that a habitual residence is established on the day of his/her arrival. However, in some cases this is not possible because it becomes clear that the child does not intend to stay in Germany for a longer period of time.

**Even if one applies the notion of "habitual" residence in a very flexible manner, protective measures will often be necessary before a habitual residence is established in the MS (see 1.2.4 below).**

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<sup>11</sup> Explanatory Report on the 1996 Hague Child Protection Convention, n° 36.

<sup>12</sup> **The Recast proposal (COM(2016) 411) modifies Recital 10, and eliminates "decisions on the right of asylum and on immigration". While this might be seen as a confirmation of the Regulation's broad application, it does not provide the clarification that is needed and proposed here.**

<sup>13</sup> Ruling A, EU:C:2009:225, points 31 et 35, and Mercredi, EU:C:2010:829, points 44 et 46. See also Recital 12.

<sup>14</sup> Oberlandesgericht Karlsruhe, 05.03.2012 - 18 UF 274/11 and 26.08.2015 - 18 UF 112/15; in both cases an unaccompanied minor was considered habitually resident after eight months.



### 1.2.2. Presence

Article 13(2) of Brussels IIa (and also Article 6 of the 1996 Hague Convention) admits the **child's presence as a basis of jurisdiction** for all "displaced children".

**Article 13(2)** thus provides a specific rule of international jurisdiction over displaced children and gives competence to the MS where the child is present in regard to "**refugee children**" or "**children internationally displaced because of disturbances occurring in their countries**". The mere presence of the child on a State's territory is thus considered a sufficient link to allow such State to assert jurisdiction, for example for the purpose of appointing a guardian (or a legal representative), conducting proper investigations into **the child's situation** and adopting appropriate measures for his/her protection<sup>15</sup>.

This provision is of extreme importance regarding asylum (international protection) claims: according to Article 6 of the Dublin III Regulation, a representative must be appointed for an unaccompanied child. This requirement may only be implemented if the State where the child is present has jurisdiction, albeit provisional, to appoint the guardian (representative) (also see below, 3.4.2).

The CJEU has had the opportunity of clarifying the importance of the criterion of "presence" in a case where the child had applied for asylum in various Member States (see 1.5.2. below).

Jurisdiction based on the **child's presence** implies **full jurisdiction**, as opposed to the competence aimed at issuing provisional and protective measures provided by Article 20 of the Brussels IIa Regulation (see 1.2.4 below). It should however be noticed that such jurisdiction is nonetheless **temporary**, as it will cease as soon as a stable solution for the child is arranged and he/she settles down and acquires a habitual residence somewhere.

The restriction to "**refugee children**" and "**children who, due to disturbances occurring in their country, are internationally displaced**" in Article 13(2) may at first glance seem problematic in the case of children who are not seeking asylum or whose claim for asylum has been rejected, including children who have come for economic reasons from third countries and even children who are EU nationals, as it is often the case, in particular with children from Romania and Bulgaria.<sup>16</sup> In our view, these terms in Article 13(2) should be understood broadly in the light of the **Article's** object and purpose. This provision is modelled on Article 6.1 of the 1996 Hague Convention – which has exactly the same wording.<sup>17</sup> The Explanatory Report of Article 6.1 recognises that not all children will seek asylum and the category is therefore not restricted to asylum seekers.<sup>18</sup> In our view this is a broad basis of jurisdiction that can provide protection also to children outside any formal procedures.

Some difficulties may occur when outlining the kind of "**disturbances**" that should be met for a child to be considered displaced under the present rule. On a textual construction, the rule would seem not to encompass children who were previously resident in countries where "disturbances" do not raise to the level of riots, civil war or severe discrimination on the grounds of race, sex, religious or other grounds. However, it is here suggested that the rule should be **interpreted extensively**, as it was clearly framed for the protection of all children,

<sup>15</sup> E. Pataut, "Article 13" in U Magnus and P Mankowski (eds), *Brussels IIa* (2012, Munich, Sellier) p.161.

<sup>16</sup> See Terre des hommes, Mario project, [Position paper](#), 2015; Save the children, "[Young, invisible, enslaved](#)", 2016; B. Hurley, M. John-Baptiste, S. Pande, "[Free to Move, Invisible to Care](#)", 2015.

<sup>17</sup> Article 6 1996 Hague Convention reads "(1) For refugee children and children who, due to disturbances occurring in their country, are internationally displaced, the authorities of the Contracting State on the territory of which these children are present as a result of their displacement have the jurisdiction provided for in paragraph 1 of Article 5. (2) The provisions of the preceding paragraph also apply to children whose habitual residence cannot be established". See also E. Pataut, "Article 13" in U Magnus and P Mankowski (eds), *Brussels IIa* (2012, Munich, Sellier) p.161.

<sup>18</sup> P. Lagarde, Explanatory Report on the 1996 Hague Child Protection Convention states at para 44: "They [the children] may indeed, for example, be led to apply for asylum..." This implies that they are not necessarily asylum seekers.

irrespective of the reason for which they are "on the move". Thus, the present rule should be construed so as to grant jurisdiction to the State where those children are, when they are not habitually resident in any EU MS, and are in need of legal protection because they lack their **parent's or another adult's** legal representation, where the latter are legally responsible for their protection. For children who are habitually resident in a MS, the system of mutual trust should be upheld. The jurisdiction remains in the MS where they are habitually resident and the emergency jurisdiction based on Article 20 is sufficient.

### 1.2.3. The residual application of national rules, an inappropriate solution

The need for the suggested extensive interpretation is also based on the lack of an otherwise appropriate and uniform rule.

In regard to children whose habitual residence cannot be ascertained<sup>19</sup>, **Article 13(1)** Brussels IIa also gives competence to the State where the child is present. However, it is generally considered that this rule is **not applicable** to children who do have a habitual residence, even if this habitual residence lies outside the EU.<sup>20</sup> On a strict interpretation of the notion of "displaced children", **the forum of the child's presence would therefore not be given** in regard to children who a) do not claim to be refugees or are not displaced in the sense of Article 13(2), and b) whose residence is clearly outside the EU. This is quite relevant when looking at the data collected by the Commission which show that the large majority of unaccompanied children – mainly aged 16 and 17 – do not file an application for international protection.

In order to deal with such remaining cases (children whose residence is outside the EU, do not claim refugee status and are not considered to be displaced because of disturbances in their country), the Regulation provides for the **residual application of national rules (Brussels IIa, Article 14)**. This implies that each MS will unilaterally decide whether to exercise competence in regard to such child or not. It may well be that most MSs also provide for a **forum necessitatis** giving competence to their courts on the mere presence of a child on their territory.<sup>21</sup> However, if one of the specific aims of the EU is child protection, then this should be achieved through proper, clearly drafted, and autonomous rules, and not only by relying on national provisions. Therefore, eventually, the introduction of a European **forum necessitatis** should be considered.

The residual jurisdiction rule can only be used if the child is not habitually resident in a third-State party to the 1996 Hague Convention. If a child is habitually resident in such third-State, the Convention has to be respected first (which does not exclude, however, that provisional measures might be possible).

### 1.2.4. Grounds for provisional and protective measures in cases of urgency

An additional ground for international jurisdiction is **Article 20** Brussels IIa. This rule allows a court, **in urgent cases**, to adopt **provisional, including protective, measures**. It covers migrant children as well as EU children on the move. The rule refers to measures that are

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<sup>19</sup> Such as a child who was just abandoned.

<sup>20</sup> E. Pataut, "Article 13" in U Magnus and P Mankowski (eds), Brussels IIa (2012, Munich, Sellier) p.160; Oberlandesgericht Koblenz, 14.02.2017 – 13 UF 32/17.

<sup>21</sup> For Belgium: Article 11 of the Code of Private International Law; For Italy: jurisdiction on voluntary matters (i.e. appointment of a guardian) is given in respect of all who are resident in Italy (and residence is ascertained very quickly) - Article 9 of Law n. 218/1995 (PIL Statute). For France: Jurisdiction depends on the domicile/habitual residence of the parents, the guardian or the institution taking care of the child, or of the child's own domicile/habitual residence (Art. 1181 and 1211 *Code de procédure civile*), but on a subsidiary basis, international jurisdiction can also be grounded on the necessity to avoid a denial of justice, provided that at least some kind of links with France exist. For Germany: If neither the 1996 Hague Child Protection Convention nor Art. 8 – 13 provide for a forum, § 99 FamFG (Family Procedure Code) will be applied (no published cases are available). § 99.I S 2 in particular knows forum necessitates.

envisaged by the *lex fori* (it does not provide for an autonomous ground for jurisdiction). This means that a court will have competence to take all measures provided under its internal law, in regard to the children who are present in that same State, including those children who do **not qualify as “refugee children” or “internationally displaced children”**.

Although the ground of jurisdiction is the same as the one used by Article 13.2 Brussels IIa (i.e. mere presence), there is a substantial difference between the two. In fact, measures taken under this head of jurisdiction will cease their effects once the MS having full jurisdiction has taken the appropriate measures. This rule may nonetheless turn to be very useful and especially appropriate when provisional measures of protection should be urgently taken in a State whose authorities do not have full competence to decide **on the child’s future, or when** the existence of such competence is uncertain and requires further investigations. This may be the case for example of measures such as the appointment of a guardian, medical treatment or medical screening (for example for age assessment), that appear to be especially urgent and a pre-requisite for the **child’s** future handling.

A major issue in practice lies in drawing a clear line between what is supposed to be provisional and therefore falls under Article 20 of the Regulation, and what is non-provisional and requires a ground for jurisdiction under Article 13 of the Regulation, with the effect that the measure must be recognized and enforced in other MSs <sup>22</sup>.

Where a child is habitually resident in a third-State Party to the 1996 Hague Convention, that Convention takes precedence over Brussels IIa. In practice this means that the jurisdiction still exists, but on a different basis (it then will be based on **Article 11 of the Convention**).

### **1.3. Management of proceedings: parallel proceedings and transfers**

#### *1.3.1. Lis Pendens*

To file parallel proceedings before **different States’** courts is something to be avoided, as this may lead to irreconcilable decisions. Brussels IIa pursues this aim by giving competence to the court first seized and obliging the second one to decline jurisdiction in favour of the first one (Article 19).

The criterion of priority – although objective, logical and easy to apply in normal cases – may not be appropriate in regard to cases concerning minors. More precisely, if the paramount consideration is the **child’s** best interest also in this context, it should be appropriate to always give competence to the court that is closer to the child, which could also be the court last seized. Indeed, in the asylum case C-648/11 (MA and Others v Secretary of State for the Home Department; see 1.5.2 below), the CJEU maintained that, in regard to the filing of multiple asylum applications in different States, the normal rule conferring responsibility on the authority first seized should be discarded in favour of the authority of the State where the child actually is. Physical presence becomes thus the new criterion to solve cases of multiple asylum applications under the CEAS. A similar rule could be envisaged in regard to *lis pendens* under Brussels IIa.

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<sup>22</sup> A delicate illustration is the new Art. 42a German Social Code VIII that came into force on 1<sup>st</sup> November 2015. This provides the youth welfare office (*Jugendamt*) with the competence to provisionally take into care all unaccompanied foreign minors, regardless of whether they have a habitual residence in another country or not. If the measures taken in this context are just provisional, one can argue that Germany has the right to do so under Art 20. In contrast, if the measures are not provisional, full jurisdiction has to be established under Art. 13 of the Regulation.

### 1.3.2. Transfer of a case to another State under the Brussels IIa Regulation / 1996 Hague Convention

Both Brussels IIa (Article 15) and the 1996 Hague Convention (Articles 8 and 9) contain a specific rule on transfers of jurisdiction. It can be used when a court or authority has jurisdiction (for instance because this is the place of the **child's** habitual residence) but another court or authority might be better placed to hear the case. The transfer can be initiated by the court with jurisdiction or by the court wishing to take the case.<sup>23</sup> This mechanism can be used in cases where the child is habitually resident in a State party to the 1996 Hague Convention, e.g. Turkey, but is seeking asylum in another Contracting State, e.g. Finland.

When considering a transfer, the court must always take into account the **child's** best interests (Article 15(1) Brussels IIa; Article 8(4) and 9(1) 1996 Hague Convention).

## 1.4. Applicable law: the 1996 Hague Convention

Brussels IIa is silent on which law should be applied. This matter is left to the 1996 Hague Convention, which all EU Member States ratified. Besides EU Member States, the Convention is applicable in 18 other States.<sup>24</sup> The Convention determines the applicable law, irrespective of whether this is the law of a Contracting State or of another country.<sup>25</sup>

The Convention is simple and clear. It contains two main rules on applicable law.

### 1.4.1. General rule: forum law with some exceptions

When a court or another authority is requested to take measures regarding the protection of a child, it applies its own law (Article 15(1)). This simplifies the competent authorities' **work**. Whenever they need to take measures, they can do so according to their own law. When the **child's** habitual residence moves to another State, the law of that State becomes applicable (Article 15(3)). Thus, should the child be brought (back) to another Contracting State to (re)join family members or relatives, he or she will enter a different legal system and its sphere of application.

There are, however, some exceptions to this general rule. An authority may exceptionally **"apply or take into consideration" another law with which the situation has a substantial connection** (Article 15(2))<sup>26</sup>.

### 1.4.2. Existence of parental responsibility by operation of law

The question of whether someone has parental responsibility by operation of law or via an agreement is determined by the law of the **child's** habitual residence (Article 16(1) and (2)). This provision may cause difficulties in the case of displaced children. If a child is not accompanied by his parent(s), the authorities will have to apply the law of the habitual residence to determine who has parental responsibility over the child. It might be difficult and lengthy **to find this law (see chapter 2, in "Private international law in a context of increasing international mobility, challenges and potential")**.

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<sup>23</sup> Article 15 Brussels IIa specifies that one of the parties may take the initiative. This is not explicitly foreseen in the 1996 Hague Convention, but is not excluded. We will not discuss this issue further here.

<sup>24</sup> These are Albania, Armenia, Australia, Cuba, Dominican Republic, Ecuador, Georgia, Lesotho, Monaco, Montenegro, Morocco, Norway, the Russian Federation, Serbia, Switzerland, Turkey, Ukraine, and Uruguay. See the full status table of the Convention at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=70>.

<sup>25</sup> Called **"universal application"** in private international law jargon.

<sup>26</sup> This provision may be useful in the case, for instance, where a court or authority seeks to protect the child by assuring the continuity of a factual situation. Perhaps authorities could even use this provision to create a **kafala** if that would be appropriate in the child's circumstances.

## 1.5. Children who are claiming asylum – specific rules

### 1.5.1. Overview of the CEAS rules applying to children - Present rules and Proposal for reform

Unaccompanied children constitute a large percentage of applicants seeking international protection in the EU. In 2016, 63 300 unaccompanied minors lodged a claim for asylum in the EU. More than half of them were Afghans or Syrians.<sup>27</sup>

Many provisions and measures are already available in the CEAS for children who are seeking or are granted international protection. We will now proceed to verify if they are consistent and in coherence with PIL instruments.

The principle of the **child's** best interests has been explicitly embedded in the CEAS instruments and key provisions on unaccompanied children have been strengthened, guaranteeing inter alia the right to family reunification. Recital 13 of the Dublin Regulation refers to the **child's** best interests, just as Recitals 12 and 13 of Brussels IIa.

The Dublin Regulation establishes the criteria and mechanisms for determining which EU MS is responsible for examining an asylum application. The rules aim at ensuring quick access to asylum procedures and examination of an application in substance by a single, clearly determined MS. The country of arrival is, in most cases, identified as the one responsible for the asylum application. The proposal for a recast of the Dublin regulation<sup>28</sup> will introduce a corrective allocation mechanism (the fairness mechanism). An important point should be mentioned: the rules which designate the MS responsible are based on a mechanism which is very similar to private international law rules on child protection.<sup>29</sup> It aims at preventing "asylum shopping" and *lis pendens*. In concrete terms: if an asylum seeker files his/her application in a MS other than the country of arrival, that State transfers the applicant to the responsible MS without examining the application. The mechanism comes very close to the one used in PIL child abduction procedures, which is designed to send children back to the State where they were residing before being abducted. In both cases, one State has the responsibility for deciding. In the asylum procedure, however, this is rather done in the interest of the States than in the interest of the applicant.

Regarding applications made by **children**, the rules aim also at determining a single State responsible but **this determination is governed by the best interests principle**. Indeed **Article 8 of the Dublin Regulation (Article 10 of the recast) focuses on the child's best interests**, which must not be confused with State's interests. **Therefore, if it is in the child's best interests**, in case of unaccompanied children, the responsible MS shall be the one where an **unaccompanied child's** family member or sibling is legally present. Where the applicant is a married minor whose spouse is not legally present on the MS territory, the responsible MS shall be the MS where the father, mother or other adult responsible for the child or a sibling is legally present. If the child has a relative who is legally present in another MS and if it is established that the relative can take care of him or her, that MS shall unite the child with his or her relative and shall be the responsible MS (Art. 8.2). Where family members or relatives are scattered across MSs, **"the MS responsible shall be decided on the basis of what is in the best interests of the unaccompanied minor"**. **Finally, in the absence of any family member or relative**, the MS responsible shall be the one where the unaccompanied minor (first) **lodged his or her application for international protection**, unless it is demonstrated that this is not in the child's best interests (Art. 8.4). It would be preferable to

<sup>27</sup> Eurostat.

<sup>28</sup> COM(2016)270 final.

<sup>29</sup> See S. Corneloup, "Can PIL contribute to global migration governance?" in Muir Watt - Fernández Arroyo, *Private International Law and Global Governance*, 2014

have this criterion replaced by the MS where the child lodged his or her application and is currently **present**, see the proposal in 1.5.2.

#### 1.5.2. Multiple asylum applications under the CEAS

The Dublin Regulation does not contain any provision on *lis pendens*. This should not be seen as a loophole. Indeed, as previously seen, in principle, there is only one State responsible for the application. Even if two asylum applications have been lodged, the question is not which State has priority but which State is responsible. Nevertheless, in case of several applications, the determination of the responsible State is affected. This has been clearly highlighted in the case C-648/11 MA and Others.<sup>30</sup> In this case, the CJEU ruled that where an unaccompanied child, with no member of his family legally present in a MS territory, has lodged asylum applications in more than one MS, the MS in which that minor is **present**, once he has lodged an asylum application, is to be designated the "responsible Member State".

In other words, the MS responsible for examining **children's** asylum requests should be the one where the most recent application has been made, in order to avoid unnecessary movements. The recast proposal, while putting the **child's** best interests first, takes a different course. Article 10(5) and Recital 20 (Recast) provide that the MS responsible should be the one where the unaccompanied minor first has lodged his or her application for international protection<sup>31</sup>. This solution should "discourage" secondary movements of unaccompanied minors. But it is not satisfactory once such secondary movements have nonetheless occurred. **The Draft Report of the EP's Committee on Civil Liberties, Justice and Home Affairs on the Dublin recast, which proposes deleting the reference to the place where the minor first has lodged his or her application, is to be approved**<sup>32</sup>. The Parliament's Rapporteur suggests that the MS responsible shall be *determined by the MS in which the applicant is present*<sup>33</sup>. This approach implies to refer to the criterion based on the presence of the child, not directly for the determination of the MS responsible for the application, but for the determination of the MS *that will determine which MS is responsible* for the application. This proposal aims at avoiding secondary movements, which are problematic not only from the perspective of *asylum shopping*, but also from that of child trafficking, which is favored by such secondary movements. Thus, the Draft Report advocates for a compromise between the criterion merely based on the presence of the child, on the one hand, and the criterion based on the first application, on the other. If the objective of the Draft Report is perfectly convincing, one has nevertheless to be aware of the complexity of this solution, which would delay the treatment of the application and would imply in some cases the transfer of an unaccompanied child to another MS, though he/she has no relatives in that State. It is one thing to prevent secondary movements in the general interest and another to protect each individual child, already present in a MS, whose individual best interests have to be a primary consideration. Therefore, the presence criterion might finally be more convenient and **in accordance with the child's best interests, as pointed out by the CJEU**. In any case, Article 10(5) of the **Commission's** proposal should be amended, in order to break the link between the registration of an unaccompanied minor and the MS becoming responsible for the minor.

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<sup>30</sup> CJEU, Judgment of 6 June 2013, MA and Others vs. Secretary of State for the Home Department, Case C-648/11.

<sup>31</sup> Whereas the **Commission's 2014 proposal conferred** the responsibility upon the MS where the minor lodged an application and is currently present: Com(2014) 382 final: Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 604/2013 as regards determining the Member State responsible for examining the application for international protection of unaccompanied minors with no family member, sibling or relative legally present in a Member State.

<sup>32</sup> Committee on Civil Liberties, Justice and Home Affairs, [Draft report](#) on the Dublin regulation proposal (recast), Rapporteur: Ms. Cecilia Wikström MEP, Amendments 5 and 60.

<sup>33</sup> LIBE Draft report, prec. Amendment 60.



### 1.5.3. Dublin transfers

Under the Dublin Regulation (Art. 18), the "responsible" MS is obliged to take back the person applying for international protection present in another MS (the so-called Dublin transfers). Here again, **the assessment of the child's best interests is of crucial importance. Following** the well-known rulings *M.S.S.*<sup>34</sup> and *N.S.*<sup>35</sup> a large number of national court rulings have suspended transfers to other MSs based on a risk of human rights violations in the responsible MS<sup>36</sup>. **Moreover, the notion of the child's best interest** has given rise to diverging interpretations and sometimes there is some mistrust among the MSs. This is not specific to migration issues. As the same difficulties have been discussed and thought through in the field of child abduction,<sup>37</sup> this question could also be resolved through the development of best practices and cooperation.

The Commission has established a list of means of proof of family/relational ties that can be used in the process of determining the responsible MS for examining the claim for international protection<sup>38</sup>. The Commission has listed the relevant family members or relatives: "father, mother, child, sibling, aunt, uncle, grandparent, adult responsible for a child, guardian". For them, evidence is needed to establish that the persons concerned are related. If this evidence is not available, a DNA or blood test can be asked for ("if necessary"). The Dublin Regulation provides some flexibility (Art. 22.5): if there is no formal proof, the requested MS shall acknowledge its responsibility when the circumstantial evidence is coherent, verifiable and sufficiently detailed to establish responsibility. This flexibility is of crucial importance because of the difficulties applicants for international protection often face in establishing family ties, such as parental ties (see below 3.2.2).

According to Art. 12(5) of the Implementing Regulation,<sup>39</sup> if several family members or relatives are present in another MS, the MS where the child is present shall cooperate with the relevant MS to determine the most appropriate person to whom the child is to be entrusted, and in particular to establish: (a) the strength of the family links between the child **and the different persons identified on the territories of the MSs;** (b) **the capacity and availability of the persons concerned to take care of the child and** (c) **the child's best interests** in each case. This provision fully complies with the search for the most appropriate jurisdiction, which is a key idea in PIL framework. Here again, the coherence between PIL and CEAS rules should be monitored. For instance, the role of the guardian in the Dublin transfers is unclear. Member States' practices diverge. Sometimes, the guardian escorts the child<sup>40</sup>. Sometimes the responsible MS authority comes and collects the child<sup>41</sup>. In order to enhance mutual trust and to ensure the child protection, harmonized rules have to be adopted (see below 3.4.2., Guardianship).

**The current practice of Dublin transfers and their compliance/conformity with the child's best interests** require further empirical research. The use of the specific provision in the Dublin

<sup>34</sup> ECtHR, *M.S.S. v Belgium & Greece*, Application no. 30696/09, Judgment of 21 January 2011 and *Tarakhel v. Switzerland*, Application no 29217/12, Judgment of 4 November 2014.

<sup>35</sup> CJEU, Joined Cases, C-411/10, C-493/10 *N.S. v. Secretary of State for the Home Department and M.E. and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, Judgment of 21 December 2011.

<sup>36</sup> See for example, UK upper tribunal 124 (IAC), 12 April 2017: <http://www.asylumlawdatabase.eu/en/case-law/uk-r-application-rsm-and-another-v-secretary-state-home-department-2017-ukut-124-iac-12#content>

<sup>37</sup> See the case law evolution after the well-known *Neulinger* ruling. BEAUMONT, P., TRIMMINGS, K, WALKER, L. & HOLLIDAY, J., *Child Abduction: Recent Jurisprudence of the European Court of Human Rights*, *International and Comparative Law Quarterly*, Vol. 64, Issue 01, January 2015, pp. 39-63.

<sup>38</sup> See Commission implementing Regulation (EU) No 118/2014 of 30 January 2014, Annex II.

<sup>39</sup> Regulation (EC) No 1560/2003 as amended by Commission Implementing Regulation (EU) No 118/2014.

<sup>40</sup> Example given by Nidos during the side event on guardianship for unaccompanied minor with took place in the 10th [European Forum on the rights of the child](http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=34456) (Brussels, November 2016); [http://ec.europa.eu/newsroom/just/item-detail.cfm?item\\_id=34456](http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=34456)

<sup>41</sup> For instance, some officers from the UK border agency have collected some children in Calais (France).

Regulation, which makes transfers on humanitarian grounds possible, can be another apt illustration. Should an unaccompanied child apply for asylum in Belgium, a transfer of his or her family staying in a Greek refugee camp can be asked for. In case of a request for transfer according to Article 17.2 of the Dublin Regulation, the MS where an application for international protection is made and which carries out the process of determining the MS responsible, or the MS responsible, may, at any time before a first decision regarding the substance is taken, request another MS to take charge of the applicant in order **to bring together any family relations, on humanitarian grounds**, even where that other MS is not responsible. These requests are based on "humanitarian grounds" and give MS authorities the discretionary power to accept or deny the request for transfer. In case the request is denied, it is not clear how the child concerned or his or her representative can challenge this decision. As of today, it is not clear whether these humanitarian Dublin transfers always serve the **child's** best interests.

#### 1.5.4. Relocation under the CEAS

Following the publication of the European Agenda on Migration in May 2015, in September 2015, the Council adopted decisions to relocate 160,000 people from Greece, Italy and other MSs directly affected by the refugee crisis within two years. Priority should be given to the relocation of vulnerable persons, including unaccompanied children, provided that a previous assessment of the **child's** best interests has been made. The Commission regularly calls upon MSs to relocate unaccompanied minors: **"Member States should devote particular attention to the needs of unaccompanied minors when carrying out relocation."**<sup>42</sup> In fact, after disembarkation, first assistance, first identification and provision of information, children are referred to competent national authorities for the purpose of taking measures of protection (e.g. appointment of a guardian, transfer to dedicated reception facilities etc.) but that often occurs at the end of the process. Despite political initiatives, authorities are still failing to relocate children from overcrowded reception centres in Italy and Greece.

**In practice, relocation does not currently work at all in relation to children.** The help given to national authorities in Greece and Italy<sup>43</sup> is not sufficient: those authorities have to establish whether it is in the **child's** best interests to be relocated in another MS in the framework of the relocation procedure. This process needs time and resources particularly for family tracing, but the authority of the MS where the child is present (Greece, Italy) is generally overworked. **The question is then whether the assessment of the child's best interests could not be done by another MS.** This would suppose some cooperation among MS authorities (see 2.4 below) and would be a derogation from the general rule under **Brussels IIa. This derogation, however, is founded on the child's best interests and also on the idea of solidarity, which is the basis of the relocation process.**

## 1.6. Children who are not claiming asylum

### 1.6.1. Children present in the EU in need of protection

Some foreign and migrant children do not belong to the category of people seeking refuge from persecution and conflict in their home countries. Their move to, or within, Europe is mainly motivated by economic or climatic reasons, and it is important not to overlook them in the context of the current refugee crisis. This category includes unaccompanied **children who have not applied and/or do not qualify for such protection.** They can be either EU

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<sup>42</sup> Communication (10 February 2016) on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration COM(2016) 85 final.

<sup>43</sup> EASO, Practical Guidance Tool on Best Interests Assessment for the Purpose of Relocation.



nationals outside their MS of habitual residence, e.g. Roma children from Bulgaria,<sup>44</sup> or third-country nationals, e.g. certain children from Balkan or African countries,<sup>45</sup> who are sometimes sent by their families to Europe. **Children whose application for international protection was rejected** should also be included here. They have passed the asylum seeking process, have been identified, but have not obtained international protection status under the CEAS. Nevertheless they may need, and are entitled, to protection under civil law.

Even though the Return Directive (Directive n° 2008/115/EC) does not prohibit in general the return and removal of unaccompanied children who come from third countries (Art. 10),<sup>46</sup> children are excluded from forcible return in several MSs under national law as long as they are minors, i.e. return decisions cannot be taken and removal measures cannot be enforced against minors<sup>47</sup>. Therefore, measures of protection under civil law have to be taken in the MS where the child is present, and PIL plays an important role here.

If return is possible under a **Member State's** national law, Art. 10 of the Return Directive provides guarantees to be observed before deciding to issue such a return decision and, if return is decided, before removing the child from the territory. These guarantees include assistance by appropriate bodies other than the authorities enforcing the return, with due consideration being given to the **child's** best interests (Art. 10.1) and the assurance that the child will be returned to a family member, a nominated guardian or adequate reception facilities in the third State of return (Art. 10.2)<sup>48</sup>. These migration law requirements bring PIL into play also with regard to the return procedure.

#### 1.6.2. Protection to be provided by the competent authorities in the EU

Member States' authorities must be aware of their jurisdiction to take measures of protection for unaccompanied children who are present in their territory and who do not qualify for asylum or subsidiary protection. As explained above (see 1.2.), even in case the child cannot be considered to have his or her habitual residence in the MS where he or she is present, authorities of that State have either full jurisdiction, in all matters related to parental **responsibility, based on the criterion of the child's mere presence**, or at least in cases of urgency, jurisdiction to take provisional measures until a stable solution for the child is found. When exercising their jurisdiction, the competent court or authority applies its own law (see 1.4. above).

In order for the Member State's authorities to be able to take protective measures, **it is of crucial importance that the children concerned can be identified and registered as soon as possible. The Commission's call for child protective measures at the hotspots, irrespective of whether children are applicants for international protection or not, is to be supported<sup>49</sup>. Once a child in need for protection is registered, a legal guardian should be appointed as soon as possible.**

If the child is accompanied by a family member, such as a sibling, uncle/aunt, or grandparent, or by an unrelated adult, while his or her parents stay in the country of origin (so-called **separated children**), the legislative framework applicable to unaccompanied children applies, but particularities exist. It must be established whether a family link between the

<sup>44</sup> See footnote 16.

<sup>45</sup> The Save the children report (see footnote 16) mentions, for instance, Egyptian children sent to Europe to work so they can send money back home to their families.

<sup>46</sup> See also the paragraph 13 of the Return Recommendation of 7 March 2017 (COM(2017) 1600 final).

<sup>47</sup> See for instance Art. L. 511-4, 1° of the French Code for Entry and Residence of Foreigners and the Right of Asylum (CESEDA). In Belgium the unaccompanied child will not receive an order to leave the Belgian territory (as adults do), but a 'removal order' (*bevel tot terugleiding*), see Art. 61/18 of the Belgian Immigration Act of 15 December 1980 on entry, stay, establishment and removal of foreigners.

<sup>48</sup> The Commission recommends that targeted reintegration policies for unaccompanied children be put in place. This requires cooperation with countries of origin (see 2.1 below).

<sup>49</sup> Communication, *The protection of children in migration*, 12.4.2017 COM(2017) 211 final, p. 6.

child and the accompanying adult exists. The recognition of foreign civil status documents and the lack of (reliable) documents raise major difficulties in this respect (see 1.2.1 in **"Private international law in a context of increasing international mobility: challenges and potential"**); moreover, in case of married minors, it is highly debated whether child marriages celebrated in the country of origin are to be recognized, with potential consequences on the taking of measures related to **child protection** (see 1.2.2.2 in **"Private international law in a context of increasing international mobility ..."**). It is also necessary to assess whether the adult is able to take care of the child. If he or she is abusive, a smuggler/trafficker or is unable to effectively take care of the child, a separation is needed. In contrast, if he or she is able and willing to take care of the child, the accompanying adult might be appointed as a guardian so that they can be accommodated together.

### 1.6.3. Search for a durable solution outside the country of origin

The protection of children who do not claim or qualify for asylum requires durable solutions. Such solutions may first be found in a country other than the country of origin (for solutions in the country of origin, see 1.6.4 below).

If contacts with **the child's relatives have been lost, the assessment of the child's best interests** first requires measures of **family tracing**. For children holding the nationality of, or habitually resident in, a MS or a Contracting State of the 1996 Hague Convention, or whose **family is spread across the EU, information on the situation of the child's family can often be gathered** by Central Authorities (CAs) through PIL cooperation mechanisms (see 2. below; and 1.4 in **"Private international law in a context of increasing international mobility..."**). The example of **France** shows that CAs operating under Brussels IIa and the 1996 Hague Convention are becoming increasingly involved (see 3.5.3 below)<sup>50</sup>. In this respect, a better cooperation with other bodies involved in family tracing, especially with the Red Cross, which is specialized in this field and has a worldwide network, is to be promoted.

**Once the child's family circumstances have been assessed, a first alternative is to provide a durable solution in the MS where the child is present** (placement with a foster family or in institutional care). All measures of protection available under national law are to be considered.

**However, it may also be in the child's best interests to be placed in another State.** In practice, the need for protection is often raised at a moment when the child is still on the move and does not intend to stay in the MS where he or she currently is, but rather tries to reach another MS. The majority of cases take place in Italy (e.g. children in Sicily who want to cross the EU to join family members in Sweden), but also elsewhere (e.g. children in the Calais migration camp who want to reach relatives in the UK)<sup>51</sup>.

Whereas relocation and resettlement programmes only apply to children claiming asylum, Brussels IIa may provide tools for the placement of children in another MS (the 1996 Hague Convention applies to placements in non-EU Contracting States; see Art. 33). Indeed, Article 56 organizes a cooperation mechanism via CAs, based on a request made by the authority having jurisdiction under the regulation and the consent to be given by the competent authority of the MS where the child is to be placed. However, such placements require coordination according to the **child's migratory status** and distinctions are to be made between different situations. For instance:

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<sup>50</sup> In other MS, e.g. Belgium, the Central Authority has had very few cases where it had to help with the tracing of family members, and these cases only concerned children claiming asylum. In Italy, the Central Authority for Brussels IIa was never requested in this area.

<sup>51</sup> A significant number of unaccompanied children leave the Italian reception centers and go missing: R. Raffaelli, *Background Information for the LIBE Delegation on Migration and Asylum in Italy* - April 2017, p. 21.

- (i) If the child qualifies for family reunification under Directive n° 2003/86/EC, which presupposes that the **child's** father or mother holds a residence permit in another MS, protection is provided through family reunification.
- (ii) If the father or the mother stays illegally in another MS, neither family reunification, nor the cross-border placement procedure under Brussels IIa applies, **because reunification with parents is not a "placement". If the family is not claiming asylum, there is no legal procedure allowing the child to be reunited with his or her parents. The child's best interest faces a legal gap, and the child risks to be left in limbo as to his or her legal status.**
- (iii) If relatives other than the parents legally stay in another MS, the cross-border placement procedure does not apply either, as it is limited to placements with foster families<sup>52</sup> or in institutional care. However, the **Draft report of the EP's Committee on Legal Affairs proposes to extend the application of the procedure to placements "with family members"** (amendment 23)<sup>53</sup>. This would significantly improve the current legal framework; therefore the proposed amendment is resolutely to be supported. Such modification would allow for instance an Italian authority to contemplate a placement of a child, currently in a reception centre in Sicily, with an aunt living in Sweden.

Cooperation between the authorities of the two MSs involved would take place under Brussels IIa, the operation of which will be improved if the recast proposals are accepted. Attention must however be paid to the **child's** migratory status. During the cooperation process, it is to be ensured that the entry and residence of the child will be authorized, which requires coordination with the immigration authorities of the State of destination.

For further developments on cooperation mechanisms under civil law, see below 2.1. on cooperation with third States, and 2.2. on cooperation among MS.

If the child is an **EU national** outside his or her country of origin, specific rules for EU citizens apply, whereas child protection under civil law is entirely governed by Brussels IIa.

#### 1.6.4. Search for protection in case of return

**If the individual assessment of the child's best interest, carried out in a multi-disciplinary approach with due involvement of the child and the child's guardian, comes to the conclusion that return to the country of origin and reunification with the family is in his or her best interest, PIL cooperation mechanisms should be used (see below 2.1. for detail), and their use should be further promoted and developed. PIL cooperation channels should ensure that the return takes place under safe conditions and that the child will actually be returned to a family member, a nominated guardian or adequate reception facilities. Protective measures are needed to allow a transition without disruption between the guardian appointed in the MS and the responsible adult in the State of origin (see 3. below).**

<sup>52</sup> However, in some countries like Belgium, relatives may become foster families.

<sup>53</sup> Committee on Legal Affairs, [Draft Report](#) on the proposal for a Council regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), Rapporteur Mr Tadeusz Zwiefka MEP.

## 2. CROSS-BORDER COOPERATION MECHANISMS, ESPECIALLY TO PROTECT UNACCOMPANIED CHILDREN

### KEY FINDINGS

- Central Authorities (CAs) in MSs should use the available mechanisms of the 1996 Hague Convention to cooperate with third States in order to take measures protecting unaccompanied minors.
- Smooth, prompt, and effective communication and cooperation between Central Authorities and courts, and public and private child protection agencies in the State is vital.
- The EU should urgently identify those third States with which cooperation regarding migrant, and in particular unaccompanied, children is necessary and possible, encourage them to join the 1996 Hague Convention, and provide assistance, where needed, to implement the convention.
- The Commission's proposals on Brussels IIa Recast specifying areas of cooperation between Central Authorities should be strongly supported.
- The EU should examine the practical operation of the European Judicial Network (EJN) with a particular eye on migrant, in particular unaccompanied, children.
- **The EU should explore whether and how the 'DubliNet' cooperation channel could be aligned with the network of Central Authorities.**
- With regard specifically to relocation of unaccompanied children, continuous legal representation of the child - during the whole relocation process between MSs – should be guaranteed.
- A series of pilot gatherings of CAs and CEAS authorities would be useful to further **explore how cooperation between the "two worlds" of child protection can be improved.**

Cross-border cooperation is crucial in order to protect children on the move. This applies to all migrant children, but in particular to those who are unaccompanied as they depend for their protection essentially on measures taken by State authorities.

### 2.1. Cooperation *with third States* in the field of child protection under civil law

Where a migrant child from a third State (i.e. a child who has his or her habitual residence in a non-EU State) arrives or is present in a MS, cooperation may be needed with the authorities from that, or another (e.g. transit), third State, e.g., in order to:

- obtain information on the child's background;
- see if family members can be located;
- in the case of a child who claims international protection, determine whether the departure of the child from the State of his or her habitual residence resulted from an international displacement or refugee situation<sup>54</sup>;

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<sup>54</sup> NB. A child protection measure taken under Article 6 of the 1996 Hague Child Protection Convention remains in force even if it is established that the departure did not result from an international displacement, until it is replaced in accordance with Art. 14.

- where appropriate, assist in transferring court jurisdiction or arranging corresponding protection in another State<sup>55</sup>;
- place children in a foster family or institutional care, or otherwise provide care in another State where this requires administrative cooperation<sup>56</sup>;
- ensure the safe return of the child, e.g. if it is found that the child is not entitled to **international protection and the child's return is ordered in conformity with the law**<sup>57</sup>.

Obviously, such cooperation with third States cannot be established through EU instruments, such as Brussels IIa, since EU Regulations can only provide for cooperation among EU Members. Cooperation with third States therefore necessarily requires cooperative arrangements with such States.

The principal global instrument governing cross-border protection of children under civil law is the 1996 Hague Child Protection Convention. It provides the nuts and bolts so as to give effect to the broad principles and rules of the quasi universally ratified 1989 UN Convention on the Rights of the Child in cross-border situations<sup>58</sup>.

The 1996 Hague Convention excludes from its scope "decisions on the right of asylum and on immigration"<sup>59</sup>, i.e. decisions on whether asylum or a residence permit will be granted or denied. But, as explained above (Chapter 1.1.), **measures regarding the protection and/or representation of a child applying for a residence permit or asylum fall within its scope**.

The Convention establishes, in its Chapter V, a practical machinery for cross-border cooperation, mainly through Central Authorities to be designated by each Contracting State. The main functions of CAs are to facilitate communication and cooperation between the competent authorities in their respective States, and to transmit requests and information to other CAs, including in situations such as those described above.

All 28 EU MSs are bound by the 1996 Hague Convention. At this point, 18 more States have joined the Convention<sup>60</sup>. Its importance in relation to migrant children from third countries has been recognised by the EU, notably when, in the context of the visa liberalization process, the EU urged Turkey to join the 1996 Convention<sup>61</sup>. Turkey indeed ratified the Convention in October 2016, which hence came into effect between Turkey and all EU MSs on 1 February 2017. Other third States from which migrant children frequently arrive in the EU are also bound by the Convention, including Albania and Morocco.

<sup>55</sup> 1996 Convention, Arts. 31, 8, 9

<sup>56</sup> Idem, Arts. 33, 34.

<sup>57</sup> In France and Italy, for example, unaccompanied children cannot be expelled or otherwise forced to leave the country. But the child may agree to return to his or her State of origin, and then Central Authority cooperation is obviously needed to ensure the safety of the return.

<sup>58</sup> For example, to Arts. 9 and 10 on personal relations and contact between parents and children; 12 on the child's opinion; 18 on parental responsibilities; 19 on protection from abuse; 20 on protection of children without families; 22 on refugees; 35 on child trafficking.

<sup>59</sup> Art. 4 j

<sup>60</sup> Albania, Armenia, Australia, Cuba, Dominican Republic, Ecuador, Georgia, Lesotho, Monaco, Montenegro, Morocco, Norway, Russia, Serbia, Switzerland, Turkey, Ukraine and Uruguay. The Convention has been signed, but not yet ratified, by Argentina, Canada and the United States. See the full status table of the Convention at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=70>.

<sup>61</sup> Second Report from the Commission on progress by Turkey in fulfilling the requirements of its visa liberalisation roadmap, 4 March 2016, COM(2016) 140 final, p. 9.

In situations involving third States bound by the 1996 Hague Convention, the treaty enables EU MSs to cooperate with such States regarding the aforementioned child protection issues; the Convention also provides for the legal infrastructure to resolve issues of jurisdiction of courts, of applicable law, and concerning the recognition and enforcement of decisions<sup>62</sup>.

However, **a number of third States from which children frequently arrive in the EU are not bound by the 1996 Convention yet**. In these cases the machinery and infrastructure for cross-border cooperation are usually not, or only partially, available. This is why the institutions of the EU and the MSs have been urged:

**“to take initiatives with a view to ... promoting the universal ratification of ... the Hague Convention on Protection of Children (1996)”<sup>63</sup>.**

Of course, such initiatives should be realistic, and focus first on countries which have the potential, possibly with some assistance from the EU, to implement and operate the Convention satisfactorily. The practical importance of the 1996 Hague Convention in relation to migrant children, especially unaccompanied children, from third States, cannot be overstated.

## **2.2. Cooperation among EU Member States in the field of child protection under civil law**

The principal instrument enabling EU Member States to cooperate among themselves for the protection of children under civil law is the Brussels IIa Regulation<sup>64</sup>. Like the 1996 Hague Convention, the Regulation does not apply to decisions on the right to asylum or on immigration<sup>65</sup>. However, as already explained, and as in the case of the 1996 Hague Convention, measures regarding the protection and/or representation of a child applying for a residence permit or asylum fall within the material scope of the Regulation (Article 13 - Article 11 in the Commission's proposal of 30 June 2016 for a recast of the Regulation<sup>66</sup>). However, no particular attention is given in the Proposal to migrant children. Indeed, since **neither the Regulation, nor the Commission's recast proposal** pay much specific attention to issues regarding migrant children, whether or not applying or qualifying for international protection, we have recommended that the EU pays particular attention to unaccompanied children in the context of the revision of Brussels IIa (see above, Chapter 1, Key Findings).

Chapter IV of the Regulation, “Cooperation between Central Authorities in Matters of Parental Responsibility”, requires MSs to designate such authorities, whose task is “to communicate information on national laws and procedures and take measures to improve the application of [the] Regulation and strengthening their cooperation”<sup>67</sup>. In theory, these broad general functions are wide enough to enable MS Central Authorities to cooperate effectively in relation also to migrant children. For example, as already mentioned above (see 1.6.3), it may well be that the procedure for the placement of a child in another MS (Art 56, recast 65) could be used to arrange care for unaccompanied migrant children with persons who are not **the child's** immediate family members (thus also reducing the risk of secondary movements).

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<sup>62</sup> From an EU perspective, the Special Commission of the Hague Conference that has been scheduled for 10-17 October 2017, to review the practical operation of both the 1980 Child Abduction and the 1996 Child Protection Convention will offer an important opportunity to examine the effectiveness of the operation of the 1996 Convention in relation to relevant third States.

<sup>63</sup> *Declaration on the Legal Status of Applicants for International Protection from Third Countries to the European Union*, adopted by the European Group for Private international Law at its Twenty-fifth meeting held in Luxembourg, 18-20 September 2015, <http://www.gedip-egpil.eu/documents/gedip-documents-25bis.htm>.

<sup>64</sup> It should be noted that Denmark is not bound by Brussels IIa. Child protection issues between Denmark and all other EU Member States are governed by the 1996 Convention. If Brexit becomes a reality, a similar situation might arise in the relations between the UK and the remaining EU Member States.

<sup>65</sup> Recital (10), cf. Chapter 1.1 above.

<sup>66</sup> <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-411-EN-F1-1.PDF>

<sup>67</sup> Art. 54



However, the provisions of Chapter IV are cast in very general terms. They are considerably less detailed than the cooperation provisions of the 1996 Hague Convention, which (while remaining applicable to children whose habitual residence is in a third Contracting State) are set aside and replaced by those of the Regulation for children having their habitual residence in a MS.<sup>68</sup>

In practice, the generally formulated cooperation tasks of the CAs have proven not to be sufficiently effective, and the Commission's proposal for a recast of the Regulation proposes to introduce more detailed provisions on cooperation, in line with those of the 1996 Hague Convention, noting that:

*"The cooperation between Central Authorities in specific cases on parental responsibility, contained in Article 55, is essential to support effectively parents and children involved in cross-border proceedings relating to child matters. A problem observed by all stakeholders, including Member States, is the unclear drafting of the article setting out the assistance to be provided by Central Authorities in specific cases on parental responsibility. This has led to delays which were detrimental to children's best interests. According to the results of the consultation, the article does not constitute a sufficient legal basis for national authorities in some Member States to take action because their national law would require a more explicit autonomous legal basis in the Regulation"*<sup>69</sup>.

Of particular importance for the purpose of better protecting migrant children, including unaccompanied children, are – in addition to the crucial provision on adequate resourcing and staffing of CAs<sup>70</sup> – the proposed Articles 63 on Cooperation in specific cases relating to parental responsibility, Article 64 on Cooperation on collecting and exchanging information, and Article 65 on Placement of a child in another MS.

More detailed cooperation provisions in Brussels IIa would be of great practical significance in the context of migration of children, and unaccompanied children in particular. Relevant provisions include those on:

- Exchanging information on the migrant child's situation (Article 64);
- Reporting on pending procedures concerning the child, including asylum procedures (Article 64);
- Reporting on decisions taken concerning the child, including the granting or denial of the right of asylum and residence permits (Article 64);
- Requesting a Member State's competent authority to take measures for the protection of the child, including the designation of a guardian (Article 64); this could be helpful e.g. in advance of a placement decision or a Dublin transfer;
- Gathering information or evidence, and making a finding, on the suitability of a person residing in a MS to exercise access to a child who is habitually resident in another MS, and on the conditions under which access should be exercised (Article 64);
- Resolving any parental disputes, including through agreed solutions by mediation or other means (Article 63);
- The placement of children in alternative care across frontiers, e.g. under fostering or other long-term arrangement falling short of adoption (Article 65).<sup>71</sup>

<sup>68</sup> Art. 61

<sup>69</sup> P.5 of the Brussels IIa [Recast proposal](#).

<sup>70</sup> Art 61 Brussels IIa Recast Proposal.

<sup>71</sup> For the placement abroad of a (migrant) child under (either full or simple) adoption, the 1993 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption provides the cooperative framework.

***The Commission proposals in this regard should be strongly supported.***

### **2.3. Coordination, cooperative arrangements and networks in the field of child protection under civil law**

Generally speaking, coordination of the 1996 Hague Convention and Brussels IIa cooperation provisions does not pose problems. They complement each other, and the Central Authorities designated by EU MSs under the 1996 Hague Convention are generally the same as those designated under Brussels IIa<sup>72</sup>. If a child arrives in Greece from Turkey, and then moves on to Germany, the 1996 and Brussels IIa CA networks provide, at least in theory, an integrated legal basis for communication and cooperation among the authorities of the three States involved. In practice, however, sizeable disparities exist among CAs in the way they are organised, staffed and actually operate. Our interviews with CAs (and the Red Cross) have confirmed that currently, the available instruments are used only very rarely in the specific context of migrant children. Moreover, the interview with the Belgian Red Cross revealed that it did not even know of the existence of the 1996 Hague Convention. However, CAs are expecting to be more frequently involved in the coming months. One reason for this is the fact that child abduction cases in the context of migration are becoming an increasing issue, as the interview with the Dutch CA revealed. For instance, one case concerned a migrant father in the Netherlands who requested family reunification with the mother and the child, who had meanwhile left their country of origin for another EU MS. As the mother refused to be reunited with the father, the father claimed wrongful retention by the mother.<sup>73</sup>

The need for cooperation is not limited to cooperation between CAs. Firstly, one of the tasks of each CA, both under the 1996 Hague Convention and under Brussels IIa, is to promote *internal* cooperation in each State. The 1996 Hague Convention provides this<sup>74</sup>; Brussels IIa should be understood in a similar way<sup>75</sup>. Smooth, prompt, and effective communication and cooperation between the CAs and the courts, and public and private child protection agencies in the State is vital. In **children's** lives, in particular the most vulnerable ones', meaning unaccompanied children, time is of the essence.

Secondly, not only is there, in the field of protection of children under civil law, a transnational CA (administrative) network, but there are also networks of judges, in particular the European Judicial Network (EJN) and the International Hague Judicial Network (IHJN). Smooth, rapid and effective cooperation between the actors of these networks is, again, vital. In practice, this is not always the case, and the actors of the two judicial networks in EU MSs are not (necessarily) the same. ***The European Union should examine the practical operation of the EJN with a particular eye on migrant, in particular unaccompanied, children.***

Thirdly, where they do not exist yet, permanent links should be established between CAs and non-governmental organisations in the field of child protection, such as the International Social Service (ISS)<sup>76</sup>, Terre des Hommes (IFTDH)<sup>77</sup>, the International Foster Care Organisation (IFCO)<sup>78</sup>, and the International Guardianship Network (IGN)<sup>79</sup>.

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<sup>72</sup> In Italy, however, different CA's have been designated for Brussels IIa and for the 1996 Convention.

<sup>73</sup> In another case, one parent applied for the return of the child, while the other (taking) parent applied for asylum in the Netherlands together with the child. In a third case, the Central Authority, on behalf of the migrant mother in the Netherlands, applied for return of father and child from another EU Member State. When return proceedings were presented to court in this Member State however, father and child had left for their country of origin.

<sup>74</sup> Art. 29 (1), see also Art. 30: "...directly or through public authorities or other bodies..."

<sup>75</sup> Cf. the reference in Art. 54 to the use by Central Authorities of the European Judicial Network, and Art. 55 "...acting directly or through public authorities or other bodies..."

<sup>76</sup> <http://www.iss-ssi.org/index.php/en/>

<sup>77</sup> <http://www.terredeshommes.org/>

<sup>78</sup> <http://www.ifco.info/>

<sup>79</sup> <http://www.international-guardianship.com/>



## 2.4. Coordination and cooperation between Central Authorities and other authorities operating in the field of child protection under civil law, and migration and asylum authorities

Currently, the arrangements and networks of CAs, and other authorities and bodies operating in the field of protection of children under civil law (e.g. youth welfare offices), and those of the authorities operating under the Common European Asylum System<sup>80</sup> are, it seems, functioning largely in parallel universes<sup>81</sup>.

With reference to the revision of Brussels IIa, it has been noted:

*“Considering the many issues relating to (unaccompanied) children seeking international protection under the CEAS, **cooperation between CEAS authorities and the network of Central Authorities under the Regulation is needed**, so that Central Authorities would, where necessary, follow up on the activity of the CEAS authorities, and vice versa. While Articles 63 and 64 are broad enough to permit such cooperation, a specific reference to the necessity to cooperation between Central Authorities and CEAS national authorities should be made in Article 63 (3), and a specific reference to such cooperation should be included in the Recitals”<sup>82</sup>.*

One major issue encountered in several MSs is the lack of cooperation between asylum authorities, which are responsible for the decisions on the right to asylum and on immigration, and authorities in charge of child protection under civil law. Ideally, the civil law children’s welfare bodies should assume a leading role, with the CEAS authorities following their decisions. For example, in Germany, the youth welfare office’s decision as to age assessment, identity, and guardianship should be accepted by the asylum authorities (in practice, this works better in some Lander, e.g. Bavaria, than in others). There is an urgent need to promote and improve cooperation between the two systems of child protection.

Under the CEAS, the exchange of information is precisely defined. National asylum authorities use the electronic communication network ‘DubliNet’ for the exchange of relevant information in order to determine the responsible MS and before a Dublin transfer is carried out. The ‘DubliNet’ was set-up under Art. 18 of Regulation (EC) No 1560/2003 and constitutes a frequently used tool for administrative cooperation under the CEAS<sup>83</sup>. During our interviews with Central Authorities, the DubliNet was never mentioned. No interaction seems to exist so far with PIL cooperation mechanisms.

**The EU should explore whether and how the ‘DubliNet’ cooperation channel could be aligned with the CA network.**

In the specific context of asylum, interviews with national authorities revealed that difficulties currently occur with respect to **migrant children’s relocation**, for instance from Greece and Italy to other MSs. In practice, relocation does not work well for unaccompanied children.

In order to improve the current legal framework, **continuous legal representation of the child – during the whole relocation process between MSs – should be guaranteed.** CAs could play a role in this respect, in order to coordinate the activities of the guardian

<sup>80</sup> Consisting of the Asylum Procedures Directive, the Reception Conditions Directive, the Qualification Directive, the Dublin Regulation and the EURODAC Regulation, all of which are currently under revision

<sup>81</sup> There are exceptions to the rule. Apparently, in the Czech Republic the Central Authority under the 1996 Convention and Brussels IIa is also competent to take decisions on the right of asylum and residence permits.

<sup>82</sup> *Resolution on the Commission Proposal for a recast of the Brussels II a Regulation, concerning parental responsibility and child abduction*, adopted by the European Group for Private International Law at its Twenty-six meeting held in Milan, 16-18 September 2016.

<sup>83</sup> Commission Implementing Regulation (EC) No 1560/2003 of 2 September 2003, amended by Commission Regulation (EU) No 118/2014 of 30 January 2014.

appointed for the time the child is in a reception centre, e.g. in Greece or Italy, with the guardian appointed in the MS of relocation.

However, some of the interviewed authorities expressed the view that efficiency requires the different authorities' **respective roles** to be clearly defined, and that, in the context of relocation, priority should be given to the authorities in charge of asylum. If asylum provisions are well conceived, it might not be necessary to have CAs intervene. Specifically, a clear cooperation mechanism between national asylum authorities under the CEAS should be defined. It could be modelled on the equivalent provisions of Brussels IIa. As asylum authorities in Greece and Italy are overburdened, the following procedure could be suggested: the asylum authorities of the MS where the child is present could take a provisional measure in which they determine the MS of relocation and transfer the file to the asylum authority of that State. The latter would then assess whether such relocation is in the **child's best interest**. In so doing, it should cooperate with the authorities operating in the field of child protection under civil law, so that the necessary measures of protection can be initiated and the transfer of the child can be accompanied at an operational level. If the **relocation is not in the child's best interest**, the asylum authority of the requested State should indicate which MS might be better suited for relocation and inform the asylum authorities of both the MS where the child is present and those of the better suited MS.

***Finally, a series of pilot gatherings of CAs and CEAS authorities would be useful to further explore how cooperation between the "two worlds" of child protection might be improved.***

### 3. CROSS-CUTTING ISSUES RELEVANT TO ALL MIGRANT CHILDREN, ESPECIALLY UNACCOMPANIED CHILDREN

#### KEY FINDINGS

- EU MSs should adopt a lenient approach in the child's best interests to the recognition of parent-child relationships established abroad (in particular in third States), and the determination of the applicable law to parentage in such cases. The use of alternative connecting factors is recommended as a means of facilitating the determination of the applicable law.
- *Kafala* is a form of parental responsibility that should be recognised under both Brussels IIa and the 1996 Hague Convention. Moreover, MSs must not deny a child placed under *kafala* the right to enter and reside on their territory without due regard to the interests of the child and his or her *khafils*. PIL recognition rules and migration law should be better coordinated.
- Concerning the recognition of child marriages, MSs should aim at striking a balance between the conflicting interests, on the one hand, of accepting the rights established by marriage under a foreign law and, on the other, of protecting children. The child's best interests must guide the decision in each individual case.
- Age assessment procedures should respect the **child's** best interests in each individual case. MSs should ensure that minors receive independent support and that a mechanism to legally challenge the outcome of the assessment procedure exists.
- Improving uniformity of age assessment procedures within the EU is an urgent matter. **Where this is in the child's best interests, the results of an age assessment procedure** in a MS should be accepted by other authorities both within that MS and all other MSs.
- Appointment of a guardian is crucial for unaccompanied children. It should be the first measure taken when a national authority is aware that a child is unaccompanied. Guardians appointed to assist children should be sufficiently qualified to ensure adequate representation in the **child's** best interests. Where more than one MS is involved, the appointment of guardians should be coordinated, and the powers of a guardian appointed in one MS should be recognised in all other MSs.
- The different authorities dealing with migration and child protection should cooperate for the purposes of family tracing. They should use the mechanisms provided for in Brussels IIa and the 1996 Hague Convention.

#### 3.1. Issues relevant for the effective protection of children

Several issues concerning the protection of children are common to all migrant children, including unaccompanied children, irrespective of whether they claim asylum and, if so, whether their claim succeeds or is rejected. These crosscutting issues are the subjects of this Chapter.

The first such issue is the recognition of personal status and various family ties such as parentage, parental responsibility, and child marriage (3.2.). The recognition of these statuses and ties is relevant to all migrant children, especially those who are on their own or have become separated from their family or relatives. The second matter is proof of minority (3.3.). **The child's position and the protection he or she is entitled to will depend on his or her age.** That age is often not known or cannot be proved as birth certificates do not exist or have been lost. The third issue is the taking of measures for the protection of children in the

State where they are (3.4.), especially the appointment of a guardian. Lastly, an effort should be made to trace family members of the unaccompanied or separated child (3.5.).

## 3.2. Cross-border recognition of personal status and family ties

As explained in Chapter I of "Private International law in a context of increasing mobility: challenges and potential", personal status is of crucial importance in the context of migration, in particular for children. The protection of unaccompanied children depends on the proof of age and requires identifying and tracing possible family members; the right to family reunification depends on the proof of marriage and parentage; the existence of family ties determines which State is responsible for asylum applications, etc. The impossibility for children to prove their civil status accuracy or the non-recognition of their personal status acquired abroad has an enormous impact on their family life and may even lead to the destruction of their family unit.

Registration and recognition of facts and documents concerning children's personal status immediately brings migration to the field of PIL, more specifically to the rules on the recognition of foreign decisions and authentic acts.<sup>84</sup> This paragraph will focus on a few burning questions concerning recognition of personal status, parentage, and measures of parental responsibility, *kafala* and child marriages.

### 3.2.1. Which law determines whether a person is a child or an adult?

EU law does not govern the recognition of personal status. Brussels IIa applies only to recognition of divorces and of measures concerning parental responsibility. Whether someone is to be considered a child (or becomes of age at the age of 16, or 19, or 21) is thus governed by each Member State's PIL rules, which determine **which law applies to the child's personal status**. In the majority of cases, PIL rules refer to the nationality of the person at stake,<sup>85</sup> but the place of the habitual residence might also be a relevant criterion, especially when the **State of nationality's** PIL rules (issue of *renvoi*) come into play. Thus, in some cases a person who is 18 or 19 years old could still be considered as a minor, in need of protection and of a legal guardian, depending on the law that applies to him/her.<sup>86</sup>

The practical relevance of these national PIL rules is however decreasing, because not only EU migration law, including the Dublin regulation, but also the 1996 Hague Convention follow a different approach: a child (or minor) is a person below the age of 18<sup>87</sup>. This coexistence of different approaches can lead to inconsistencies. See the **Study "Private international law in a context of increasing international mobility: challenges and potential, 3.3."**

For the issue of *proof* of minority, see below 3.3.

### 3.2.2. Recognition of parentage

Similarly, EU law does not regulate the recognition of parentage: Brussels IIa explicitly **excludes "the establishment or contesting of a parent-child relationship"**<sup>88</sup>. The same is true with the 1996 Hague Convention<sup>89</sup>. This matter therefore also falls under each Member State's PIL rules. Here again PIL rules often refer to nationality and this will, in cases of

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<sup>84</sup> In this regard, see also "Private international law in a context of increasing international mobility: challenges and potential", Chapter 1.

<sup>85</sup> E.g., in Belgium: Art. 34 PIL code; in Italy: Article 33 Italian PIL Law; in Germany: Art. 7 Introductory Act to the Civil Code; in France, Article 3 Civil Code.

<sup>86</sup> Oberlandesgericht Bremen, 23.02.2016 – 4 UF 186/15 (child from Guinea); Brandenburgisches Oberlandesgericht, 26.04.2016 – 13 UF 40/16 (child from Guinea).

<sup>87</sup> See footnote 6, and Art. 2 of the 1996 Hague Convention.

<sup>88</sup> Art. 1 (3) a).

<sup>89</sup> Art. 4 a).

migration, generally lead to the application of foreign law<sup>90</sup>. Even if the criterion of the habitual residence is used, a foreign law may be applicable unless it is considered that the person at stake has acquired a habitual residence in the host country<sup>91</sup>. The existence or non-existence of the parent-child relationship is however an essential prerequisite for resolving many of the issues that the child will be confronted with (in particular in the process of family reunification, see 3.5.) and, therefore, the recognition of a parent-child relationship established abroad or the application of a foreign law to determine such a parent-child relationship should not constitute an insurmountable obstacle to the conclusion that such parentage exists. ***MSs should therefore take a lenient approach to the recognition of parent-child relationships established abroad, in particular in third States, and the determination of the applicable law to parentage, in light of the child's best interests. Introducing alternative connecting factors is recommended as a mean to facilitating the determination of the applicable law.***

In many cases, no (legalized) documents proving parental ties can be obtained from the administration of the country of origin. The only option left is to resort to the method of factual **proof by a genetic paternity/maternity test**. This is not exactly in accordance with the rules on legal parenthood in several Member States' substantive family laws, which do not necessarily correlate with genetic kinship, but can be established e.g. by the pater-est rule<sup>92</sup> or by adoption. So, while this test can often help, it can also create problems.

Another issue concerning the absence of documents appears in the following example: In **Belgium**, the lack of documentary proof can create frictions between the asylum and migration authorities' decisions and the National Register authorities' ones. When, e.g., a Syrian man is granted refugee status, he will seek a family reunification visa for his wife and children who are still living in Syria or in a refugee camp in Turkey. The current practice is **that the man's family members will be granted a visa to come to Belgium**, but to satisfy the requirements of registration into the National Register they will need to produce legalised marriage and birth certificates. If they cannot provide these documents, they will be **registered as 'unrelated' to the man, with all kinds of negative consequences (e.g. no child or other family benefits)**. One of the pragmatic solutions is then to make those family members also apply for asylum in Belgium.

In **France**, such frictions are avoided: the asylum authority (OFPRA) establishes documents in lieu of civil-status records for persons granted international protection<sup>93</sup>. This procedure, which is currently only available for refugees and beneficiaries of subsidiary protection, can be seen as a model of good practice.<sup>94</sup>

### 3.2.3. Recognition of measures of parental responsibility

Recognition of measures of parental responsibility falls under Brussels IIa and under the 1996 Hague Convention. **As explained in para 1.4 above, the main rule is the law of the child's habitual residence and this applies to parental responsibility *ex lege***. If parental responsibility existed in the State of the child's habitual residence prior to moving, it cannot be lost<sup>95</sup>.

While these rules are of primary importance, they do not provide a solution for the situation **where a child's parents are not present in a MS, and** where the child needs protection. In

<sup>90</sup> See "Private international law in a context of increasing international mobility: challenges and potential" Chapter 2.

<sup>91</sup> See "Private international law in a context of increasing international mobility: challenges and potential" Chapter 3 (3.4).

<sup>92</sup> Whereby the husband of the mother is the legal father, no matter whether he is genetically the father.

<sup>93</sup> Art. L. 721-3 Code for Entry and Residence of Foreigners and the Right of Asylum (CESEDA).

<sup>94</sup> See for further details, *Private International law in a context of increasing mobility: challenges and potential*, Chapter 1.2.1.4. c)

<sup>95</sup> Hague 1996 Convention Art. 16 (3)

such a case it remains necessary to appoint a guardian for the child. This issue is dealt with below, 3.4.2.

**Kafala is a** specific situation, especially in relation with migration law.

### 3.2.4. Recognition of *kafala*: its effects under PIL and under migration law

**Kafala** is a form of protection of children that exists in several countries whose legal systems are based on, or inspired by, Muslim law, which prohibits the adoption of children. It entails the conferral of parental responsibility. The conferral can be done voluntarily by a parent (e.g. to a relative such as an aunt or uncle) or in order to protect a child who has been abandoned by his or her parents. The extent to which parental responsibility is conferred varies greatly, which makes it difficult to fit this legal figure into European legal systems. In any event, the legal ties with the original parents are not severed and the child remains part of the original family, e.g., for the purposes of inheritance.

#### 3.2.4.1. Effects under PIL

Although recognition of **kafala** should now be guaranteed when the arrangement is made in a State party to the 1996 Hague Convention, as this is in force in all MSs and applies to all measures aimed at protecting children, the unknown structure of this measure leads to characterization difficulties when the issue of recognising **kafala** arises in the EU. The following examples from Italy and France illustrate this issue.

In **Italy** recognition of **kafala** was for a long time considered to be a problem<sup>96</sup>. In recent years, courts started recognising some effects of **kafala** in order to give protection to the child and, in a few cases, national rules on custody and adoption were applied to the relations between the parties<sup>97</sup>. In very recent times, however, together with the decision to ratify the 1996 Hague Convention, the Italian Supreme Court<sup>98</sup> made it clear that **kafala** should not be governed by internal rules on adoption, especially because Islamic countries prohibit adoption. Today, having due regard to the **minors'** best interests which include the need to respect the children's culture, **kafala** is recognized as an instrument for the protection of children providing them with material and affective support for many purposes, but which does not terminate the parenthood of the biological parents or establish a parent-child relationship between **khafil(s)** and child. The actual content of the parental responsibility rights will vary according to, and must be separately appreciated in, each given case.

A similar evolution has occurred in **France**. The content of the decision establishing **kafala and the child's family circumstances determine the parental responsibility rights**<sup>99</sup>. As far as orphans, abandoned children or children with no proven family link are concerned, the **khafil** exercises all parental responsibility prerogatives. Regarding children still having a family link, **kafala** is seen as a – partial or total – delegation of parental authority.

#### 3.2.4.2. Effects under migration law

Even when **kafala** is recognized under PIL – whether as adoption or as foster care or as an institution *sui generis* – **this is often not sufficient from the perspective of migration law**, in the sense that the recognition of personal status under civil law (i.e. under PIL) is not necessarily followed by the issuance of an adequate status under migration law. This difference in treatment of **kafala** is indeed an eloquent illustration of insufficient coordination between the two sets of rules: while under PIL **kafala** brings about several civil law effects in

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<sup>96</sup> See Court of Reggio Emilia, February 9<sup>th</sup> 2005

<sup>97</sup> See Court of appeal of Brescia, February 2<sup>nd</sup> 2012

<sup>98</sup> February 2<sup>nd</sup> 2015, No 1843

<sup>99</sup> See Ministerial reply n° 59244, JOAN, 6 sept. 2016, p. 7980 referring to Circular 22 October 2014, CIV/07/13, n° NOR JUSC1416688C, not published.



the EU MSs, this is not systematically followed by the possibility for the child to legally enter/reside in the EU territory.

The *Chbihi Loudoudi* case<sup>100</sup> shows that although **Article 8 of the ECHR** does not guarantee non-nationals with the right to enter or reside in a particular State, the Convention does not allow MSs to deny a child placed under *kafala* the right to enter and reside on its territory without having examined the interests of the parties concerned. In practice, this means that MSs **must strike a fair balance between the child's** interests, those of his or her *khafils*, and of the society as a whole. A MS that refuses a child access to its territory might violate Article 8 of the Convention if the refusal creates disproportionate repercussions on the private or family life of the individual(s) concerned.<sup>101</sup>

Although the existence of rights is undebatable in theory, the situation in practice shows that children placed under *kafala* and their *khafils* often face a long legal battle before being granted any form of recognition and right to reside on the State's territory. **The EU should spread awareness of the existence of the 1996 Hague Convention and obligations it imposes in respect of migrant children, including those subject to a *kafala* arrangement.** MSs should be made aware of the fact that *kafala*, although unknown in their own legal system, creates certain rights for migrant children.

Finally, recognition of *kafala* poses a problem of whether the child should be considered **unaccompanied**. If a minor arrives with his or her *khafil*, the situation may lead to different outcomes. If the *kafala* is converted into, or recognised as, an adoption in the receiving State, the minor is not unaccompanied. If the *kafala* is not converted into, or recognised as an adoption, but recognised as a foster arrangement, this should be considered parental responsibility under Brussels IIa and the 1996 Hague Convention. In addition, under the Dublin Regulation, the child should not be considered unaccompanied since there is an "adult responsible for the applicant, whether by law or by the practice of the Member State where the adult is present."<sup>102</sup>

### 3.2.5. Recognition of child marriages

In the current refugee and migration context, special attention is needed in relation to child marriages. On the one hand, refusing to accept such marriages in EU MSs necessarily impacts on their legal consequences. This has a huge effect on migration files: no family reunification visa or residence permits, no Dublin transfers, etc. On the other hand, the child who has been married may be unhappy, if not victimised, and may urgently need protection. In more general terms, child marriages may violate public policy. **A balance needs to be struck between these conflicting interests in each single case on the basis of the individual child's best interests.** This issue is further elaborated in "Private international law in a context of increasing international mobility: challenges and potential", Chapter 1.2.2.2.

## 3.3. Proof of minority

### 3.3.1. General remarks

Proof of minority is a key issue for the protection of migrant children. Correct age assessment is important both in order to grant children the protection they need, and to prevent adults from posing as minors. It is crucial, in particular, for unaccompanied children. Unaccompanied minors cannot act without proper representation, and therefore depend on the appointment of a guardian who will act on their behalf, including to apply for asylum, or

<sup>100</sup> ECtHR 16 December 2014, n° 52265/10, Chbihi Loudoudi and Others/Belgium.

<sup>101</sup> For the situation in Germany see the Study *Private International law in a context of increasing mobility: challenges and potential*, 13,2; and for France, Conseil d'Etat 6 April 2016, n° 378338.

<sup>102</sup> Art. 2 j) of Regulation No 604/2013.

act for them in asylum proceedings. Often, however, the age of a young person entering the EU is not easy to verify.

If no birth certificate exists or if the foreign certificate is not legalized or is considered to be unreliable, it is necessary to consider other age assessment procedures. Ideally, an independent advisor should assist the child and when the reliability of age assessment techniques is not scientifically established, it should be investigated whether sufficient possibilities of appeal from any decision exist, as a guardian cannot be appointed before minority has been established, and the authorities involved may find themselves in a conflict of interest.

In case the **child's** State of origin keeps a birth registry, cooperation between CAs could facilitate evidence of age. Within the EU, **Article 14 of Regulation 2016/1191** already provides such a procedure for cooperation between MSs: where an authority has a reasonable doubt as to the authenticity of a public document, such as a birth certificate, it can submit a request for information, through the Internal Market Information System or the relevant CA, to the authority that issued the document. **Similar cooperation procedures should also be developed with third countries.**

### 3.3.2. Age assessment

According to Art. 25(5) of Directive 2013/32/EU, minority is to be presumed when, after exploring all assessment methods available in the individual case, age determination with sufficient certainty is not possible. This means that in practice the authorities have to assume minority when doubts remain. However, not all MSs have implemented this provision.

The Study "Private international law in a context of increasing international mobility: challenges and potential", Chapter 1.2.1.4., provides examples of how several MSs (France, Belgium, Germany, and Italy) have established various rules and practices to assess the age of a child where documents are not available. There is no procedure, be it medical or otherwise, that guarantees 100% accuracy in age assessment – a divergence from the actual age by about three years is not uncommon.

***Improving uniformity of age assessment procedures within the EU is an urgent matter. Minors need to be given independent support, and assessment methods have to respect the children's best interests in each individual case. A mechanism to legally challenge the outcome of the assessment procedure has to be provided.***

### 3.3.3. Recognition of age assessment

***Where it is in the child's best interests, the results of an age assessment procedure in a MS should be accepted by other authorities, both within that MS and in all other MSs.*** The Commission's proposal of 13 June 2016 replacing the Asylum Procedures Directive with a Regulation goes in this direction: according to Art 24(6) "A Member State shall recognise age assessment decisions taken by other Member States on the basis of a medical examination carried out in accordance with this Article and based on methods which are recognised under its national law."<sup>103</sup> But this Article leaves the method of age assessment decisions to national law, and therefore does not provide for uniformity of age assessment procedures as recommended in 3.3.2. above.

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<sup>103</sup> COM(2016) 467 final.



### 3.4. Measures of protection for children

Another crosscutting issue of crucial importance for unaccompanied children is the taking of protection measures in the State where the children are, especially the appointment of a guardian.

#### 3.4.1. Cross-border placement

For a discussion on the placement of children under Article 56 of the Brussels IIa and Article 33 of the 1996 Hague Convention, see above, 1.6.3. and 2.2.

#### 3.4.2. Guardianship

##### 3.4.2.1. General observations

As emphasised in this study and in the **study "Private international law in a context of increasing international mobility: challenges and potential"**, the appointment of a guardian is crucial. **The Commission's proposal of 13 June 2016** replacing the Asylum Procedures Directive with a Regulation defines guardianship in Article 4(2)(f) as follows: " 'guardian' means a person or an organisation appointed to assist and represent an unaccompanied minor with a view to safeguarding the best interests of the child and his or her general well-being in procedures provided for in this Regulation and exercising legal capacity for the minor where necessary".<sup>104</sup>

An unaccompanied child urgently needs to be supported in all legal and other matters. Therefore, guardianship should be installed as quickly as possible in order to assist the child throughout the asylum procedures and all other important issues (be it legal, medical, and schooling ones). In some MSs a person under 18 who is not properly represented by a guardian (or similar legal representative) cannot apply for asylum or validly act during asylum proceedings. The CEAS is less restrictive: a guardian has to be appointed but that can be done once the application is lodged; the responsible authorities shall, as soon as possible and not later than five working days from the moment when an unaccompanied minor makes an application, appoint a person or an organisation as a guardian<sup>105</sup>. This provision is to be criticized: the appointment of a guardian should be the first measure to be taken when a national authority is aware that the child is unaccompanied. **Therefore, a guardian should be appointed as soon as possible and before any asylum application is made.**

The rule of the Dublin Regulation according to which an unaccompanied child will not be transferred under the Regulation before a guardian or representative has been appointed (this follows from Article 6(2) which does not allow any procedures without a representative) can mean a hindrance, because it often entails a loss of time<sup>106</sup>: where a placement with a relative in another MS can be arranged within a short time frame, waiting for the formal appointment of a guardian unduly delays the proceedings. Additionally, it seems disproportionate to establish full guardianship for short, transitory periods of time (e.g. until reunification with family members who will take care of the child). For this reason, it would be helpful for MSs to offer preliminary custody measures, which would allow the authorities to take responsibility and implement quickly the necessary protection measures. In **Germany**, this has been achieved by introducing § 42a German Social Code VIII which is aimed in particular at the protection of unaccompanied children. Under this rule, the youth welfare office (*Jugendamt*) has an emergency competence (and duty) to provisionally take

<sup>104</sup> COM(2016) 467 final.

<sup>105</sup> See recast proposal of the Asylum Procedures Directive, Art. 22; the current Art. 25 of directive 2013/32/EU is less detailed.

<sup>106</sup> The Belgian practice, according to which the appointment of a guardian is a very expeditious procedure, is an exception.

into care all unaccompanied foreign minors.<sup>107</sup> Similarly, in **the Netherlands**, NIDOS can exercise the task of provisional guardian under the so-called Schiphol project.<sup>108</sup> The Council for the protection of children (*Raad voor Kinderbescherming*) requests the provisional guardianship, which is usually granted for three months.<sup>109</sup>

#### 3.4.2.2. Varying practices in Member States

Currently, the practice concerning the appointment of guardians in the various MSs seems to be very different. While in some MSs (e.g. the **Netherlands, Belgium, France and Germany**) a guardian is appointed almost immediately after the child has entered the country, other MSs (e.g. **Italy**), due to the huge numbers of incoming unaccompanied children, as a first measure first relocate children within their territory, and subsequently, during the first interview or as soon as doubts arise regarding their age, appoint a (provisional) guardian. In **Germany**, as already mentioned, a guardian will be appointed for any minor, no matter whether he or she has refugee status. The guardian will then start the asylum proceedings, if need be. This is also the case in **Belgium**, where the Federal Guardianship Service within the Federal Public Service Justice is responsible for designating guardians for unaccompanied minors<sup>110</sup>. Currently, however, the fact of beginning asylum proceedings at a late stage brings about another problem: some **children go "missing"**. This is due to the fact that children's identification (registration of fingerprints for EURODAC) only takes place once they apply for asylum. If a minor moves to another MS (or even another town within the MS) before that occurs, he or she cannot be traced. On the other hand, fingerprinting of minors without the consent of a guardian may raise delicate issues of personality rights and data protection, so that there is no simple means of avoiding this gap.

While in **Germany** the youth welfare office is not granted custody of the child at the stage of the provisional taking into care<sup>111</sup>, it has the right to act as an interim representative for the child in all matters that require urgent attention, which may especially include asylum and/or immigration matters. Once it is established that there is no one in Germany exercising parental custody over the foreign minor, long-term taking into care is carried out by the youth welfare office<sup>112</sup>, which immediately informs the court that the appointment of a guardian and/or curator is necessary. In the course of the proceedings, the court hears the child, and, if possible, also the parents. The hearing of the parents seems to cause the greatest practical problem. If the minor provides the court with a telephone number of his or her parents who may then be reached, a hearing is usually performed. However, the urgency of the appointment of the guardian and the time required to reach the parents for a hearing always need to be balanced.

There are differences in Germany as to the choice of the person who will be appointed as guardian. In the large majority of cases, the youth welfare office itself is appointed as official guardian<sup>113</sup>. This double role of the youth welfare office may lead to conflicts of interests as, in their position as representative/guardian, they are bound **to assert the child's interests**, while as a state authority, they may need to make decisions which might be disadvantageous for the child (e.g. age assessment, local allocation procedures, not to mention fiscal

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<sup>107</sup> For a general overview of the youth welfare office's role and competences, see Lack, K., "Die Rechte unbegleitet in die Bundesrepublik eingereister Minderjähriger", in: Heilmann, S. / Lack, K. (eds.): *Die Rechte des Kindes*, Cologne 2016, 85-114, and Veit, B., "Das Gesetz zur Verbesserung der Unterbringung, Versorgung und Betreuung ausländischer Kinder und Jugendlicher", *FamRZ* 2016, 93-98.

<sup>108</sup> NIDOS is an organisation with the task of acting as guardian for unaccompanied minors and to help them in the asylum procedure. See [www.nidos.nl](http://www.nidos.nl) and specifically their Annual Report of 2016 (<https://www.nidos.nl/wp-content/uploads/2017/05/Nidos-jaarverslag-2016.pdf>).

<sup>109</sup> See Nidos Annual Report 2016 at p. 7.

<sup>110</sup> Article 3, § 2, 1° and 5° Guardianship law, *Moniteur belge*, 31 December 2002

<sup>111</sup> Art. 42a SGB VIII

<sup>112</sup> § 42 German Social Code VIII

<sup>113</sup> § 1791b I 1 German Civil Code

concerns). One solution could be to split the tasks among different people within the office, but that may prove difficult in practice, especially in smaller branches. However, Federal states (*Bundesländer*) differ in their approach to the **guardian's** necessary specific qualifications: while some require the guardian to be a person acquainted with the asylum procedure, in other states, any person qualified for guardianship may generally be appointed. Apparently in some states, it is quite common to appoint a **minor's** relatives, even older siblings. This is problematic as one of the **guardian's** main responsibilities is to make decisions on behalf of the child regarding asylum and/or immigration matters (e.g. whether to apply for asylum). Claiming that they lack in-depth knowledge of asylum and immigration law and are hence not qualified to represent the unaccompanied child in these matters, youth welfare offices frequently apply for the appointment of a specialized attorney as supplementary curator<sup>114</sup> or joint guardian.<sup>115</sup> Currently, the permissibility and necessity of this point is strongly debated.<sup>116</sup>

In **Italy**, the current reception procedure provides that the public security authority which comes into contact with unaccompanied children gives notice of his/her presence to a) the **Guardianship Judge** (*'giudice tutelare'* located at the Ordinary Tribunal) in order to open guardianship procedure and to appoint **a guardian**; b) the **Youth Prosecutor's Office**, who asks the Youth Court to open a procedure for the confirmation of the measures adopted; and c) the General Direction for Immigration and Integration Policies of the Ministry of Labour and Social Policies, for its census skills and liaising with IOM (International Organization of Migration), which is responsible for gathering information in the country of origin. The same goes for unaccompanied children who landed on Italian coasts and were allocated from Prefectures to Municipalities (Local Authorities) of all the Italian national territory.

Normally, the legal representative of a reception centre receiving an unaccompanied minor performs *ex-lege* the tasks of provisional guardian (or ad interim guardian), in order to deal **with all the guardian's functions (not limited to the asylum/international protection request)**, until the Judicial Authority appoints the latter<sup>117</sup>. This is usually provided by the Guardianship Judge or, in some southern districts such as Catania (Sicily) where the judicial authorities of the district have agreed to proceed differently, by directly involving the Youth Court.

Due to the high number of unaccompanied children and therefore the number of guardians that are needed, the municipality of the **child's** place of residence (or where the child was tracked or first aid was provided) is normally appointed as provisional guardian. Some courts have long begun the practice of appointing a natural person as a "volunteer" guardian (for example in the courts of Bologna, Cagliari, Florence, Trento and Venice). Article 11 of the **new Law 47/2017 provides for the establishment of a list of "Voluntary Guardians" by the Youth Court, where any private citizens "can be registered, selected and adequately trained by Regional Ombudsman for Children"**.

<sup>114</sup> § 1909 I 1 German Civil Code

<sup>115</sup> § 1775 S. 2 German Civil Code. For an overview, see Riegner, K., "Sachkunde und schwierige Geschäfte bei der Vormundschaft", NZFam 2015, 193-198; Lettl, T., "Die Vertretung unbegleiteter Minderjähriger nach §§ 1773 ff. BGB", JA 2016, 481-487; Etzold, R., "Bestellung eines rechtskundigen Mitvormunds für unbegleitete minderjährige Flüchtlinge nach § 1775 S. 2 BGB", FamRZ 2016, 609-613, and Erb-Klünemann, M. / Kößler, M., "Unbegleitete minderjährige Flüchtlinge – eine verstärkte familiengerichtliche Herausforderung", FamRB 2016, 160-165.

<sup>116</sup> As the arguments for both sides hinge on the interpretation of the child protection rules of European law (Art. 6 II Dublin III regulation ["the representative shall have the qualifications and expertise to ensure that the best interests of the minor are taken into consideration during the procedures carried out under this Regulation"] and Art. 25 I lit. a) directive 2013/32/EU, Art. 24 I 1 directive 2013/33/EU ["the representative [...] shall have the necessary expertise to that end"]), a clarification on the EU level would be welcome. It needs to be borne in mind, however, that demanding specific legal expertise in the person of the guardian him- or herself would in practice lead to the need for appointing a specialist lawyer as a co-curator or co-guardian in practically all cases. This may not be feasible in practice, especially as guardianship duties would extend beyond providing legal advice.

<sup>117</sup> Article 402 Civil Code

The Guardianship Judge does not convene and hear the child before appointing a guardian; once appointed, the guardian does not always make an effective supervision of the placement and of the project prepared by the reception centre.

In **France**, as unaccompanied children do not have any legal capacity, they must be represented for any act under all asylum procedures. The guardian appointed by the court that is competent for the protection of children (**guardianship judge**) is the child's representative in all procedures, including procedures relating to migration. If no guardian has been appointed by the guardianship judge before placing the child into care, the Public Prosecutor, notified by the Prefecture, should without delay appoint an **ad hoc** administrator (a legal representative) who will represent the child throughout the asylum procedure<sup>118</sup>. There are two lists of **ad hoc** administrators drawn up within the jurisdiction of each Court of Appeal: one list is dedicated to asylum while the other list focuses on border procedure. The July 2015 reform of the law on asylum consolidates the status of **ad hoc** administrators. However, they represent the child in administrative and judicial procedures related to asylum claims only, without the need to more generally **ensure the child's welfare** the way an ordinary guardian would.

Before the asylum authority (OFPRA), the **ad hoc** administrator is the only person authorised to sign the asylum application form. The French court of asylum (CNDA) has recently annulled an OFPRA decision rejecting an asylum claim of an unaccompanied child, after an interview conducted in the absence of the **ad hoc** administrator<sup>119</sup>. In this decision, the Court held that the interview conducted under these circumstances constituted a violation of the asylum seeker's fundamental guarantees.

#### 3.4.3. Recognition of the guardian

As mentioned above (see 1.2.4.), the appointment of a guardian by a MS' authorities may be based on a jurisdictional ground defined by Brussels IIa itself, or, via its Article 20, on a national law ground. In the latter case, however, recognition of the appointment abroad is uncertain, because this will, again, depend on the national law of the other MS. By contrast, if the appointment of the guardian is based, e.g., on its Article 13(2), Brussels IIa guarantees **the recognition of the appointment and the guardian's powers**. It should be noted that a professional guardian appointed in the first MS will usually have to be replaced if the child is transferred to a second MS as he or she cannot support the child adequately after the transfer.

### 3.5. Family Tracing

#### 3.5.1. Overview

Family tracing is a matter at the crossroads of international jurisdiction, administrative cooperation and the recognition of personal status acquired abroad.

In order to get some insights from practice, the National Red Cross in Belgium, France, Germany and the Netherlands and the Central Authorities under Brussels IIa (which also act as CA under the 1996 Hague Convention) were interviewed. The Red Cross was chosen because the National Red Cross or Red Crescent Societies are contacted by hundreds of families who have lost contact with their relatives somewhere within or on their way to Europe. The Tracing Services of the National Societies try to help these families find their family members. The

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<sup>118</sup> Art. L. 741-3, Code for Entry and Residence of Foreigners and the Right of Asylum

<sup>119</sup> CNDA, Mme Y, Decision No 14012645, 5 October 2016

interviews with the National Red Cross in Belgium and the Netherlands stressed the importance of the "Trace the Face" website<sup>120</sup>.

Differently from above, in Italy, family tracing is mostly carried out by the International Organization for Migration (IOM). The latter has been cooperating since 2001 with the General Department for Immigration Policies (a division of the Ministry of Labour and Social Policies).

Again, the few interviews carried out revealed that further empirical research is needed to obtain a better insight into the different methods, and their effectiveness.

### 3.5.2. Legal context

Family tracing is a preliminary measure that is often a first step in order to prepare family reunification. Family reunification is carried out under harmonized EU law (Family Reunification Directive (2003/86/EC) and Dublin Regulation Art. 6.4).

Art. 10.3 of the Family Reunification Directive provides that MSs shall authorise the entry and residence of the **minor's** first-degree relatives in the direct ascending line; they may also authorise such entry and residence for **the minor's legal guardian or any other** family member, **"where the refugee has no relatives in the direct ascending line or such relatives cannot be traced."** Various legal problems may occur here that have been tackled in this paper. In particular, legal parentage or guardianship/*kafala* may have to be proven (see 3.2.4). Even more complicated issues arise if a minor has already entered the EU and is to be reunified with one parent while the other parent cannot be reached or is not in favour of the move. Here, parental responsibility will have to be investigated (see 3.2.3).

Under Art. 6.4 of Dublin Regulation, family tracing is undertaken for the purposes of determining the MS responsible. The assistance of international or other relevant organizations is specifically provided. The question is whether family tracing requires the informed consent of the child<sup>121</sup>.

### 3.5.3. National practices in the Member States

The interview with the **Belgian Red Cross** revealed the **contradiction** that exists between the mission of the Red Cross to trace and restore families, on the one hand, and family reunification procedures, on the other hand, **with regard to the concept of "family"**. In the eyes of the (Belgian) Red Cross, the concept of family encompasses not only people who share a biological tie, but also people who have built up a socio-affective bond with each other in the absence of a biological tie. In many countries, it is not uncommon to take care of family members' **children** or in extreme circumstances of **neighbours'** children (the interviewee gave the example of a child from Somalia taken in when the neighbours were killed by Al Shabaab). This transmission of parental authority and responsibilities is seldom officially registered. The absence of a biological tie or another official document, which may prove the existing family tie, leads to problems in the event of a request for family reunification. Belgian migration authorities have shown little flexibility with regard to the interpretation of the notion of "family member". If no authentic documents are available, DNA tests will be carried out leaving little room to balance the interests at stake. As a result, families are denied the right to live together in a safe country (apart from the psychosocial impact of these family reunification rules, which may lead to a child discovering that he/she is not a biological child of the family that has taken care of him or her)<sup>122</sup>.

<sup>120</sup> Families can have their photo published on this website (<https://familylinks.icrc.org/europe/en/Pages/publish-your-photo.aspx>) with the aim of tracing and restoring families

<sup>121</sup> See ECRE Comments on Dublin Regulation, [https://www.ecre.org/wp-content/uploads/2016/07/ECRE-Comments-on-the-Dublin-III-Regulation\\_March-2015.pdf](https://www.ecre.org/wp-content/uploads/2016/07/ECRE-Comments-on-the-Dublin-III-Regulation_March-2015.pdf)

<sup>122</sup> The **Belgian CA** within the Federal Public Service Justice has in the past two years had two cases where it had to help with the tracing of family members and thereafter establishing contact between children and a parent. Both

In **Germany**, family tracing begins at an early stage along the preliminary taking into care procedure. During the initial interview with the minor, s/he is asked about relatives in Germany and/or Europe. If family reunification is possible in the short term (usually 4 weeks) and lies in the **child's** best interest<sup>123</sup>, it will be immediately carried out.

If a minor is taken into long-term care, family tracing forms part of the direct pedagogical work. The youth welfare office holds a central role and cooperates with the private youth care organisations involved and the guardian, using all methods available. This may include **e.g. the private organisation's own network** or the Red Cross. The Red Cross actively conducts searches for relatives in 190 countries worldwide, cooperating with the United Nations High Commissioner for Refugees (UNHCR) and the International Social Service. A major problem is posed by the loss or lack of documents as (legalized) birth and marriage certificates are needed by Embassies, which are strict on the requirements for authenticity; concerning children, DNA tests are commonly used instead. Additionally, the analysis and application of foreign law proves problematic for the diplomatic missions involved. The Red Cross also advises guardians who may be less specialised and gives information on the prerequisites and chances of such unification.

In assessing the possibilities of, and interest in, family reunification, the youth welfare office may work together with Brussels IIa and Dublin authorities. While the German Brussels IIa Central Authority (Federal Office of Justice) has not often been approached in refugee cases yet, they are able to provide help in tracing family members (e.g. when family members have migrated to different EU MSs), although, strictly speaking, Brussels IIa does not provide for a mechanism to find them. **The youth welfare office in the family members' country is then contacted and asked to investigate the family situation and provide a report on their circumstances and the possibilities of placing the child with them ("Sozialbericht"). However,** using the Dublin procedures and mechanisms primarily and relying on the Brussels IIa options only in a subsidiary manner may make more sense in a migration/refugee context.

In **France**, the CA plays a role in family tracing for children who are already on the French territory. Requests from *conseils départementaux* (departmental boards) are sent to the Central Authority since the *circulaire* (ministerial circular) of 25 January 2016 on unaccompanied children<sup>124</sup> has stated that departmental boards have to assess whether a child is unaccompanied. The circular refers explicitly to the 1996 Hague Convention, explaining that information can be gathered on the situation of the child and his/her family, if the child holds the nationality of a MS or of a Contracting State of the 1996 Hague Convention, by contacting the French CA, which cooperates for that purpose with the authorities of the State of origin. Regarding family tracing, no cooperation exists so far between the CA and the Red Cross, but the CA has contacts with the International Social Service, with foreign CAs, and also with the consulates of foreign States in France, where no international agreement exists.

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cases concerned refugees from Iraq. In one case the children and one parent were in Belgium while the other parent was in Sweden. In the other case the children and one parent were in Belgium while the other parent was in Denmark. The Central Authority received a request to locate the children in order to establish contact with the parent in Sweden/Denmark. For this the CA used the procedures provided in the 1980 Hague Child Abduction Convention. It managed to locate the children and institute proceedings for the establishment of contact. In these cases they also had contact with the Red Cross.

<sup>123</sup> § 42a V 2 German Social Code VIII.

<sup>124</sup> BOMJ n°2016-01 du 29 janvier 2016 – JUSF1602101C.



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This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee, will be presented during a Workshop dedicated to potential and challenges of private international law in the current migratory context. The child's best interests are a primary consideration under international and EU law. EU migration and private international law frameworks regulate child protection, but in an uncoordinated way: the Dublin III and Brussels IIa Regulations are neither aligned nor applied coherently. This should change. In particular, the rules and mechanisms of Brussels IIa should be used to enhance the protection of migrant children. These include rules on jurisdiction to take protective measures, on applicable law, and on recognition and enforcement of protective measures, and mechanisms for cross-border cooperation between authorities.

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