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Committee of Experts on the Rights and the Best interests of the Child in Parental Separation and in Care Proceedings (CJ/ENF-ISE)

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Agenda item 6. Best interests of the child and children's rights in parental separation – compilation of excerpts of relevant international and European instruments

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The best interests of the child and children's rights in parental separation

1. International treaties and declaration

UN General Assembly, *United Nations Convention on the Rights of the Child (UNCRC)*, 1989.

[Available at: <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>]

Article 1

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

UN Committee on the Rights of the Child (CRC), General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1). [Available at: http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf]

Paragraph 43: *Assessment of a child's best interests must include respect for the child's right to express his or her views freely and due weight given to said views in all matters affecting the child. This is clearly set out in the Committee's general comment No. 12 which also highlights the inextricable links between articles 3, paragraph 1,*

and 12. The two articles have complementary roles: the first aims to realize the child's best interests, and the second provides the methodology for hearing the views of the child or children and their inclusion in all matters affecting the child, including the assessment of his or her best interests. Article 3, paragraph 1, cannot be correctly applied if the requirements of article 12 are not met. Similarly, article 3, paragraph 1, reinforces the functionality of article 12, by facilitating the essential role of children in all decisions affecting their lives.

Paragraph 52: Based on these preliminary considerations, the Committee considers that the elements to be taken into account when assessing and determining the child's best interests, as relevant to the situation in question, are as follows: [...]

Paragraph 53: Article 12 of the Convention provides for the right of children to express their views in every decision that affects them. Any decision that does not take into account the child's views or does not give their views due weight according to their age and maturity, does not respect the possibility for the child or children to influence the determination of their best interests.

Paragraph 56: Regarding religious and cultural identity, for example, when considering a foster home or placement for a child, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background (art. 20, para. 3), and the decision-maker must take into consideration this specific context when assessing and determining the child's best interests. The same applies in cases of adoption, separation from or divorce of parents. [...]

Paragraph 60: Preventing family separation and preserving family unity are important components of the child protection system, and are based on the right provided for in article 9, paragraph 1, which requires "that a child shall not be separated from his or her parents against their will, except when [...] such separation is necessary for the best interests of the child". Furthermore, the child who is separated from one or both parents is entitled "to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests" (art. 9, para. 3). This also extends to any person holding custody rights, legal or customary primary caregivers, foster parents and persons with whom the child has a strong personal relationship.

Paragraph 67: The Committee is of the view that shared parental responsibilities are generally in the child's best interests. However, in decisions regarding parental responsibilities, the only criterion shall be what is in the best interests of the particular child. It is contrary to those interests if the law automatically gives parental responsibilities to either or both parents. In assessing the child's best interests, the judge must take into consideration the right of the child to preserve his or her relationship with both parents, together with the other elements relevant to the case.

Paragraph 70: Preservation of the family environment encompasses the preservation of the ties of the child in a wider sense. These ties apply to the extended family, such as grandparents, uncles/aunts as well friends, school and the wider environment and are particularly relevant in cases where parents are separated and live in different places.

Article 4

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

UN Committee on the Rights of the Child (CRC), General Comment No. 5 (2003) on general measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6). [Available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fGC%2f2003%2f5&Lang=en]

Paragraph 12: The development of a children's rights perspective throughout Government, parliament and the judiciary is required for effective implementation of the whole Convention and, in particular, in the light of the following articles in the Convention identified by the Committee as general principles:

Article 2: the obligation of States to respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind. This non-discrimination obligation requires States actively to identify individual children and groups of children the recognition and realization of whose rights may demand special measures. For example, the Committee highlights, in particular, the need for data collection to be disaggregated to enable discrimination or potential discrimination to be identified. Addressing discrimination may require changes in legislation, administration and resource allocation, as well

as educational measures to change attitudes. It should be emphasized that the application of the non-discrimination principle of equal access to rights does not mean identical treatment. A general comment by the Human Rights Committee has underlined the importance of taking special measures in order to diminish or eliminate conditions that cause discrimination.

Article 3 (1): the best interests of the child as a primary consideration in all actions concerning children.

The article refers to actions undertaken by “public or private social welfare institutions, courts of law, administrative authorities or legislative bodies”. The principle requires active measures throughout Government, parliament and the judiciary. Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children’s rights and interests are or will be affected by their decisions and actions - by, for example, a proposed or existing law or policy or administrative action or court decision, including those which are not directly concerned with children, but indirectly affect children.

Article 6: the child’s inherent right to life and States parties’ obligation to ensure to the maximum extent possible the survival and development of the child. The Committee expects States to interpret “development” in its broadest sense as a holistic concept, embracing the child’s physical, mental, spiritual, moral, psychological and social development. Implementation measures should be aimed at achieving the optimal development for all children.

Article 12: the child’s right to express his or her views freely in “all matters affecting the child”, those views being given due weight. This principle, which highlights the role of the child as an active participant in the promotion, protection and monitoring of his or her rights, applies equally to all measures adopted by States to implement the Convention.

Opening government decision-making processes to children is a positive challenge which the Committee finds States are increasingly responding to. Given that few States as yet have reduced the voting age below 18, there is all the more reason to ensure respect for the views of unenfranchised children in Government and parliament. If consultation is to be meaningful, documents as well as processes need to be made accessible. But appearing to “listen” to children is relatively unchallenging; giving due weight to their views requires real change. Listening to children should not be seen as an end in itself, but rather as a means by which States make their interactions with children and their actions on behalf of children ever more sensitive to the implementation of children’s rights.

One-off or regular events like Children’s Parliaments can be stimulating and raise general awareness. But article 12 requires consistent and ongoing arrangements. Involvement of and consultation with children must also avoid being tokenistic and aim to ascertain representative views. The emphasis on “matters that affect them” in article 12 (1) implies the ascertainment of the views of particular groups of children on particular issues - for example children who have experience of the juvenile justice system on proposals for law reform in that area, or adopted children and children in adoptive families on adoption law and policy. It is important that Governments develop a direct relationship with children, not simply one mediated through non-governmental organizations (NGOs) or human rights institutions. In the early years of the Convention, NGOs had played a notable role in pioneering participatory approaches with children, but it is in the interests of both Governments and children to have appropriate direct contact.

Article 5

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

UN Committee on the Rights of the Child (CRC), General Comment No. 20 (2016) on the implementation of the rights of the child during adolescence. [Available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f20&Lang=en]

Paragraph 18: Article 5 of the Convention requires that parental direction and guidance be provided in a manner consistent with the evolving capacities of the child. The Committee defines evolving capacities as an enabling principle

that addresses the process of maturation and learning through which children progressively acquire competencies, understanding³ and increasing levels of agency to take responsibility and exercise their rights. The Committee has argued that the more a child knows and understands, the more his or her parents will have to transform direction and guidance into reminders and gradually to an exchange on an equal footing.

Paragraph 22: The right of the child to have his or her best interests taken into account as a primary consideration is a substantive right, an interpretative legal principle and a rule of procedure, and it applies to children both as individuals and as a group. All measures of implementation of the Convention, including legislation, policies, economic and social planning, decision-making and budgetary decisions, should follow procedures that ensure that the best interests of the child, including adolescents, are taken as a primary consideration in all actions concerning them. In the light of its general comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, the Committee stresses that, when determining best interests, the child's views should be taken into account, consistent with their evolving capacities and taking into consideration the child's characteristics. States parties need to ensure that appropriate weight is afforded to the views of adolescents as they acquire understanding and maturity.

Article 7

- 1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.*
- 2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.*

Article 8

- 1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.*
- 2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.*

Article 9

- 1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately, and a decision must be made as to the child's place of residence.*
- 2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.*
- 3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.*
- 4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be*

detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Article 10

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

Article 11

1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

UN Committee on the Rights of the Child (CRC), General Comment No. 12 (2009) on the right of the child to be heard. [Available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f12&Lang=en]

Divorce and separation

Paragraph 51: *In cases of separation and divorce, the children of the relationship are unequivocally affected by decisions of the courts. Issues of maintenance for the child as well as custody and access are determined by the judge either at trial or through court-directed mediation. Many jurisdictions have included in their laws, with respect to the dissolution of a relationship, a provision that the judge must give paramount consideration to the “best interests of the child”.*

Paragraph 52: *For this reason, all legislation on separation and divorce has to include the right of the child to be heard by decision makers and in mediation processes. Some jurisdictions, either as a matter of policy or legislation, prefer to state an age at which the child is regarded as capable of expressing her or his own views. The Convention, however, anticipates that this matter be determined on a case-by-case basis, since it refers to age and maturity, and for this reason requires an individual assessment of the capacity of the child.*

The right to be heard and the links with other provisions of the Convention – Articles 12 and 13

Paragraph 70: *The purpose of article 3 is to ensure that in all actions undertaken concerning children, by a public or private welfare institution, courts, administrative authorities or legislative bodies, the best interests of the child are a*

primary consideration. It means that every action taken on behalf of the child has to respect the best interests of the child. The best interests of the child is similar to a procedural right that obliges States parties to introduce steps into the action process to ensure that the best interests of the child are taken into consideration. The Convention obliges States parties to assure that those responsible for these actions hear the child as stipulated in article 12. This step is mandatory.

Paragraph 71: The best interests of the child, established in consultation with the child, is not the only factor to be considered in the actions of institutions, authorities and administration. It is, however, of crucial importance, as are the views of the child.

Paragraph 74: There is no tension between articles 3 and 12, only a complementary role of the two general principles: one establishes the objective of achieving the best interests of the child and the other provides the methodology for reaching the goal of hearing either the child or the children. In fact, there can be no correct application of article 3 if the components of article 12 are not respected. Likewise, article 3 reinforces the functionality of article 12, facilitating the essential role of children in all decisions affecting their lives.

Article 14

- 1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.*
- 2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.*
- 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.*

Article 18

- 1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.*
- 2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.*

Article 27

- 1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.*
- 2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.*
- 3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.*
- 4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.*

Article 30

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

Article 42

States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.

UN General Assembly, *International Covenant on Civil and Political Rights (ICCPR)*, 1996. [Available at: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>]

Article 17

- 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*
- 2. Everyone has the right to the protection of the law against such interference or attacks.*

Article 18(4)

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 23

- 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*
- 2. The right of men and women of marriageable age to marry and to found a family shall be recognized.*
- 3. No marriage shall be entered into without the free and full consent of the intending spouses.*
- 4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.*

Article 24

- 1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.*
- 2. Every child shall be registered immediately after birth and shall have a name.*
- 3. Every child has the right to acquire a nationality.*

Hague Conference on Private International law, *Hague Convention on the Civil Aspects of International Child Abduction*, 1980. [Available at: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=24>]

Preamble

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody [...]

Article 13(2)

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

Perez-Vera, E., Explanatory Report on the HCCH Hague Convention on International Child Abduction, 1982. [Available at: <https://assets.hcch.net/upload/expl28.pdf>]

C. Importance attached to the best interests of the child

Paragraph 20: *Above all, one has to justify the reasons for including an examination of this matter within the context of a consideration of the Convention's objects. These reasons will appear clearly if one considers, on the one hand, that the interests of the child are often invoked in this regard, and on the other hand, that it might be argued that the Convention's object in securing the return of the child ought always to be subordinated to a consideration of the child's interests.*

Paragraph 21: *In this regard, one fact has rightly been highlighted, viz. that 'the legal standard of the best interests of the child' is at first view of such vagueness that it seems to resemble more closely a sociological paradigm than a concrete juridical standard. How can one put flesh on its bare bones without delving into the assumptions concerning the ultimate interests of a child which are derived from the moral framework of a particular culture? The word 'ultimate' gives rise to immediate problems when it is inserted into the equation since the general statement of the standard does not make it clear whether the interests of the child to be served are those of the immediate aftermath of the decision, of the adolescence of the child, of young adulthood, maturity, senescence or old age'.*

Paragraph 22: *On the other hand, it must not be forgotten that it is by invoking 'the best interests of the child' that internal jurisdictions have in the past often finally awarded the custody in question to the person who wrongfully removed or retained the child, it can happen that such a decision is the most just, but we cannot ignore the fact that recourse by internal authorities to such a notion involves the risk of their expressing particular cultural, social, etc. attitudes which themselves derive from a given national community and thus basically imposing their own subjective value judgments upon the national community from which the child has recently been snatched.*

Paragraph 23: *For these reasons, among others, the dispositive part of the Convention contains no explicit of their qualifying the Convention's stated object, which is to secure the prompt return of children who have been wrongfully removed or retained. However, its silence on this point ought not to lead one to the conclusion that the Convention ignores the social paradigm which declares the necessity of considering the interests of children in regulating all the problems which concern them. On the contrary, right from the start the signatory States declare themselves to be 'firmly convinced that the interests of children are of paramount importance in matters relating to their custody'; it is precisely of this conviction that they drew up the Convention, 'desiring to protect children internationally from the harmful effects of their wrongful removal or retention'.*

Paragraph 24: *These two paragraphs in the preamble reflect quite clearly the philosophy of the Convention in this regard. It can be defined as follows: the struggle against the great increase in international child abductions must always be inspired by the desire to protect children and should be based upon an interpretation of their true interests. Now, the right not to be removed or retained in the name of more or less arguable rights concerning its person is one of the most objective examples of what constitutes the interests of the child. In this regard, it would be as well to refer to Recommendation 874(1979) of the Parliamentary Assembly of the Council of Europe, the first general principle of which states that 'children must no longer be regarded as parents' property but must be recognized as individuals with their own rights and needs'. [...]*

Paragraph 25: *It is thus legitimate to assert that the two objects of the Convention – the one preventive, the other designed to secure the immediate reintegration of the child into its habitual environment – both correspond to a specific idea of what constitutes the 'best interests of the child'. However, even when viewing from this perspective, it has to be admitted that the removal of the child can sometimes be justified by objective reasons which have to do with its person, or with the environment with which it is most closely connected. Therefore, the Convention*

recognizes the need for certain exceptions to the general obligations assumed by States to secure the prompt return of children who have been unlawfully removed or retained. For the most part, these exceptions are only concrete illustrations of the overly vague principle whereby the interests of the child are stated to be the guiding criterion in this area.

HCCH, Guide to Good Practice Part VI – Article 13(1)(b), 2020. [Available at: <https://assets.hcch.net/docs/225b44d3-5c6b-4a14-8f5b-57cb370c497f.pdf>]

ii. Wrongful removal or retention is harmful to the child

The second underlying concept is that the wrongful removal or retention of a child is prejudicial to the child's welfare and that, save for the limited exceptions provided for in the Convention, it will be in the best interests of the child to return to the State of habitual residence.

f. Limited Exceptions to the duty to order return forthwith

24. Through the enumerated exceptions, the Convention recognises that the non-return of a wrongfully removed or retained child can sometimes be justified. The general concept that a prompt return is in the best interests of the child can therefore be rebutted in the individual case where an exception is established.

26. In particular, while the exceptions derive from a consideration of the interests of the child, they do not turn the return proceedings into custody proceedings. Exceptions are focussed on the (possible non-)return of the child. They should neither deal with issues of custody nor mandate a full "best interests assessment" for a child within return proceedings. The competent court or authority seised of return proceedings must apply the provisions of the Convention and avoid intervening on questions that are for the State of habitual residence to decide.

Hague Conference on Private International law, Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, 1996. [Available at: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=70>]

Preamble

Confirming that the best interests of the child are to be a primary consideration, [...].

Article 8

(1) By way of exception, the authority of a Contracting State having jurisdiction under Article 5 or 6, if it considers that the authority of another Contracting State would be better placed in the particular case to assess the best interests of the child, may either

- request that other authority, directly or with the assistance of the Central Authority of its State, to assume jurisdiction to take such measures of protection as it considers to be necessary, or*
- suspend consideration of the case and invite the parties to introduce such a request before the authority of that other State. [...]*

(4) The authority addressed as provided in paragraph 1 may assume jurisdiction, in place of the authority having jurisdiction under Article 5 or 6, if it considers that this is in the child's best interests.

Article 9

(1) If the authorities of a Contracting State referred to in Article 8, paragraph 2, consider that they are better placed in the particular case to assess the child's best interests, they may either

- request the competent authority of the Contracting State of the habitual residence of the child, directly or with the assistance of the Central Authority of that State, that they be authorised to exercise jurisdiction to take the measures of protection which they consider to be necessary, or
- invite the parties to introduce such a request before the authority of the Contracting State of the habitual residence of the child.

Article 10

(1) Without prejudice to Articles 5 to 9, the authorities of a Contracting State exercising jurisdiction to decide upon an application for divorce or legal separation of the parents of a child habitually resident in another Contracting State, or for annulment of their marriage, may, if the law of their State so provides, take measures directed to the protection of the person or property of such child if

a) at the time of commencement of the proceedings, one of his or her parents habitually resides in that State and one of them has parental responsibility in relation to the child, and

b) the jurisdiction of these authorities to take such measures has been accepted by the parents, as well as by any other person who has parental responsibility in relation to the child, and is in the best interests of the child.

Article 22

The application of the law designated by the provisions of this Chapter can be refused only if this application would be manifestly contrary to public policy, taking into account the best interests of the child.

Article 23

(1) The measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States.

(2) Recognition may however be refused [...]

d) if such recognition is manifestly contrary to public policy of the requested State, taking into account the best interests of the child; [...].

Article 28

Measures taken in one Contracting State and declared enforceable, or registered for the purpose of enforcement, in another Contracting State shall be enforced in the latter State as if they had been taken by the authorities of that State. Enforcement takes place in accordance with the law of the requested State to the extent provided by such law, taking into consideration the best interests of the child.

Lagarde, P., Explanatory Report on the HCCH Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, 1996. [Available at: <https://www.hcch.net/en/publications-and-studies/details4/?pid=2943&dtid=3>]

Chapter II – JURISDICTION

Paragraph 37: *The jurisdiction of authorities other than those of the State of the habitual residence would have, in principle, to have been requested or authorised by the authorities of this State, where it appears that these other authorities would be in a better position to assess the best interests of the child in a particular case (Art. 8 and 9).*

Articles 8 and 9 (jurisdiction transferred to an appropriate forum or requested by one)

Paragraph 52: *These Articles introduce into the Convention a reversible mechanism for forum non conveniens and forum conveniens, where it appears that the child's best interest is that his or her protection be ensured by authorities other than those of the State of the habitual residence. The two articles are parallel. Article 8 allows the authorities of the habitual residence of the child to decline jurisdiction in favour of the authorities of another State, where they are satisfied that such authorities will exercise the jurisdiction entrusted to them. Article 9 allows the authorities of a State other than that of the habitual residence of the child to request that the competent authority of the State of the child's habitual residence abandon its jurisdiction, so that the authorities of this other State may take the measures of protection which they consider necessary.*

Article 10 (the divorce court)

Paragraph 65: *The second series of conditions (subparagraph b) is that the protective jurisdiction of the divorce court has been accepted by both parents and is in the best interests of the child. The text does not require the agreement of the parents on the measures to be taken, but only on jurisdiction. It adds that this jurisdiction should also have been accepted by any other person having parental responsibility in respect of the child. As sub-paragraph a had already required that one of these parents have this parental responsibility, it is necessary, in order to give meaning to this condition set out in sub-paragraph b, to imagine a situation in which parental responsibility would be divided between one of the parents and a third person. The conformity of this jurisdiction to the best interests of the child is to be judged sovereignly by the court which is seised of the request for divorce.*

Article 22 (public policy)

Paragraph 117: *This article reproduces the habitual provision in the Hague Conventions on the public policy exception. It specifies, however, that the intervention of public policy should take into account the best interests of the child, which principle moreover should inspire the application of all the articles of the Convention.*

HCCH Practical Handbook on the Operation of the 1996 Hague Child Protection Convention, 2014. [Available at: <https://www.hcch.net/en/publications-and-studies/details4/?pid=6096&dtid=3>]

d) Jurisdiction in cases where there is a pending divorce or legal separation of the child's parents - Article 10

4.26 *It is possible for the authorities of a Contracting State exercising jurisdiction in an application for divorce, legal separation or an annulment of the marriage of the parents of a child habitually resident in another Contracting State to take measures directed to the person and property of such a child if certain conditions are met. These are:*

- *The child is habitually resident in another Contracting State and*
- *the law of the Contracting State of the authorities exercising such jurisdiction allows them to take such measures in the circumstances and*
- *at the time the proceedings commence at least one of the parents habitually resides in that Contracting State and*
- *at the time the proceedings commence at least one of the parents has parental responsibility in relation to the child and*
- *the jurisdiction of the authorities to take these measures has been accepted by the parents, as well as by any other person who has parental responsibility in relation to the child and*
- *it is in the best interests of the child that jurisdiction be exercised on this basis.*

A When can jurisdiction to take measures of protection be transferred? - Articles 8 and 9

5.3 *A request to transfer jurisdiction can arise in two ways:*

- *an authority having general jurisdiction under the Convention, if it considers that another authority without jurisdiction would be better placed in the particular case to assess the best interests of the child, can request to transfer jurisdiction to that authority (Art. 8);*
- *an authority which does not have jurisdiction but believes that it is better placed in the particular case to assess the child's best interests can request that it be allowed to exercise jurisdiction (Art. 9).*

5.4 These articles permit a transfer of jurisdiction when the authority that has jurisdiction is not the best placed to assess the best interests of the child. The best interests of the child should be assessed “in the particular case”, i.e., “at the moment when [the] need for protection is being felt, and for the purpose of responding to [that] need”.

B What conditions must be fulfilled before a transfer of jurisdiction can take place?

5.9 Under both Articles 8 and 9 jurisdiction may only be transferred when certain conditions are fulfilled:

- Connection between the child and the Contracting State to whose authorities it is permissible to transfer jurisdiction. The Contracting States whose authorities may have jurisdiction transferred to them, or who can request that jurisdiction be transferred to them, must have a connection with the child. The Contracting State must be one of the following:
 - a State of which the child is a national;
 - a State in which property of the child is located;
 - a State whose authorities are seised of an application for divorce or legal separation of the child's parents, or for an annulment of their marriage;
 - a State with which the child has a substantial connection.
- The best interests of the child. The authority making the request that jurisdiction be transferred must consider that this will allow for a better assessment of the child's best interests. The authority asked to assume or cede jurisdiction can only do so if it believes this is in the child's best interests.
- Agreement of the authorities of both Contracting States. [...]

Hague Conference on Private International law, *Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance*, 2007. [Available at: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=131>]

Preamble

Recalling that, in accordance with Articles 3 and 27 of the United Nations Convention on the Rights of the Child of 20 November 1989,

- *in all actions concerning children the best interests of the child shall be a primary consideration,*
- *every child has a right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development,*
- *the parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development, and*
- *States Parties should take all appropriate measures, including the conclusion of international agreements, to secure the recovery of maintenance for the child from the parent(s) or other responsible persons, in particular where such persons live in a State different from that of the child, [...]*

Article 15 - Free legal assistance for child support applications

(1) The requested State shall provide free legal assistance in respect of all applications by a creditor under this Chapter concerning maintenance obligations arising from a parent-child relationship towards a person under the age of 21 years.

(2) Notwithstanding paragraph 1, the requested State may, in relation to applications other than those under Article 10(1) a) and b) and the cases covered by Article 20(4), refuse free legal assistance if it considers that, on the merits, the application or any appeal is manifestly unfounded.

Hague Conference on Private International law, *Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations*, 1973. [Available at: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=85>]

Hague Conference on Private International law, *Hague Convention on the Law Applicable to Maintenance Obligations*, 1973. [Available at: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=86>]

Hague Conference on Private International Law and International Centre for Missing and Exploited Children, *Washington Declaration on International Family Relocation*, 2010 [Available at: https://assets.hcch.net/upload/decl_washington2010e.pdf]

2. European treaties

a. Council of Europe

Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, 1950. [Available at: https://www.echr.coe.int/Documents/Convention_ENG.pdf]

Article 6 – Right to a fair trial

1. *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.*
2. *Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.*
3. *Everyone charged with a criminal offence has the following minimum rights:*
 - (a) *to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*
 - (b) *to have adequate time and facilities for the preparation of his defence;*
 - (c) *to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*
 - (d) *to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
 - (e) *to have the free assistance of an interpreter if he cannot understand or speak the language used in court.*

Article 8 – Right to respect for private and family life

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

Article 9 – Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 13 – Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 14 – Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 53 – Safeguard for existing human rights

Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.

Council of Europe, Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, 1952. [Available at: <https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/rms/090000168006377c>]

Article 2 – Right to education

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

Council of Europe, Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, 1963. [Available at: <https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/rms/090000168006b65c>]

Article 2 – Freedom of movement

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

Article 4 – Prohibition of collective expulsion of aliens

Collective expulsion of aliens is prohibited.

Council of Europe, Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 1984. [Available at: https://www.echr.coe.int/Documents/Convention_ENG.pdf]

Article 5 - Equality between spouses

Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children.

Council of Europe, European Social Charter (revised), 1996. [Available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007cf93>]

Part I

The Parties accept as the aim of their policy, to be pursued by all appropriate means both national and international in character, the attainment of conditions in which the following rights and principles may be effectively realised: [...]

7. Children and young persons have the right to a special protection against the physical and moral hazards to which they are exposed.

[...]

17. Children and young persons have the right to appropriate social, legal and economic protection.

Article 17 –The right of children and young persons to social, legal and economic protection

With a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities, the Parties undertake, either directly or in co-operation with public and private organisations, to take all appropriate and necessary measures designed:

1. a. to ensure that children and young persons, taking account of the rights and duties of their parents, have the care, the assistance, the education and the training they need, in particular by providing for the establishment or maintenance of institutions and services sufficient and adequate for this purpose;

b. to protect children and young persons against negligence, violence or exploitation;

c. to provide protection and special aid from the state for children and young persons temporarily or definitively deprived of their family's support;

2. to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools.

Article 19 – The right of migrant workers and their families to protection and assistance

With a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance in the territory of any other Party, the Parties undertake:

- 1. to maintain or to satisfy themselves that there are maintained adequate and free services to assist such workers, particularly in obtaining accurate information, and to take all appropriate steps, so far as national laws and regulations permit, against misleading propaganda relating to emigration and immigration;*
- 2. to adopt appropriate measures within their own jurisdiction to facilitate the departure, journey and reception of such workers and their families, and to provide, within their own jurisdiction, appropriate services for health, medical attention and good hygienic conditions during the journey;*
- 3. to promote co-operation, as appropriate, between social services, public and private, in emigration and immigration countries;*
- 4. to secure for such workers lawfully within their territories, insofar as such matters are regulated by law or regulations or are subject to the control of administrative authorities, treatment not less favourable than that of their own nationals in respect of the following matters:*
 - a. remuneration and other employment and working conditions;*
 - b. membership of trade unions and enjoyment of the benefits of collective bargaining;*
 - c. accommodation;*
- 5. to secure for such workers lawfully within their territories treatment not less favourable than that of their own nationals with regard to employment taxes, dues or contributions payable in respect of employed persons;*
- 6. to facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory;*
- 7. to secure for such workers lawfully within their territories treatment not less favourable than that of their own nationals in respect of legal proceedings relating to matters referred to in this article;*
- 8. to secure that such workers lawfully residing within their territories are not expelled unless they endanger national security or offend against public interest or morality;*
- 9. to permit, within legal limits, the transfer of such parts of the earnings and savings of such workers as they may desire;*
- 10. to extend the protection and assistance provided for in this article to self-employed migrants insofar as such measures apply;*
- 11. to promote and facilitate the teaching of the national language of the receiving state or, if there are several, one of these languages, to migrant workers and members of their families;*
- 12. to promote and facilitate, as far as practicable, the teaching of the migrant worker's mother tongue to the children of the migrant worker.*

Article 27 –The right of workers with family responsibilities to equal opportunities and equal treatment

With a view to ensuring the exercise of the right to equality of opportunity and treatment for men and women workers with family responsibilities and between such workers and other workers, the Parties undertake: [...]

- 2. to provide a possibility for either parent to obtain, during a period after maternity leave, parental leave to take care of a child, the duration and conditions of which should be determined by national legislation, collective agreements or practice;*

Council of Europe, Convention on preventing and combating violence against women and domestic violence, 2011. [Available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008482e>]

Article 26 – Protection and support for child witnesses

- 1. Parties shall take the necessary legislative or other measures to ensure that in the provision of protection and support services to victims, due account is taken of the rights and needs of child witnesses of all forms of violence covered by the scope of this Convention.*
- 2. Measures taken pursuant to this article shall include age-appropriate psychosocial counselling for child witnesses of all forms of violence covered by the scope of this Convention and shall give due regard to the best interests of the child.*

Article 31 – Custody, visitation rights and safety

- 1. Parties shall take the necessary legislative or other measures to ensure that, in the determination of custody and visitation rights of children, incidents of violence covered by the scope of this Convention are taken into account.*
- 2. Parties shall take the necessary legislative or other measures to ensure that the exercise of any visitation or custody rights does not jeopardise the rights and safety of the victim or children.*

Article 45 – Sanctions and measures

- 2. Parties may adopt other measures in relation to perpetrators, such as: [...]*
 - withdrawal of parental rights, if the best interests of the child, which may include the safety of the victim, cannot be guaranteed in any other way.*

Article 56 – Measures of protection

- 2. A child victim and child witness of violence against women and domestic violence shall be afforded, where appropriate, special protection measures taking into account the best interests of the child.*

Explanatory report available at:

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d383a>

Council of Europe, Convention on Contact Concerning Children, 2003. [Available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008370f>]

Preamble

Recognising that, as provided in the different international legal instruments of the Council of Europe as well as in Article 3 of the United Nations Convention on the Rights of the Child of 20 November 1989, the best interests of the child shall be a primary consideration; [...]

Taking into account Article 9 of the United Nations Convention on the Rights of the Child which provides for the right of a child, who is separated from one or both parents, to maintain personal relations and direct contact with both parents on a regular basis, except when this is contrary to the child's best interests; [...]

Agreeing on the need for children to have contact not only with both parents but also with certain other persons having family ties with children and the importance for parents and those other persons to remain in contact with children, subject to the best interests of the child; [...].

Article 4 – Contact between a child and his or her parents

1. *A child and his or her parents shall have the right to obtain and maintain regular contact with each other.*
2. *Such contact may be restricted or excluded only where necessary in the best interests of the child.*
3. *Where it is not in the best interests of a child to maintain unsupervised contact with one of his or her parents the possibility of supervised personal contact or other forms of contact with this parent shall be considered.*

Article 5 – Contact between a child and persons other than his or her parents

1. *Subject to his or her best interests, contact may be established between the child and persons other than his or her parents having family ties with the child.*
2. *States Parties are free to extend this provision to persons other than those mentioned in paragraph 1, and where so extended, States may freely decide what aspects of contact, as defined in Article 2 letter a shall apply.*

Article 6 –The right of a child to be informed, consulted and to express his or her views

1. *A child considered by internal law as having sufficient understanding shall have the right, unless this would be manifestly contrary to his or her best interests:*
 - *to receive all relevant information;*
 - *to be consulted;*
 - *to express his or her views.*
2. *Due weight shall be given to those views and to the ascertainable wishes and feelings of the child.*

Article 7 – Resolving disputes concerning contact

When resolving disputes concerning contact, the judicial authorities shall take all appropriate measures:

- a. *to ensure that both parents are informed of the importance for their child and for both of them of establishing and maintaining regular contact with their child;*
- b. *to encourage parents and other persons having family ties with the child to reach amicable agreements with respect to contact, in particular through the use of family mediation and other processes for resolving disputes;*
- c. *before taking a decision, to ensure that they have sufficient information at their disposal, in particular from the holders of parental responsibilities, in order to take a decision in the best interests of the child and, where necessary, obtain further information from other relevant bodies or persons.*

Article 8 – Contact agreements

1. *States Parties shall encourage, by means they consider appropriate, parents and other persons having family ties with the child to comply with the principles laid down in Articles 4 to 7 when making or modifying agreements on contact concerning a child. These agreements should preferably be in writing.*
2. *Upon request, judicial authorities shall, except where internal law otherwise provides, confirm an agreement on contact concerning a child, unless it is contrary to the best interests of the child.*

Explanatory report available at:

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d380d>

Council of Europe, *European Convention on the Exercise of Children's Rights*, 1996. [Available at: <https://rm.coe.int/168007cc53>].

Preamble

Convinced that the rights and best interests of children should be promoted and to that end children should have the opportunity to exercise their rights, in particular in family proceedings affecting them;

Recognising that children should be provided with relevant information to enable such rights and best interests to be promoted and that due weight should be given to the views of children;

Recognising the importance of the parental role in protecting and promoting the rights and best interests of children and considering that, where necessary, States should also engage in such protection and promotion;

Considering, however, that in the event of conflict it is desirable for families to try to reach agreement before bringing the matter before a judicial authority,

Article 1 – Scope and object of the Convention

1 This Convention shall apply to children who have not reached the age of 18 years.

2 The object of the present Convention is, in the best interests of children, to promote their rights, to grant them procedural rights and to facilitate the exercise of these rights by ensuring that children are, themselves or through other persons or bodies, informed and allowed to participate in proceedings affecting them before a judicial authority.

3 For the purposes of this Convention proceedings before a judicial authority affecting children are family proceedings, in particular those involving the exercise of parental responsibilities such as residence and access to children.

Article 3 – Right to be informed and to express his or her views in proceedings

A child considered by internal law as having sufficient understanding, in the case of proceedings before a judicial authority affecting him or her, shall be granted, and shall be entitled to request, the following rights:

- a. to receive all relevant information;*
- b. to be consulted and express his or her views;*
- c. to be informed of the possible consequences of compliance with these views and the possible consequences of any decision.*

Article 4 – Right to apply for the appointment of a special representative

1 Subject to Article 9, the child shall have the right to apply, in person or through other persons or bodies, for a special representative in proceedings before a judicial authority affecting the child where internal law precludes the holders of parental responsibilities from representing the child as a result of a conflict of interest with the latter.

2 States are free to limit the right in paragraph 1 to children who are considered by internal law to have sufficient understanding.

Article 5 – Other possible procedural rights

Parties shall consider granting children additional procedural rights in relation to proceedings before a judicial authority affecting them, in particular:

- a. the right to apply to be assisted by an appropriate person of their choice in order to help them express their views;*
- b. the right to apply themselves, or through other persons or bodies, for the appointment of a separate representative, in appropriate cases a lawyer;*

- c. *the right to appoint their own representative;*
- d. *the right to exercise some or all of the rights of parties to such proceedings.*

Article 6 – Decision-making process

In proceedings affecting a child, the judicial authority, before taking a decision, shall:

- a. *consider whether it has sufficient information at its disposal in order to take a decision in the best interests of the child and, where necessary, it shall obtain further information, in particular from the holders of parental responsibilities;*
- b. *in a case where the child is considered by internal law as having sufficient understanding:*
 - *ensure that the child has received all relevant information;*
 - *consult the child in person in appropriate cases, if necessary privately, itself or through other persons or bodies, in a manner appropriate to his or her understanding, unless this would be manifestly contrary to the best interests of the child;*
 - *allow the child to express his or her views;*
- c. *give due weight to the views expressed by the child.*

Article 7 – Duty to act speedily

In proceedings affecting a child the judicial authority shall act speedily to avoid any unnecessary delay and procedures shall be available to ensure that its decisions are rapidly enforced. In urgent cases the judicial authority shall have the power, where appropriate, to take decisions which are immediately enforceable.

Article 8 – Acting on own motion

In proceedings affecting a child the judicial authority shall have the power to act on its own motion in cases determined by internal law where the welfare of a child is in serious danger.

Article 9 – Appointment of a representative

1 In proceedings affecting a child where, by internal law, the holders of parental responsibilities are precluded from representing the child as a result of a conflict of interest between them and the child, the judicial authority shall have the power to appoint a special representative for the child in those proceedings.

2 Parties shall consider providing that, in proceedings affecting a child, the judicial authority shall have the power to appoint a separate representative, in appropriate cases a lawyer, to represent the child.

Article 10

1 In the case of proceedings before a judicial authority affecting a child the representative shall, unless this would be manifestly contrary to the best interests of the child:

- a. *provide all relevant information to the child, if the child is considered by internal law as having sufficient understanding;*
- b. *provide explanations to the child if the child is considered by internal law as having sufficient understanding, concerning the possible consequences of compliance with his or her views and the possible consequences of any action by the representative;*
- c. *determine the views of the child and present these views to the judicial authority.*

2 Parties shall consider extending the provisions of paragraph 1 to the holders of parental responsibilities.

Article 11

Parties shall consider extending the provisions of Articles 3, 4 and 9 to proceedings affecting children before other bodies and to matters affecting children which are not the subject of proceedings.

Article 13 – Mediation or other processes to resolve disputes

In order to prevent or resolve disputes or to avoid proceedings before a judicial authority affecting children, Parties shall encourage the provision of mediation or other processes to resolve disputes and the use of such processes to reach agreement in appropriate cases to be determined by Parties.

Article 14 – Legal aid and advice

Where internal law provides for legal aid or advice for the representation of children in proceedings before a judicial authority affecting them, such provisions shall apply in relation to the matters covered by Articles 4 and 9.

Council of Europe, *European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children*, 1980. [Available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/105>]

Article 4

1 Any person who has obtained in a Contracting State a decision relating to the custody of a child and who wishes to have that decision recognised or enforced in another Contracting State may submit an application for this purpose to the central authority in any Contracting State.

2 The application shall be accompanied by the documents mentioned in Article 13.

3 The central authority receiving the application, if it is not the central authority in the State addressed, shall send the documents directly and without delay to that central authority.

4 The central authority receiving the application may refuse to intervene where it is manifestly clear that the conditions laid down by this Convention are not satisfied.

5 The central authority receiving the application shall keep the applicant informed without delay of the progress of his application.

Article 7

A decision relating to custody given in a Contracting State shall be recognised and, where it is enforceable in the State of origin, made enforceable in every other Contracting State.

Article 14

Each Contracting State shall apply a simple and expeditious procedure for recognition and enforcement of decisions relating to the custody of a child. To that end it shall ensure that a request for enforcement may be lodged by simple application.

Article 15

1 Before reaching a decision under paragraph 1.b of Article 10, the authority concerned in the State addressed:

- a. shall ascertain the child's views unless this is impracticable having regard in particular to his age and understanding; and*

b. may request that any appropriate enquiries be carried out.

2 The cost of enquiries in any Contracting State shall be met by the authorities of the State where they are carried out.

3 Request for enquiries and the results of enquiries may be sent to the authority concerned through the central authorities.

Explanatory report available at:

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800ca432>

Council of Europe, *European Convention on the Legal Status of Children born out of Wedlock, 1975*. [Available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/085>]

Article 6

1 The father and mother of a child born out of wedlock shall have the same obligation to maintain the child as if it were born in wedlock.

2 Where a legal obligation to maintain a child born in wedlock falls on certain members of the family of the father or mother, this obligation shall also apply for the benefit of a child born out of wedlock.

Article 7

1 Where the affiliation of a child born out of wedlock has been established as regards both parents, parental authority may not be attributed automatically to the father alone.

2 There shall be power to transfer parental authority; cases of transfer shall be governed by the internal law.

Article 8

Where the father or mother of a child born out of wedlock does not have parental authority over or the custody of the child, that parent may obtain a right of access to the child in appropriate cases.

Article 9

A child born out of wedlock shall have the same right of succession in the estate of its father and its mother and of a member of its father's or mother's family, as if it had been born in wedlock.

Article 10

The marriage between the father and mother of a child born out of wedlock shall confer on the child the legal status of a child born in wedlock.

Explanatory report available at:

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800c96ca>

b. European Union

European Union, *Charter of Fundamental Rights of the European Union, 2012*. [Available at: https://www.europarl.europa.eu/charter/pdf/text_en.pdf].

Article 24 - The rights of the child

- 1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.*
- 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.*
- 3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.*

Explanations relating to the Charter of Fundamental Rights available at: [https://eur-lex.europa.eu/legal-content/EN/ALL/;ELX_SESSIONID=p2QjJGDQ45pwjsnB0pyYthlGIBJQpyLj1150pPKCknxpxVHLXBD!1743625223?uri=CELEX:32007X1214\(01\)](https://eur-lex.europa.eu/legal-content/EN/ALL/;ELX_SESSIONID=p2QjJGDQ45pwjsnB0pyYthlGIBJQpyLj1150pPKCknxpxVHLXBD!1743625223?uri=CELEX:32007X1214(01))

Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction. [Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELLAR%3A524570fa-9c9a-11e9-9d01-01aa75ed71a1>] Entry into force in 1 August 2022.

Preamble

(19) The grounds of jurisdiction in matters of parental responsibility are shaped in the light of the best interests of the child and should be applied in accordance with them. Any reference to the best interests of the child should be interpreted in light of Article 24 of the Charter of Fundamental Rights of the European Union ('the Charter') and the United Nations Convention on the Rights of the Child of 20 November 1989 ('UN Convention on the Rights of the Child') as implemented by national law and procedure.

(20) To safeguard the best interests of the child, jurisdiction should in the first place be determined according to the criterion of proximity. Consequently, jurisdiction should lie with the Member State of the habitual residence of the child, except for certain situations set out in this Regulation, for instance, where there is a change in the child's residence or pursuant to an agreement between the holders of parental responsibility.

Article 12 - Transfer of jurisdiction to a court of another Member State

1. In exceptional circumstances, a court of a Member State having jurisdiction as to the substance of the matter may, upon application from a party or of its own motion, if it considers that a court of another Member State with which the child has a particular connection would be better placed to assess the best interests of the child in the particular case, stay the proceedings or a specific part thereof and either:

- (a) set a time limit for one or more of the parties to inform the court of that other Member State of the pending proceedings and the possibility to transfer jurisdiction and to introduce an application before that court; or*
- (b) request a court of another Member State to assume jurisdiction in accordance with paragraph 2.*

2. The court of the other Member State may, where due to the specific circumstances of the case this is in the best interests of the child, accept jurisdiction within six weeks after:

- (a) its seisure in accordance with point (a) of paragraph 1; or*
- (b) receipt of the request in accordance with point (b) of paragraph 1.*

Article 13 - Request for transfer of jurisdiction by a court of a Member State not having jurisdiction

- 1. In exceptional circumstances and without prejudice to Article 9, if a court of a Member State which does not have jurisdiction under this Regulation, but with which the child has a particular connection in accordance with Article 12(4), considers that it is better placed to assess the best interests of the child in the particular case, it may request a transfer of jurisdiction from the court of the Member State of the habitual residence of the child.*
- 2. Within six weeks following receipt of the request pursuant to paragraph 1, the requested court may accept to transfer its jurisdiction, if it considers that due to the specific circumstances of the case such a transfer is in the best interests of the child. Where the requested court accepts to transfer jurisdiction, it shall inform the requesting court without delay. In the absence of such acceptance within the timeframe, the requesting court shall not have jurisdiction.*

Article 21 – Right of the child to express his or her views

- 1. When exercising their jurisdiction under Section 2 of this Chapter, the courts of the Member States shall, in accordance with national law and procedure, provide the child who is capable of forming his or her own views with a genuine and effective opportunity to express his or her views, either directly, or through a representative or an appropriate body.*
- 2. Where the court, in accordance with national law and procedure, gives a child an opportunity to express his or her views in accordance with this Article, the court shall give due weight to the views of the child in accordance with his or her age and maturity.*

Article 25 - Alternative dispute resolution

As early as possible and at any stage of the proceedings, the court either directly or, where appropriate, with the assistance of the Central Authorities, shall invite the parties to consider whether they are willing to engage in mediation or other means of alternative dispute resolution, unless this is contrary to the best interests of the child, it is not appropriate in the particular case or would unduly delay the proceedings.

Article 39 – Grounds for refusal of recognition of decisions in matters of parental responsibility

- 1. The recognition of a decision in matters of parental responsibility shall be refused:*
 - (a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is invoked, taking into account the best interests of the child;*
 - (b) where it was given in default of appearance if the person in default was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defence unless it is determined that such person has accepted the decision unequivocally;*
 - (c) upon application by any person claiming that the decision infringes his or her parental responsibility, if it was given without such person having been given an opportunity to be heard;*
 - (d) if and to the extent that it is irreconcilable with a later decision relating to parental responsibility given in the Member State in which recognition is invoked;*
 - (e) if and to the extent that it is irreconcilable with a later decision relating to parental responsibility given in another Member State or in the non-Member State of the habitual residence of the child provided that the later decision fulfils the conditions necessary for its recognition in the Member State in which recognition is invoked; or*
 - (f) if the procedure laid down in Article 82 has not been complied with.*
- 2. The recognition of a decision in matters of parental responsibility may be refused if it was given without the child who is capable of forming his or her own views having been given an opportunity to express his or her views in accordance with Article 21, except where:*

- (a) *the proceedings only concerned the property of the child and provided that giving such an opportunity was not required in light of the subject matter of the proceedings; or*
- (b) *there were serious grounds taking into account, in particular, the urgency of the case.*

Article 68 – Grounds for refusal of recognition or enforcement

1. *The recognition of an authentic instrument or agreement on legal separation or divorce shall be refused if:*
 - (a) *such recognition is manifestly contrary to the public policy of the Member State in which recognition is invoked;*
 - (b) *it is irreconcilable with a decision, an authentic instrument or agreement between the same parties in the Member State in which recognition is invoked; or*
 - (c) *it is irreconcilable with an earlier decision, authentic instrument or agreement given in another Member State or in a non-Member State between the same parties, provided that the earlier decision, authentic instrument or agreement fulfils the conditions necessary for its recognition in the Member State in which recognition is invoked.*
2. *The recognition or enforcement of an authentic instrument or agreement in matters of parental responsibility shall be refused:*
 - (a) *if such recognition is manifestly contrary to the public policy of the Member State in which recognition is invoked, taking into account the best interests of the child;*
 - (b) *upon application by any person claiming that the authentic instrument or agreement infringes his or her parental responsibility, if the authentic instrument was drawn up or registered, or the agreement was concluded and registered, without that person having been involved;*
 - (c) *if and to the extent that it is irreconcilable with a later decision, authentic instrument or agreement in matters of parental responsibility given in the Member State in which recognition is invoked or enforcement is sought;*
 - (d) *if and to the extent that it is irreconcilable with a later decision, authentic instrument or agreement in matters of parental responsibility given in another Member State or in the non-Member State of the habitual residence of the child provided that the later decision, authentic instrument or agreement fulfils the conditions necessary for its recognition in the Member State in which recognition is invoked or enforcement is sought.*
3. *The recognition or enforcement of an authentic instrument or agreement in matters of parental responsibility may be refused if the authentic instrument was formally drawn up or registered, or the agreement was registered, without the child who is capable of forming his or her own views having been given an opportunity to express his or her views.*

Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations. [Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32009R0004>]

Preamble

(19) *In order to increase legal certainty, predictability and the autonomy of the parties, this Regulation should enable the parties to choose the competent court by agreement on the basis of specific connecting factors. To protect the weaker party, such a choice of court should not be allowed in the case of maintenance obligations towards a child under the age of 18.*

(36) *On account of the costs of proceedings it is appropriate to provide for a very favourable legal aid scheme, that is, full coverage of the costs relating to proceedings concerning maintenance obligations in respect of children under the age of 21 initiated via the Central Authorities. Specific rules should therefore be added to the current rules on legal aid in the European Union which exist by virtue of Directive 2003/8/EC thus setting*

up a special legal aid scheme for maintenance obligations. In this context, the competent authority of the requested Member State should be able, exceptionally, to recover costs from an applicant having received free legal aid and lost the case, provided that the person's financial situation so permits. This would apply, in particular, where someone well-off had acted in bad faith.

Article 4 - Choice of court

1. The parties may agree that the following court or courts of a Member State shall have jurisdiction to settle any disputes in matters relating to a maintenance obligation which have arisen or may arise between them:

(a) a court or the courts of a Member State in which one of the parties is habitually resident;

(b) a court or the courts of a Member State of which one of the parties has the nationality;

(c) in the case of maintenance obligations between spouses or former spouses:

(i) the court which has jurisdiction to settle their dispute in matrimonial matters; or

(ii) a court or the courts of the Member State which was the Member State of the spouses' last common habitual residence for a period of at least one year.

The conditions referred to in points (a), (b) or (c) have to be met at the time the choice of court agreement is concluded or at the time the court is seised.

The jurisdiction conferred by agreement shall be exclusive unless the parties have agreed otherwise.

2. A choice of court agreement shall be in writing. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'.

3. This Article shall not apply to a dispute relating to a maintenance obligation towards a child under the age of 18.

Article 46 - Free legal aid for applications through Central Authorities concerning maintenance to children

1. The requested Member State shall provide free legal aid in respect of all applications by a creditor under Article 56 concerning maintenance obligations arising from a parent-child relationship towards a person under the age of 21.

2. Notwithstanding paragraph 1, the competent authority of the requested Member State may, in relation to applications other than those under Article 56(1)(a) and (b), refuse free legal aid if it considers that, on the merits, the application or any appeal or review is manifestly unfounded.

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. [Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003R2201&from=EN>] Regulation repealed from 1 August 2022.

Preamble

(12) The grounds of jurisdiction in matters of parental responsibility established in the present Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity. This means that jurisdiction should lie in the first place with the Member State of the child's habitual residence, except for certain cases of a change in the child's residence or pursuant to an agreement between the holders of parental responsibility.

(13) In the interest of the child, this Regulation allows, by way of exception and under certain conditions, that the court having jurisdiction may transfer a case to a court of another Member State if this court is better

placed to hear the case. However, in this case the second court should not be allowed to transfer the case to a third court.

Article 11 – Return of the child

1. Where a person, institution or other body having rights of custody applies to the competent authorities in a Member State to deliver a judgment on the basis of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter ‘the 1980 Hague Convention’), in order to obtain the return of a child that has been wrongfully removed or retained in a Member State other than the Member State where the child was habitually resident immediately before the wrongful removal or retention, paragraphs 2 to 8 shall apply.

2. When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity.

3. A court to which an application for return of a child is made as mentioned in paragraph 1 shall act expeditiously in proceedings on the application, using the most expeditious procedures available in national law. Without prejudice to the first subparagraph, the court shall, except where exceptional circumstances make this impossible, issue its judgment no later than six weeks after the application is lodged.

4. A court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return.

5. A court cannot refuse to return a child unless the person who requested the return of the child has been given an opportunity to be heard.

6. If a court has issued an order on non-return pursuant to Article 13 of the 1980 Hague Convention, the court must immediately either directly or through its central authority, transmit a copy of the court order on non-return and of the relevant documents, in particular a transcript of the hearings before the court, to the court with jurisdiction or central authority in the Member State where the child was habitually resident immediately before the wrongful removal or retention, as determined by national law. The court shall receive all the mentioned documents within one month of the date of the non-return order.

7. Unless the courts in the Member State where the child was habitually resident immediately before the wrongful removal or retention have already been seised by one of the parties, the court or central authority that receives the information mentioned in paragraph 6 must notify it to the parties and invite them to make submissions to the court, in accordance with national law, within three months of the date of notification so that the court can examine the question of custody of the child.

Without prejudice to the rules on jurisdiction contained in this Regulation, the court shall close the case if no submissions have been received by the court within the time limit.

8. Notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention, any subsequent judgment which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable in accordance with Section 4 of Chapter III below in order to secure the return of the child.

Article 12 - Prorogation of jurisdiction

1. The courts of a Member State exercising jurisdiction by virtue of Article 3 on an application for divorce, legal separation or marriage annulment shall have jurisdiction in any matter relating to parental responsibility connected with that application where:

(a) at least one of the spouses has parental responsibility in relation to the child;

and

(b) the jurisdiction of the courts has been accepted expressly or otherwise in an unequivocal manner by the spouses and by the holders of parental responsibility, at the time the court is seised, and is in the superior interests of the child.

2. The jurisdiction conferred in paragraph 1 shall cease as soon as:

(a) the judgment allowing or refusing the application for divorce, legal separation or marriage annulment has become final;

(b) in those cases where proceedings in relation to parental responsibility are still pending on the date referred to in (a), a judgment in these proceedings has become final;

(c) the proceedings referred to in (a) and (b) have come to an end for another reason.

Article 15 - Transfer to a court better placed to hear the case

1. By way of exception, the courts of a Member State having jurisdiction as to the substance of the matter may, if they consider that a court of another Member State, with which the child has a particular connection, would be better placed to hear the case, or a specific part thereof, and where this is in the best interests of the child:

(a) stay the case or the part thereof in question and invite the parties to introduce a request before the court of that other Member State in accordance with paragraph 4; or

(b) request a court of another Member State to assume jurisdiction in accordance with paragraph 5. [...]

5. The courts of that other Member State may, where due to the specific circumstances of the case, this is in the best interests of the child, accept jurisdiction within six weeks of their seisure in accordance with paragraph 1(a) or 1(b). In this case, the court first seised shall decline jurisdiction. Otherwise, the court first seised shall continue to exercise jurisdiction in accordance with Articles 8 to 14.

Article 23 – Grounds of non-recognition for judgments relating to parental responsibility

A judgment relating to parental responsibility shall not be recognised:

(a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests of the child;

(b) if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought;

(c) where it was given in default of appearance if the person in default was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defence unless it is determined that such person has accepted the judgment unequivocally;

(d) on the request of any person claiming that the judgment infringes his or her parental responsibility, if it was given without such person having been given an opportunity to be heard;

e) if it is irreconcilable with a later judgment relating to parental responsibility given in the Member State in which recognition is sought;

(f) if it is irreconcilable with a later judgment relating to parental responsibility given in another Member State or in the non-Member State of the habitual residence of the child provided that the later judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought; or

(g) if the procedure laid down in Article 56 has not been complied with.

Article 41 – Right to access

1. *The rights of access referred to in Article 40(1)(a) granted in an enforceable judgment given in a Member State shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with paragraph 2. Even if national law does not provide for enforceability by operation of law of a judgment granting access rights, the court of origin may declare that the judgment shall be enforceable, notwithstanding any appeal.*

2. *The judge of origin shall issue the certificate referred to in paragraph 1 using the standard form in Annex III (certificate concerning rights of access) only if:*

(a) where the judgment was given in default, the person defaulting was served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defense, or, the person has been served with the document but not in compliance with these conditions, it is nevertheless established that he or she accepted the decision unequivocally;

(b) all parties concerned were given an opportunity to be heard; and

(c) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity. The certificate shall be completed in the language of the judgment.

3. *Where the rights of access involve a cross-border situation at the time of the delivery of the judgment, the certificate shall be issued ex officio when the judgment becomes enforceable, even if only provisionally. If the situation subsequently acquires a cross-border character, the certificate shall be issued at the request of one of the parties.*

Article 42 – Return of the child

1. *The return of a child referred to in Article 40(1)(b) entailed by an enforceable judgment given in a Member State shall be recognised and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with paragraph 2.*

Even if national law does not provide for enforceability by operation of law, notwithstanding any appeal, of a judgment requiring the return of the child mentioned in Article 11(b)(8), the court of origin may declare the judgment enforceable.

2. *The judge of origin who delivered the judgment referred to in Article 40(1)(b) shall issue the certificate referred to in paragraph 1 only if:*

(a) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity;

(b) the parties were given an opportunity to be heard; and

(c) the court has taken into account in issuing its judgment the reasons for and evidence underlying the order issued pursuant to Article 13 of the 1980 Hague Convention.

In the event that the court or any other authority takes measures to ensure the protection of the child after its return to the State of habitual residence, the certificate shall contain details of such measures.

The judge of origin shall of his or her own motion issue that certificate using the standard form in Annex IV (certificate concerning return of the child(ren)).

The certificate shall be completed in the language of the judgment.

3. European Union Directives

Council of the European Union, Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters. [Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1437981174293&uri=CELEX:32008L0052>]

Article 7 - Confidentiality of mediation

1. *Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except:*

(a) where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or

(b) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.

2. *Nothing in paragraph 1 shall preclude Member States from enacting stricter measures to protect the confidentiality of mediation.*

Council of the European Union and Parliament, Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC. [Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32004L0038>]

Article 1 - Subject

This Directive lays down:

- (a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members;*
- (b) the right of permanent residence in the territory of the Member States for Union citizens and their family members;*
- (c) the limits placed on the rights set out in (a) and (b) on grounds of public policy, public security or public health.*

Article 12(3) – Retention of the right of residence by family members in the event of death or departure of the Union citizen

3. *The Union citizen's departure from the host Member State or his/her death shall not entail loss of the right of residence of his/her children or of the parent who has actual custody of the children, irrespective of nationality, if the children reside in the host Member State and are enrolled at an educational establishment, for the purpose of studying there, until the completion of their studies.*

Article 13 – Retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership

1. *Without prejudice to the second subparagraph, divorce, annulment of the Union citizen's marriage or termination of his/her registered partnership, as referred to in point 2(b) of Article 2 shall not affect the right of residence of his/her family members who are nationals of a Member State.*

Before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1).

2. *Without prejudice to the second subparagraph, divorce, annulment of marriage or termination of the registered partnership referred to in point 2(b) of Article 2 shall not entail loss of the right of residence of a Union citizen's family members who are not nationals of a Member State where:*

- (a) prior to initiation of the divorce or annulment proceedings or termination of the registered partnership referred to in point 2(b) of Article 2, the marriage or registered partnership has lasted at least three years, including one year in the host Member State; or*
- (b) by agreement between the spouses or the partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has custody of the Union citizen's children; or*
- (c) this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting; or*
- (d) by agreement between the spouses or partners referred to in point 2(b) of Article 2 or by court order, the spouse or partner who is not a national of a Member State has the right of access to a minor child, provided that the court has ruled that such access must be in the host Member State, and for as long as is required.*

Before acquiring the right of permanent residence, the right of residence of the persons concerned shall remain subject to the requirement that they are able to show that they are workers or self-employed persons or that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State, or that they are members of the family, already constituted in the host Member State, of a person satisfying these requirements. "Sufficient resources" shall be as defined in Article 8(4).

Such family members shall retain their right of residence exclusively on personal basis.

Article 14 – Retention of the right of residence

1. *Union citizens and their family members shall have the right of residence provided for in Article 6, as long as they do not become an unreasonable burden on the social assistance system of the host Member State.*

2. *Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein.*

In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.

3. *An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State.*

4. *By way of derogation from paragraphs 1 and 2 and without prejudice to the provisions of Chapter VI, an expulsion measure may in no case be adopted against Union citizens or their family members if:*

- (a) the Union citizens are workers or self-employed persons, or*
- (b) the Union citizens entered the territory of the host Member State in order to seek employment. In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.*

Council of the European Union, Directive 2003/86/EC of 22 September 2003 on the right to family reunification. [Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003L0086&from=EN>]

Article 4

1. The Member States shall authorise the entry and residence, pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, as well as in Article 16, of the following family members:

(a) the sponsor's spouse;

(b) the minor children of the sponsor and of his/her spouse, including children adopted in accordance with a decision taken by the competent authority in the Member State concerned or a decision which is automatically enforceable due to international obligations of that Member State or must be recognised in accordance with international obligations;

(c) the minor children including adopted children of the sponsor where the sponsor has custody and the children are dependent on him or her. Member States may authorise the reunification of children of whom custody is shared, provided the other party sharing custody has given his or her agreement;

(d) the minor children including adopted children of the spouse where the spouse has custody and the children are dependent on him or her. Member States may authorise the reunification of children of whom custody is shared, provided the other party sharing custody has given his or her agreement.

The minor children referred to in this Article must be below the age of majority set by the law of the Member State concerned and must not be married. By way of derogation, where a child is aged over 12 years and arrives independently from the rest of his/her family, the Member State may, before authorising entry and residence under this Directive, verify whether he or she meets a condition for integration provided for by its existing legislation on the date of implementation of this Directive.

2. The Member States may, by law or regulation, authorise the entry and residence, pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, of the following family members:

(a) first-degree relatives in the direct ascending line of the sponsor or his or her spouse, where they are dependent on them and do not enjoy proper family support in the country of origin;

(b) the adult unmarried children of the sponsor or his or her spouse, where they are objectively unable to provide for their own needs on account of their state of health.

3. The Member States may, by law or regulation, authorise the entry and residence, pursuant to this Directive and subject to compliance with the conditions laid down in Chapter IV, of the unmarried partner, being a third country national, with whom the sponsor is in a duly attested stable long-term relationship, or of a third country national who is bound to the sponsor by a registered partnership in accordance with Article 5(2), and of the unmarried minor children, including adopted children, as well as the adult unmarried children who are objectively unable to provide for their own needs on account of their state of health, of such persons. Member States may decide that registered partners are to be treated equally as spouses with respect to family reunification.

4. In the event of a polygamous marriage, where the sponsor already has a spouse living with him in the territory of a Member State, the Member State concerned shall not authorise the family reunification of a further spouse.

By way of derogation from paragraph 1(c), Member States may limit the family reunification of minor children of a further spouse and the sponsor.

5. *In order to ensure better integration and to prevent forced marriages Member States may require the sponsor and his/her spouse to be of a minimum age, and at maximum 21 years, before the spouse is able to join him/her.*

6. *By way of derogation, Member States may request that the applications concerning family reunification of minor children have to be submitted before the age of 15, as provided for by its existing legislation on the date of the implementation of this Directive. If the application is submitted after the age of 15, the Member States which decide to apply this derogation shall authorise the entry and residence of such children on grounds other than family reunification.*

Article 15(3)

3. *In the event of widowhood, divorce, separation, or death of first-degree relatives in the direct ascending or descending line, an autonomous residence permit may be issued, upon application, if required, to persons who have entered by virtue of family reunification. Member States shall lay down provisions ensuring the granting of an autonomous residence permit in the event of particularly difficult circumstances.*

4. Council of Europe recommendations and resolutions

a. Council of Europe Committee of Ministers Recommendations

Council of Europe, Recommendation CM/Rec(2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents. [Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016807b3175]

II. Basic principles

2. *Where a custodial sentence is being contemplated, the rights and best interests of any affected children should be taken into consideration and alternatives to detention be used as far as possible and appropriate, especially in the case of a parent who is a primary caregiver.*

Council of Europe, Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, adopted on 17 November 2010. [Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016804b2cf3]

III. Fundamental principles

B. Best interests of the child

1. *Member states should guarantee the effective implementation of the right of children to have their best interests be a primary consideration in all matters involving or affecting them.*

2. *In assessing the best interests of the involved or affected children:*

- a. *their views and opinions should be given due weight;*
- b. *all other rights of the child, such as the right to dignity, liberty and equal treatment should be respected at all times;*
- c. *a comprehensive approach should be adopted by all relevant authorities so as to take due account of all interests at stake, including psychological and physical well-being and legal, social and economic interests of the child.*

3. *The best interests of all children involved in the same procedure or case should be separately assessed and balanced with a view to reconciling possible conflicting interests of the children.*

4. *While the judicial authorities have the ultimate competence and responsibility for making the final decisions, member states should make, where necessary, concerted efforts to establish multidisciplinary approaches with the objective of assessing the best interests of children in procedures involving them.*

E. Rule of law

2. *Elements of due process such as the principles of legality and proportionality, the presumption of innocence, the right to a fair trial, the right to legal advice, the right to access to courts and the right to appeal, should be guaranteed for children as they are for adults and should not be minimised or denied under the pretext of the child's best interests. This applies to all judicial and nonjudicial and administrative proceedings.*

IV. Child-friendly justice before, during and after judicial proceedings

A. General elements of child-friendly justice

5. Multidisciplinary approach

17. *A common assessment framework should be established for professionals working with or for children (such as lawyers, psychologists, physicians, police, immigration officials, social workers and mediators) in proceedings or interventions that involve or affect children to provide any necessary support to those taking decisions, enabling them to best serve children's interests in a given case.*

B. Child-friendly justice before judicial proceedings

24. *Alternatives to judicial proceedings such as mediation, diversion (of judicial mechanisms) and alternative dispute resolution should be encouraged whenever these may best serve the child's best interests. The preliminary use of such alternatives should not be used as an obstacle to the child's access to justice.*

D. Child-friendly justice during judicial proceedings

3. Right to be heard and to express views

47. *A child should not be precluded from being heard solely on the basis of age. Whenever a child takes the initiative to be heard in a case that affects him or her, the judge should not, unless it is in the child's best interests, refuse to hear the child and should listen to his or her views and opinion on matters concerning him or her in the case.*

4. Avoiding undue delay

50. *In all proceedings involving children, the urgency principle should be applied to provide a speedy response and protect the best interests of the child, while respecting the rule of law.*

V. Promoting other child-friendly actions

Member states are encouraged to: [...]

1. *ensure that all concerned professionals working in contact with children in justice systems receive appropriate support and training, and practical guidance in order to guarantee and implement adequately the rights of children, in particular while assessing children's best interests in all types of procedures involving or affecting them.*

**Council of Europe, Recommendation Rec(98)1 of the Committee of Ministers to member States
on family mediation.** [Available at:

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804ecb6e>]

Preamble

2. Recognising the growing number of family disputes, particularly those resulting from separation or divorce, and noting the detrimental consequences of conflict for families and the high social and economic cost to states;

3. Considering the need to ensure the protection of the best interests and welfare of the child as enshrined in international instruments, especially taking into account problems concerning custody and access arising as a result of a separation or divorce;

5. Acknowledging the special characteristics of family disputes, namely:

- the fact that family disputes involve persons who, by definition, will have interdependent and continued relationships;*
- the fact that family disputes arise in a context of distressing emotions and increase them;*
- the fact that separation and divorce impact on all the members of the family, especially children;*

7. Taking into account the results of research into the use of mediation and experiences in this area in several countries, which show that the use of family mediation has the potential to:

- improve communication between members of the family;*
- reduce conflict between parties in dispute;*
- produce amicable settlements;*
- provide continuity of personal contacts between parents and children;*

III. Process of mediation

States should ensure that there are appropriate mechanisms to enable the process of mediation to be conducted according to the following principles: [...]

viii. the mediator should have a special concern for the welfare and best interests of the children, should encourage parents to focus on the needs of children and should remind parents of their prime responsibility relating to the welfare of their children and the need for them to inform and consult their children;

Council of Europe, Recommendation Rec(95)6 of the Committee of Ministers to member States on the application of the European Convention on recognition and enforcement of decisions concerning custody of children and on restoration of custody of children. [Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680504c6e]

Preamble

Realising that a delay in the repatriation of a child may occur when neither parent is able or willing to pay for the costs of the repatriation and may result in the child being placed in care until the repatriation can take place; [...]

Agreeing on the need to resolve matters relating to the repatriation of children as soon as possible and in the best interests of the children themselves, [...]

Council of Europe, Recommendation Rec(91)9 of the Committee of Ministers to member States on emergency measures in family matters. [Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804bfa85]

Preamble

Noting that, in many cases, the courts and other competent authorities dealing with family matters do not succeed in providing rapid solutions where the interests of children and other persons in need of special protection and assistance are in serious danger;

Recognising that existing emergency measures do not always enable the courts and other competent bodies to deal satisfactorily with certain urgent cases and in particular with cases where children have been improperly removed or their welfare is in serious danger; [...]

Principle 1

Courts and other competent authorities dealing with family matters should have sufficient emergency powers and resources to protect children and other persons in need of special protection and assistance and whose interests are in serious danger.

Particular protection should be given to a child whose welfare is in serious danger owing to neglect or any other physical or mental ill-treatment or who has been or may be improperly removed from a person entitled to custody.

Principle 3

1. Simple and expeditious procedures should be available to ensure that decisions are reached very quickly. To this end, the following measures could be used:

- lodging a request by simple application;*
- allowing a court or competent authority to act on its own motion;*
- provisional measures taken without a hearing;*
- using all modern communication technology to facilitate the introduction and conduct of any proceedings, the transmission of requests and exchanges of information between courts and other competent authorities and the different parties to the proceedings;*
- allowing the court or competent authority to play an active role in conducting the case and in calling for and taking evidence;*
- preventing any party from improperly delaying emergency measures.*

2. National authorities should ensure that information on emergency measures is given to the public and to those to whom a person in need of such measures may turn for help.

3. Legal aid and advice should be provided rapidly when required.

4. Courts and other competent authorities should have the power to grant decisions which are immediately enforceable.

5. Courts and other competent authorities should be given sufficient powers to ensure that their decisions are rapidly enforced.

Council of Europe, Recommendation Rec(84)4 of the Committee of Ministers to member States on parental responsibilities. [Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016804de2e4]

Principle 2

Any decision of the competent authority concerning the attribution of parental responsibilities or the way in which these responsibilities are exercised should be based primarily on the interests of the child. However, the equality between parents should also be respected and no discrimination should be made, in particular on grounds of sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Principle 3

When the competent authority is required to take a decision relating to the attribution or exercise of parental responsibilities and affecting the essential interests of the children, the latter should be consulted if their degree of maturity with regard to the decision so permits.

Principle 5

Parental responsibilities for a child of their marriage should belong jointly to both parents.

Principle 6

In the case of a dissolution of the marriage or of a separation of the parents, the competent authority requested to intervene should rule on the exercise of parental responsibilities. It should accordingly take any appropriate measures, for example by dividing the exercise of the responsibilities between the two parents or, where the parents consent, by providing that the responsibilities should be exercised jointly. In taking its decision, the authority should take account of any agreement concluded between the parents provided it is not contrary to the interests of the children.

Principle 7

- 1. Where the child is born out of wedlock and a legal filiation link is established with regard to one parent only, the parental responsibilities should belong to that parent.*
- 2. Where the child is born out of wedlock and a legal filiation link is established with regard to both parents, national law may provide that the parental responsibilities should be exercised:*
 - a. subject to the provisions of Principle 8:*
 - i. by the mother alone;*
 - ii. by the father alone, when a decision has been taken by the competent authority or when an agreement has been concluded between the two parents;*
 - b. according to the division between the two parents decided by the competent authority;*
 - c. jointly by both parents if they live together or if an agreement has been concluded between them.*

Principle 8

In all cases both parents should be under a duty to maintain the child. The parent with whom the child does not live should have at least the possibility of maintaining personal relationships with the child unless such relationships would be seriously harmful to the interests of the child.

Principle 10

1. *Where parental responsibilities are exercised jointly by both parents, any decision affecting the interests of the child should be taken by the agreement of both.*
2. *Where there is a disagreement and the matter is referred to the competent authority by one of the parents, this authority should, insofar as the interests of the child so require, try to reconcile the parents, and, if this fails, take the appropriate decision.*
3. *With regard to third parties, the agreement of both parents should be presumed except in cases where national law, having regard to the importance of the interests at stake, requires an express agreement.*

Principle 11

Each parent should normally be informed of the exercise of the responsibilities which have not been given to him, to the extent desired by him and, in any event, when the essential interests of the child are affected.

Council of Europe, Resolution Res(78)37 of the Committee of Ministers on equality of spouses in civil law. [Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016804e8e9e]

[The Committee of Ministers recommends the governments of member states]:

18. *to take all necessary steps to grant both spouses equal rights and obligations in respect of the children of the marriage and children adopted by them in particular in the following matters:*

- i. *the use, administration, receipt of profits, disposal of the property or income of the child;*
- ii. *the legal representation of the child;*
- iii. *decisions concerning the personal life of the child, in particular matters relating to education, religion, health, travel, consent to marriage, adoption, choice of the first name or first names of the child, access and other rights and obligations concerning the child itself;*
- iv. *the contribution of spouses towards the maintenance of their children according to the means of each spouse;*

19. *to take all necessary steps to ensure that, in the case of separation and after the dissolution of the marriage, the rights and obligations granted to spouses or former spouses concerning their common children, shall be given without any discrimination based on the sex of the parents;*

b. Council of Europe Parliamentary Assembly Resolutions

Council of Europe, Parliamentary Assembly Resolution 2207 (2018) on Gender equality and child maintenance. [Available at: <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?fileid=24534&lang=EN&search=YWx0ZXJuYXRpdmUgY2FyZSBjaGlsZHJlbnxjYXRlZ29yeV9zdHJfZW46IkFkb3B0ZWQgdGV4dCI=>]

7. *In the light of these considerations, the Assembly calls on Council of Europe member and observer States and States whose parliaments enjoy observer status with the Assembly to:*

7.2. *as regards non-compliance with child-maintenance payments:*

7.2.1. *in the best interests of the child, introduce effective substitute maintenance mechanisms, based on advance payment by the State in case of non-compliance or partial or irregular compliance with maintenance payment obligations, whether this lack of compliance is intentional or not. Advance payment should be made upon request and be granted within a reasonable time frame with no or minimal fees for the recipient;*

- 7.2.2. ensure adequate and sustainable funding for substitute maintenance payment and adequate investment in the relevant structures for case management, including for the recoupment from the debtor of the sums advanced by the State;*
- 7.2.3. introduce effective sanctions for child-maintenance avoidance (intentional noncompliance or partial or irregular compliance with payments), including criminal sanctions when it amounts to a form of psychological violence, in line with the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (CETS No. 210, "Istanbul Convention");*
- 7.2.4. prevent child-maintenance avoidance by working closely with tax and financial investigative departments;*
- 7.2.5. promote a "culture of paying", by conducting information and awareness-raising activities on the harmful consequences of failed, partial or delayed payments on children and parents with day-to-day care responsibilities, also with a view to preventing debt accumulation;*
- 7.2.6. promote mediation between separated parents as a means of overcoming conflicts over child-maintenance payments;*
- 7.5. strengthen international co-operation in the area of child maintenance with a view to facilitating the recovery of payments and exchanging relevant good practices.*

Council of Europe, Parliamentary Assembly Resolution 2194 (2017) on Cross-border parental responsibility conflicts. [Available at: <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?fileid=24272&lang=EN&search=YWx0ZXJuYXRpdmUgY2FyZSBjaGlzZHJlbncjYXRlZ29yeV9zdHJfZW46IkFkb3B0ZWQgdGV4dCI=>]

2. The international and European legal instruments which govern these situations are based on the concept of a fair balance being struck between competing interests (those of the child, of the two parents and of public order), while guaranteeing the primacy of the child's best interests. The objectives of preventing child abduction and the immediate return of abducted children have been judged by the European Court of Human Rights to correspond to a specific conception of "the best interests of the child" in this context.

5. The Parliamentary Assembly thus recommends that Council of Europe member States make the enforcement of a parental responsibility decision abroad simpler, speedier and less costly, by:

- 5.1. helping to widen the geographical scope of the key legal instruments and ensure their proper application in all countries bound by them, including their own (for example, by making information widely available to the general public and professionals concerned);*
- 5.2. streamlining the processing of cases of child abduction or retention in the context of crossborder parental responsibility conflicts, including by limiting the number of appeals possible and by doing away with onerous requirements of exequatur for the enforcement of decisions taken;*
- 5.3. finding a way to better deal with cases in which the primary or sole carer abducts or does not return the child or children concerned, by giving particular weight to their views in such cases;*
- 5.4. seeking to guarantee that the views of the child or children concerned are heard and taken into account in an adequate manner in all cases;*
- 5.5. ensuring the proper specialisation of professionals concerned and good co-operation between the central authority and other national authorities;*
- 5.6. promoting properly (and internationally) recognised mediation services and agreements in crossborder parental responsibility conflicts.*

Council of Europe, Parliamentary Assembly Resolution 2079 (2015) on Equality and shared parental responsibility: the role of fathers. [Available at: <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?fileid=22220&lang=EN&search=cGFyZW50YWwgc2VwYXJhdGlvbXNjYXRlZ29yeV9zdHJfZW46lkFkb3B0ZWQgdGV4dCI=>]

2. *Shared parental responsibility implies that parents have rights, duties and responsibilities with regard to their children. The fact is, however, that fathers are sometimes faced with laws, practices and prejudices which can cause them to be deprived of sustained relationships with their children. In its Resolution 1921 (2013) on gender equality, reconciliation of private and working life and co-responsibility, the Assembly called on the authorities of the member States to respect the right of fathers to enjoy shared responsibility by ensuring that family law foresees, in case of separation or divorce, the possibility of joint custody of children, in their best interests, based on mutual agreement between the parents.*

3. *The Assembly wishes to point out that respect for family life is a fundamental right enshrined in Article 8 of the European Convention on Human Rights (ETS No. 5) and numerous international legal instruments. For a parent and child, being together is an essential part of family life. Parent–child separation has irremediable effects on their relationship. Such separation should only be ordered by a court and only in exceptional circumstances entailing grave risks to the interest of the child.*

5. *In the light of these considerations, the Assembly calls on the member States to: [...]*

5.5. *introduce into their laws the principle of shared residence following a separation, limiting any exceptions to cases of child abuse or neglect, or domestic violence, with the amount of time for which the child lives with each parent being adjusted according to the child's needs and interests;*

5.6. *respect the right of children to be heard in all matters that affect them when they are deemed to have a sufficient understanding of the matters in question;*

5.7. *take shared residence arrangements into account when awarding social benefits;*

5.8. *take all necessary steps to ensure that decisions relating to children's residence and to access rights are fully enforced, particularly by following up complaints with respect to failure to hand over a child;*

5.9. *encourage and, where appropriate, develop mediation within the framework of judicial proceedings in family cases involving children, in particular by instituting a court-ordered mandatory information session, in order to make the parents aware that shared residence may be an appropriate option in the best interests of the child, and to work towards such a solution, by ensuring that mediators receive appropriate training and by encouraging multidisciplinary co-operation based on the "Cochem model";*

5.10. *ensure that the professionals who come into contact with children during court proceedings in family cases receive the necessary interdisciplinary training on the specific rights and needs of children of different age groups, as well as on proceedings that are adapted to them, in accordance with the Council of Europe Guidelines on child-friendly justice;*

Council of Europe, Parliamentary Assembly Resolution 1714 (2010) on Children who witness domestic violence. [Available at: <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?fileid=17826&lang=EN&search=YWx0ZXJuYXRpdmUgY2FyZSBjaGlzZHJlbXNjYXRlZ29yeV9zdHJfZW46lkFkb3B0ZWQgdGV4dCI=>]

6. *The Assembly further invites Council of Europe member states to:*

6.4. *strengthen the special consideration in legal and administrative procedures for children having witnessed domestic violence, for example by:*

6.4.2. *providing the children concerned with physical protection during relevant proceedings and through custody and contact rights following situations of domestic violence;*

6.4.5. *taking into account the best interest of the child who has witnessed domestic violence when ruling on parental authority and contact of the author of domestic violence with the child concerned;*

Council of Europe, Parliamentary Assembly Resolution 1291 (2002) on International abduction of children by one of the parents. [Available at: <http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?fileid=17022&lang=EN&search=YWx0ZXJuYXRpdmUgY2FyZSBjaGlsZHJlbnxiYXRIZ29yeV9zdHJfZW46lkFkb3B0ZWQgdGV4dCI=>]

2. It points out that, under the United Nations Convention on the Rights of the Child all children have the right to maintain regular personal relations with both parents; abduction by a parent is a denial of the child's rights; abducted children are deprived of one of their parents and their wider family; they are often cut off from their mother tongue and part of their cultural background; parents are helpless when faced with complex formalities, different procedures and the cost of action on their part, and so forth. Even if children are returned, they are marked by the abduction for the rest of their lives.

5. It urges each Council of Europe member state to:

make abduction by a parent of a child under 16 years of age a crime and punish it as such;

provide appropriate training for all people working in this field (police, lawyers, judges) and in particular for specialists investigating the disappearance of children;

promote family mediation as a means of preventing parental child abduction and helping to resolve family conflicts;

at national level, give only a small number of specialised courts, and perhaps only one, jurisdiction to deal with cases of parental child abduction in order to ensure that such cases are concentrated and dealt with more rapidly by well-informed judges and that decisions are consistent;

7. Within the framework of their bilateral relations and also with the non-Council of Europe countries concerned, member states should set up mediation boards or other similar bodies to deal with all pending cases of conflict involving parental child abduction as rapidly as possible and propose solutions in the objective interests of the children concerned.

5. International and European judgments

Issues relating to the best interests of the child in parental separation fall under or are grounded in Article 8 ECHR.

[Chbihi Loudoudi and Others v. Belgium](#), No. 52265/10, 16 December 2014, para. 131. [Text only available in French]

131. Il ressort au surplus de la jurisprudence de la Cour que, lorsque des mineurs d'âge sont concernés, l'intérêt « supérieur » de l'enfant doit constituer la principale considération des autorités nationales dans l'évaluation de la proportionnalité aux fins de la Convention (paragraphe 92, ci-dessus ; voir, parmi d'autres, Nunez, précité, § 84, Kanagaratnam c. Belgique, no 15297/09, § 67, 13 décembre 2011, et Popov c. France, nos 39472/07 et 39474/07, § 109, 19 janvier 2012 et Jeunesse, précité, § 109).

[Hokkanen v. Finland](#), No. 19823/92, 23 September 1994, para. 58.

58. The Court recalls that the obligation of the national authorities to take measures to facilitate reunion is not absolute, since the reunion of a parent with a child who has lived for some time with other persons may not be able to take place immediately and may require preparatory measures being taken to this effect. The nature and extent of such preparation will depend on the circumstances of each case, but the understanding and co-operation of all concerned will always be an important ingredient. Whilst national authorities must do their utmost to facilitate such co-operation, any obligation to apply coercion in this area must be limited since the interests as well as the rights and freedoms of all concerned must be taken into account, and more particularly the best interests of the child and his or her rights under Article 8 (art. 8) of the Convention. Where contacts with the parent might appear to threaten those interests or interfere with those rights, it is for the national authorities to strike a fair balance between them (see the above-mentioned *Olsson* (no. 2) judgment, pp. 35-36, para. 90).

[Ignaccolo-Zenide v. Romania](#), No. 31679/96, 25 January 2000, para. 94.

94. That being so, it must be determined whether there has been a failure to respect the applicant's family life. The Court reiterates that the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There are in addition positive obligations inherent in an effective "respect" for family life. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see the *Keegan v. Ireland* judgment of 26 May 1994, Series A no. 290, p. 19, § 49).

As to the State's obligation to take positive measures, the Court has repeatedly held that Article 8 includes a parent's right to the taking of measures with a view to his or her being reunited with his or her child and an obligation on the national authorities to take such action (see, for example, the following judgments: *Eriksson v. Sweden*, 22 June 1989, Series A no. 156, pp. 26-27, § 71; *Margareta and Roger Andersson v. Sweden*, 25 February 1992, Series A no. 226-A, p. 30, § 91; *Olsson v. Sweden* (no. 2), 27 November 1992, Series A no. 250, pp. 35-36, § 90; and *Hokkanen v. Finland*, 23 September 1994, Series A no. 299-A, p. 20, § 55).

However, the national authorities' obligation to take measures to facilitate reunion is not absolute, since the reunion of a parent with children who have lived for some time with the other parent may not be able to take place immediately and may require preparatory measures to be taken. The nature and extent of such preparation will depend on the circumstances of each case, but the understanding and cooperation of all concerned are always an important ingredient. Whilst national authorities must do their utmost to facilitate such cooperation, any obligation to apply coercion in this area must be limited since the interests as well as the rights and freedoms of all concerned must be taken into account, and more particularly the best interests of the child and his or her rights under Article 8 of the Convention. Where contacts with the parent might appear to threaten those interests or interfere with those rights, it is for the national authorities to strike a fair balance between them (see the *Hokkanen* judgment cited above, p. 22, § 58).

[Keegan v. Ireland](#), No. 16969/90, 26 May 1994, para. 49.

49. The Court recalls that the essential object of Article 8 (art. 8) is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in an effective "respect" for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, none the less, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see, for example, the *Powell and Rayner v. the United Kingdom* judgment of 21 February 1990, Series A no. 172, p. 18, para. 41, and the above-mentioned *Johnston and Others* judgment, p. 25, para. 55).

[Babiarz v. Poland](#), No. 1955/10, 10 January 2017, para. 46-47.

46. The Court observes that the applicant's complaint about the alleged breach of his rights guaranteed by Articles 8 and 12 of the Convention is based on the same fact, namely the courts' refusal to grant him a divorce (see *Ivanov and Petrova v. Bulgaria*, no. 15001/04, §§ 55 et seq., 14 June 2011).

47. In so far as the applicant relies on Article 8 of the Convention, the Court reiterates that while the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see *Mikulić v. Croatia*, no. 53176/99, § 57, ECHR 2002-I). However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are nonetheless similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests (see *S.H. and Others v. Austria [GC]*, no. 57813/00, § 87, ECHR 2011-V); and in both contexts the State enjoys a certain margin of appreciation (see, among other authorities, *Mizzi v. Malta*, no. 26111/02, § 106, ECHR 2006-I (extracts) and *Jeunesse v. the Netherlands [GC]*, no. 12738/10, § 106, ECHR 2014). In the area of framing their divorce laws and implementing them in concrete cases, the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention and to reconcile the competing personal interests at stake (compare and contrast, *Johnston and Others*, cited above, § 55).

[Fröhlich v. Germany](#), No. 16112/15, 26 July 2018, para. 41.

41. The Court also reiterates that the member States' margin of appreciation is wide in respect of the determination of a child's legal status, but is more limited regarding questions of contact and information rights (*A.I. v. Poland*, no. 28609/08, § 68, 18 February 2014; *L.D. and P.K. v. Bulgaria*, nos. 7949/11 and 45522/13, 59, 8 December 2016). There will, however, usually be a wide margin of appreciation if the State is required to strike a balance between competing private and public interests or Convention rights (*S.H. and Others v. Austria [GC]*, no. 57813/00, § 94, 3 November 2011; *Mandet v. France*, no. 30955/12, § 52, 14 January 2016 with further references).

[Sahin v. Germany](#), No. 30943/96, 8 July 2003, para. 65.

65. The margin of appreciation to be accorded to the competent national authorities will vary in accordance with the nature of the issues and the importance of the interests at stake. Thus, the Court has recognised that the authorities enjoy a wide margin of appreciation when deciding on custody matters. However, a stricter scrutiny is called for as regards any further limitations, such as restrictions placed by those authorities on parental rights of access, and as regards any legal safeguards designed to secure the effective protection of the right of parents and children to respect for their family life. Such further limitations entail the danger that the family relations between a young child and one or both parents would be effectively curtailed (see *Elsholz v. Germany [GC]*, no. 25735/94, § 49, ECHR 2000-VIII, and *Kutzner*, cited above, § 67).

[Sommerfeld v. Germany](#), No. 31871/96, 8 July 2003, para. 63.

63. The margin of appreciation to be accorded to the competent national authorities will vary in accordance with the nature of the issues and the importance of the interests at stake. Thus, the Court has recognised that the authorities enjoy a wide margin of appreciation, in particular when deciding on custody. However, a stricter scrutiny is called for as regards any further limitations, such as restrictions placed by those authorities on parental rights of access, and as regards any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life. Such further limitations entail the danger that the family relations between a young child and one or both parents would be effectively curtailed (see *Elsholz v. Germany [GC]*, no. 25735/94, § 49, ECHR 2000-VIII; and *Kutzner*, cited above, § 67).

[Elsholz v. Germany](#), No. 25735/94, 13 July 2000, para. 49-50.

49. *The margin of appreciation to be accorded to the competent national authorities will vary in accordance with the nature of the issues and the importance of the interests at stake. Thus, the Court recognises that the authorities enjoy a wide margin of appreciation, in particular when assessing the necessity of taking a child into care. However, a stricter scrutiny is called for in respect of any further limitations, such as restrictions placed by those authorities on parental rights of access, and of any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life. Such further limitations entail the danger that the family relations between the parents and a young child would be effectively curtailed (see the Johansen judgment cited above, pp. 1003-04, § 64).*

50. *The Court further recalls that a fair balance must be struck between the interests of the child and those of the parent (see, for example, the Olsson v. Sweden judgment (no. 2) of 27 November 1992, Series A no. 250, pp. 35-36, § 90) and that in doing so particular importance must be attached to the best interests of the child which, depending on their nature and seriousness, may override those of the parent. In particular, the parent cannot be entitled under Article 8 of the Convention to have such measures taken as would harm the child's health and development (see the Johansen judgment cited above, pp. 1008-09, § 78).*

[Strand Lobben and others v. Norway](#), No. 37283/13, 10 September 2019, para. 202-213.

202. *The first paragraph of Article 8 of the Convention guarantees to everyone the right to respect for his or her family life. As is well established in the Court's case-law, the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life, and domestic measures hindering such enjoyment amount to an interference with the right protected by this provision. Any such interference constitutes a violation of this Article unless it is "in accordance with the law", pursues an aim or aims that is or are legitimate under its second paragraph and can be regarded as "necessary in a democratic society" (see, among other authorities, K. and T. v. Finland [GC], no. 25702/94, § 151, ECHR 2001-VII; and Johansen, cited above, § 52).*

203. *In determining whether the latter condition was fulfilled, the Court will consider whether, in the light of the case as a whole, the reasons adduced to justify that measure were relevant and sufficient for the purposes of paragraph 2 of Article 8 (see, among many other authorities, Paradiso and Campanelli, cited above, § 179). The notion of necessity further implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued, regard being had to the fair balance which has to be struck between the relevant competing interests (ibid., § 181).*

204. *In so far as the family life of a child is concerned, the Court reiterates that there is a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests are of paramount importance (see, among other authorities, Neulinger and Shuruk v. Switzerland [GC], no. 41615/07, § 135, ECHR 2010). Indeed, the Court has emphasised that in cases involving the care of children and contact restrictions, the child's interests must come before all other considerations (see Jovanovic, cited above, § 77, and Gnahoré v. France, no. 40031/98, § 59, ECHR 2000-IX).*

205. *At the same time, it should be noted that regard for family unity and for family reunification in the event of separation are inherent considerations in the right to respect for family life under Article 8. Accordingly, in the case of imposition of public care restricting family life, a positive duty lies on the authorities to take measures to facilitate family reunification as soon as reasonably feasible (K. and T. v. Finland, cited above, § 178).*

206. *In instances where the respective interests of a child and those of the parents come into conflict, Article 8 requires that the domestic authorities should strike a fair balance between those interests and that, in the balancing process, particular importance should be attached to the best interests of the child which, depending on their nature and seriousness, may override those of the parents (see, for instance, Sommerfeld v. Germany [GC], no. 31871/96, § 64, ECHR 2003-VIII (extracts)), and the references therein).*

207. Generally, the best interests of the child dictate, on the one hand, that the child's ties with its family must be maintained, except in cases where the family has proved particularly unfit, since severing those ties means cutting a child off from its roots. It follows that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, if and when appropriate, to "rebuild" the family (see *Gnahoré*, cited above, § 59). On the other hand, it is clearly also in the child's interest to ensure its development in a sound environment, and a parent cannot be entitled under Article 8 to have such measures taken as would harm the child's health and development (see, among many other authorities, *Neulinger and Shuruk*, cited above, § 136; *Elsholz v. Germany* [GC], no. 25735/94, § 50, ECHR 2000-VIII; and *Maršálek v. the Czech Republic*, no. 8153/04, § 71, 4 April 2006). An important international consensus exists to the effect that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child (see Article 9 § 1 of the United Nations Convention on the Rights of the Child, recited in paragraph 134 above). In addition, it is incumbent on the Contracting States to put in place practical and effective procedural safeguards for the protection of the best interests of the child and to ensure their implementation (see the United Nations Committee on the Rights of the Child General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, paragraphs 85 and 87, quoted at paragraph 136 above).

208. Another guiding principle is that a care order should be regarded as a temporary measure, to be discontinued as soon as circumstances permit, and that any measures implementing temporary care should be consistent with the ultimate aim of reuniting the natural parents and the child (see, for instance, *Olsson v. Sweden* (no. 1), 24 March 1988, § 81, Series A no. 130). The above-mentioned positive duty to take measures to facilitate family reunification as soon as reasonably feasible will begin to weigh on the competent authorities with progressively increasing force as from the commencement of the period of care, subject always to its being balanced against the duty to consider the best interests of the child (see, for example, *K. and T. v. Finland*, cited above, § 178). In this type of case the adequacy of a measure is to be judged by the swiftness of its implementation, as the passage of time can have irremediable consequences for relations between the child and the parent with whom it does not live (see, *inter alia*, *S.H. v. Italy*, no. 52557/14, § 42, 13 October 2015). Thus, where the authorities are responsible for a situation of family breakdown because they have failed in their above-mentioned obligation, they may not base a decision to authorise adoption on the grounds of the absence of bonds between the parents and the child (see *Pontes v. Portugal*, no. 19554/09, §§ 92 and 99, 10 April 2012). Furthermore, the ties between members of a family and the prospects of their successful reunification will perforce be weakened if impediments are placed in the way of their having easy and regular access to each other (see *Scozzari and Giunta*, cited above, § 174; and *Olsson* (No. 1), cited above, § 81). However, when a considerable period of time has passed since the child was originally taken into public care, the interest of a child not to have his or her *de facto* family situation changed again may override the interests of the parents to have their family reunited (see *K. and T. v. Finland*, cited above, § 155).

209. As regards replacing a foster home arrangement with a more far-reaching measure such as deprivation of parental responsibilities and authorisation of adoption, with the consequence that the applicants' legal ties with the child are definitively severed, it is to be reiterated that "such measures should only be applied in exceptional circumstances and could only be justified if they were motivated by an overriding requirement pertaining to the child's best interests" (see, for example, *Johansen*, cited above, § 78, and *Aune*, cited above, § 66). It is in the very nature of adoption that no real prospects for rehabilitation or family reunification exist and that it is instead in the child's best interests that he or she be placed permanently in a new family (see *R. and H. v. the United Kingdom*, no. 35348/06, § 88, 31 May 2011).

210. In determining whether the reasons for the impugned measures were relevant and sufficient for the purpose of paragraph 2 of Article 8 of the Convention, the Court will have regard to the fact that perceptions as to the appropriateness of intervention by public authorities in the care of children vary from one Contracting State to another, depending on such factors as traditions relating to the role of the family and to State intervention in family affairs and the availability of resources for public measures in this particular area. However, consideration of what is in the best interests of the child is in every case of crucial importance. Moreover, it must be borne in mind that the national authorities have the benefit of direct contact with all

the persons concerned, often at the very stage when care measures are being envisaged or immediately after their implementation. It follows from these considerations that the Court's task is not to substitute itself for the domestic authorities in the exercise of their responsibilities for the regulation of the care of children and the rights of parents whose children have been taken into public care, but rather to review under the Convention the decisions taken by those authorities in the exercise of their power of appreciation (see, for example, *K. and T. v. Finland*, cited above, § 154; and *Johansen*, cited above, § 64).

211. The margin of appreciation to be accorded to the competent national authorities will vary in the light of the nature of the issues and the seriousness of the interests at stake, such as, on the one hand, the importance of protecting a child in a situation which is assessed as seriously threatening his or her health or development and, on the other hand, the aim to reunite the family as soon as circumstances permit. The Court thus recognises that the authorities enjoy a wide margin of appreciation in assessing the necessity of taking a child into care (see, for example, *K. and T. v. Finland*, cited above, § 155; and *Johansen*, cited above, § 64). However, this margin is not unfettered. For example, the Court has in certain instances attached weight to whether the authorities, before taking a child into public care, had first attempted to take less drastic measures, such as supportive or preventive ones, and whether these had proved unsuccessful (see, for example, *Olsson* (no. 1), cited above, §§ 72-74; *R.M.S. v. Spain*, no. 28775/12, § 86, 18 June 2013, § 86; and *Kutzner v. Germany*, no. 46544/99, § 75, ECHR 2002-I). A stricter scrutiny is called for in respect of any further limitations, such as restrictions placed by the authorities on parental rights of access, and of any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life. Such further limitations entail the danger that the family relations between the parents and a young child are effectively curtailed (see *K. and T. v. Finland*, cited above, *ibid.*, and *Johansen*, cited above, *ibid.*).

212. In cases relating to public-care measures, the Court will further have regard to the authorities' decision-making process, to determine whether it has been conducted such as to secure that the views and interests of the natural parents are made known to and duly taken into account by the authorities and that they are able to exercise in due time any remedies available to them (see, for instance, *W. v. the United Kingdom*, 8 July 1987, § 63, Series A no. 121, and *Elsholz*, cited above, § 52). What has to be determined is whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken, the parents have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests and have been able fully to present their case (see, for example, *W. v. the United Kingdom*, cited above, § 64; *T.P. and K.M. v. the United Kingdom* [GC], no. 28945/95, § 72, ECHR 2001-V (extracts); *Neulinger and Shuruk*, cited above, § 139; and *Y.C. v. the United Kingdom*, no. 4547/10, § 138, 13 March 2012). From the foregoing considerations it follows that natural parents' exercise of judicial remedies with a view to obtaining family reunification with their child cannot as such be held against them. In addition, in cases of this kind there is always the danger that any procedural delay will result in the *de facto* determination of the issue submitted to the court before it has held its hearing. Equally, effective respect for family life requires that future relations between parent and child be determined solely in the light of all relevant considerations and not by the mere effluxion of time (see *W. v. the United Kingdom*, cited above, § 65).

213. Whether the decision-making process sufficiently protected a parent's interests depends on the particular circumstances of each case (see, for example, *Sommerfeld*, cited above, § 68). With a view to its examination of the present instance, the Court observes that in the aforementioned case it was called upon to examine the issue of ordering a psychological report on the possibilities of establishing contact between the child and the applicant. It observed that as a general rule it was for the national courts to assess the evidence before them, including the means to ascertain the relevant facts (see *Vidal v. Belgium*, 22 April 1992, § 33, Series A no. 235-B). It would be going too far to say that domestic courts are always required to involve a psychological expert on the issue of awarding contact to a parent not having custody, but this issue depends on the specific circumstances of each case, having due regard to the age and maturity of the child concerned (see *Sommerfeld*, cited above, § 71).

[Neulinger and Shuruk v. Switzerland](#), No. 41615/07, 6 July 2010, para. 134-136.

134. In this area the decisive issue is whether a fair balance between the competing interests at stake – those of the child, of the two parents, and of public order – has been struck, within the margin of appreciation afforded to States in such matters (see *Maumousseau and Washington*, cited above, § 62), bearing in mind, however, that the child’s best interests must be the primary consideration (see, to that effect, *Gnahoré v. France*, no. 40031/98, § 59, ECHR 2000-IX), as is indeed apparent from the Preamble to the Hague Convention, which provides that “the interests of children are of paramount importance in matters relating to their custody”. The child’s best interests may, depending on their nature and seriousness, override those of the parents (see *Sahin v. Germany* [GC], no. 30943/96, § 66, ECHR 2003-VIII). The parents’ interests, especially in having regular contact with their child, nevertheless remain a factor when balancing the various interests at stake (*ibid.*; see also *Haase v. Germany*, no. 11057/02, § 89, ECHR 2004-III, and *Kutzner v. Germany*, no. 46544/99, § 58, ECHR 2002-I, and the numerous authorities cited therein).

135. The Court notes that there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount (see the numerous references in paragraphs 49-56 above, and in particular Article 24 § 2 of the European Union’s Charter of Fundamental Rights). As indicated, for example, in the Charter, “[e]very child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests”.

136. The child’s interest comprises two limbs. On the one hand, it dictates that the child’s ties with its family must be maintained, except in cases where the family has proved particularly unfit. It follows that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, if and when appropriate, to “rebuild” the family (see *Gnahoré*, cited above, § 59). On the other hand, it is clearly also in the child’s interest to ensure its development in a sound environment, and a parent cannot be entitled under Article 8 to have such measures taken as would harm the child’s health and development (see, among many other authorities, *Elsholz v. Germany* [GC], no. 25735/94, § 50, ECHR 2000-VIII, and *Maršálek v. the Czech Republic*, no. 8153/04, § 71, 4 April 2006).

[X. v. Latvia](#), No. 27853/09, 26 November 2013, para. 96-97.

96. The Court reiterates that there is a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount (see paragraphs 37-39 above).

97. The same philosophy is inherent in the Hague Convention, which associates this interest with restoration of the status quo by means of a decision ordering the child’s immediate return to his or her country of habitual residence in the event of unlawful abduction, while taking account of the fact that non-return may sometimes prove justified for objective reasons that correspond to the child’s interests, thus explaining the existence of exceptions, specifically in the event of a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation (Article 13, first paragraph, (b)). The Court further notes that the European Union subscribes to the same philosophy, in the framework of a system involving only European Union member States and based on a principle of mutual trust. The Brussels II bis Regulation, whose rules on child abduction supplement those already laid down in the Hague Convention, likewise refers in its Preamble to the best interests of the child (see paragraph 42 above), while Article 24 § 2 of the Charter of Fundamental Rights emphasises that in all actions relating to children the child’s best interests must be a primary consideration (see paragraph 41 above).

[Jansen v. Norway](#), No. 2822/16, 6 September 2018, para. 88-93, 104.

88. The Court reiterates that, in determining whether an impugned measure was “necessary in a democratic society”, it will consider whether, in the light of the case as a whole, the reasons adduced to justify that measure were relevant and sufficient for the purposes of Article 8 § 2 (see, among many other authorities, *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, § 179, 24 January 2017). The essential object of Article

8 is to protect the individual against arbitrary action by the public authorities (see, for example, *Wagner and J.M.W.L. v. Luxembourg*, no. 76240/01, § 118, 28 June 2007).

89. In accordance with the Court's established case-law, the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, is proportionate to the legitimate aim pursued, regard being had to the fair balance which has to be struck between the relevant competing interests. In determining whether an interference was "necessary in a democratic society", the Court takes into account that a margin of appreciation is left to the national authorities, whose decision remains subject to review by the Court for conformity with the requirements of the Convention (see *Paradiso and Campanelli*, cited above, § 180).

90. The margin of appreciation to be accorded to the competent national authorities will vary in the light of the nature of the issues and the seriousness of the interests at stake, such as, on the one hand, the importance of protecting a child in a situation which is assessed as seriously threatening his or her health or development and, on the other hand, the aim to reunite the family as soon as circumstances permit. When a considerable period of time has passed since the child was originally taken into public care, the interest of a child not to have his or her *de facto* family situation changed again may override the interests of the parents to have their family reunited. The Court thus recognises that the authorities enjoy a wide margin of appreciation in assessing the necessity of taking a child into care. However, a stricter scrutiny is called for in respect of any further limitations, such as restrictions placed by the authorities on parental rights of access, and of any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life. Such further limitations entail the danger that the family relations between the parents and a young child are effectively curtailed (see *K. and T. v. Finland* [GC], no. 25702/94, § 155, ECHR 2001-VII).

91. Where children are involved, their best interests must be taken into account. The Court reiterates that there is a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests are of paramount importance (see, among other authorities, *Neulinger and Shuruk*, cited above, § 135). Indeed, the Court has emphasised that in cases involving the care of children and contact restrictions, the child's interests must come before all other considerations (see *Jovanovic v. Sweden*, no. 10592/12, § 77, 22 October 2015, and *Gnahoré*, no. 40031/98, § 59, ECHR 2000 IX).

92. On the one hand, the best interests of the child dictate that the child's ties with his or her family must be maintained, except in cases where the family has proved particularly unfit. On the other hand, it is clearly also in the child's interests to ensure his or her development in a sound environment, and a parent cannot be entitled under Article 8 of the Convention to have such measures taken as would harm the child's health and development (see, among many other authorities, *Neulinger and Shuruk*, cited above, § 136).

93. According to the Court's case-law, measures that totally deprive an applicant of his or her family life with the child and are inconsistent with the aim of reuniting them should "only be applied in exceptional circumstances and could only be justified if they were motivated by an overriding requirement pertaining to the child's best interests" (see, for instance, *Johansen*, cited above, § 78, and *Aune v. Norway*, no. 52502/07, § 66, 28 October 2010). It should also be reiterated that in *Gnahoré v. France*, cited above, § 59; see also *Görgülü v. Germany*, no. 74969/01, § 48, 26 February 2004), the Court held:

"... it is clear that it is equally in the child's interest for its ties with its family to be maintained, except in cases where the family has proved particularly unfit, since severing those ties means cutting a child off from its roots. It follows that the interest of the child dictates that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, if and when appropriate, to 'rebuild' the family."

[...]

104. In conclusion, although the Court accepts that the decisions of the national authorities were made in what they considered to be the best interests of the child and bears in mind that perceptions as to the appropriateness of intervention by public authorities in the care of children vary from one Contracting State to another (see paragraph 95 above), the Court holds that in the instant case, the potential negative long-term consequences of losing contact with her mother for A and the positive duty to take measures to facilitate family reunification as soon as reasonably feasible were not sufficiently weighed in the balancing exercise.

[Petrov and X v. Russia](#), No. 23608/16, 23 October 2018, para. 98-102.

98. *In determining whether the refusal of custody or access was justified under Article 8 § 2 of the Convention, the Court has to consider whether, in the light of the case as a whole, the reasons adduced to justify this measure were relevant and sufficient. Undoubtedly, consideration of what lies in the best interests of the child is of crucial importance in every case of this kind. Moreover, it must be borne in mind that the national authorities have the benefit of direct contact with all the persons concerned. It follows from these considerations that the Court's task is not to substitute itself for the domestic authorities in the exercise of their responsibilities regarding child custody and access issues, but rather to review, in the light of the Convention, the decisions taken by those authorities in the exercise of their (see Sahin v. Germany [GC], no. 30943/96, § 64, ECHR 2003-VIII; Sommerfeld v. Germany [GC], no. 31871/96, § 62, ECHR 2003-VIII (extracts); C. v. Finland, no. 18249/02, § 52, 9 May 2006; and Z.J. v. Lithuania, no. 60092/12, § 96, 29 April 2014). To that end the Court must ascertain whether the domestic courts conducted an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person, with a constant concern for determining what the best solution would be for the child (see Neulinger and Shuruk v. Switzerland [GC], no. 41615/07, § 139, ECHR 2010, and Antonyuk v. Russia, cited above, § 134).*

99. *The margin of appreciation to be accorded to the competent national authorities will vary in accordance with the nature of the issues and the importance of the interests at stake. Thus, the Court has recognised that the authorities enjoy a wide margin of appreciation, in particular when deciding on custody. However, stricter scrutiny is called for as regards any further limitations, such as restrictions placed by those authorities on parental rights of access, and as regards any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life. Such further limitations entail the danger that the family relations between a young child and one or both parents would be effectively curtailed (see Sahin, cited above, § 65, and Sommerfeld, cited above, § 63).*

100. *Article 8 requires that the domestic authorities should strike a fair balance between the interests of the child and those of the parents and that, in the balancing process, particular importance should be attached to the best interests of the child, which, depending on their nature and seriousness, may override those of the parents. In particular, a parent cannot be entitled under Article 8 to have such measures taken as would harm the child's health and development (see Sahin, cited above, § 66, and Sommerfeld, cited above, § 64).*

101. *The Court cannot satisfactorily assess whether the reasons advanced by the domestic courts were "sufficient" for the purposes of Article 8 § 2 without at the same time determining whether the decision-making process, seen as a whole, was fair (see Sahin, cited above, § 68, and Sommerfeld, cited above, § 66). While Article 8 of the Convention contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to ensure due respect for the interests safeguarded by Article 8. The Court must therefore determine whether, having regard to the circumstances of the case and notably the importance of the decisions to be taken, the applicant has been involved in the decision-making process to a degree sufficient to provide him with the requisite protection of his interests (see Z.J. v. Lithuania, cited above, § 100, with further references).*

102. *Lastly, the Court considers that in conducting its review in the context of Article 8 it may also have regard to the length of the local authority's decision-making process and of any related judicial proceedings. In cases of this kind there is always the danger that any procedural delay will result in the de facto determination of the issue submitted to the court before it has held its hearing. And an effective respect for family life requires that future relations between parent and child be determined solely in the light of all relevant considerations and not by the mere passage of time (see W. v. the United Kingdom, 8 July 1987, § 65, Series A no. 121; Sylvester v. Austria, nos. 36812/97 and 40104/98, § 69, 24 April 2003; and Z.J. v. Lithuania, cited above, § 100).*

[Ribić v. Croatia](#), No. 27148/12, 2 April 2015, para. 92.

92. *Given that an effective respect for family life requires that future relations between parent and child be determined solely in the light of all the relevant considerations and not by the mere passage of time (see Diamante and Pelliccioni v. San Marino, no. 32250/08, § 177, 27 September 2011), the ineffective, and in particular delayed, conduct of custody and contact proceedings may give rise to a breach of positive obligations under Article 8 of the Convention (see Eberhard and M. v. Slovenia, no. 8673/05 and 9733/05, § 127, 1 December 2009, and S.I. v. Slovenia, no. 45082/05, § 69, 13 October 2011) as procedural delay may lead to a de facto determination of the matter at issue (see H. v. the United Kingdom, 8 July 1987, § 89, Series A no. 120). Therefore, in cases concerning a person's relationship with his or her child there is a duty to exercise exceptional diligence in view of the risk that the passage of time may result in a de facto determination of the matter. This duty, which is decisive in assessing whether a case has been heard within a reasonable time as required by Article 6 § 1 of the Convention, also forms part of the procedural requirements implicit in Article 8 (see, for example, Süß v. Germany, no. 40324/98, § 100, 10 November 2005, and Strömblad v. Sweden, no. 3684/07, § 80, 5 April 2012).*

[Raw and others v. France](#), No. 10131/11, 7 March 2013, para. 78-83. [Text only available in French].

78. *Cela étant, la Cour rappelle que, si l'article 8 de la Convention tend pour l'essentiel à prémunir l'individu contre des ingérences arbitraires des pouvoirs publics, il engendre aussi des obligations positives inhérentes à un « respect » effectif de la vie familiale. Dans un cas comme dans l'autre, il faut avoir égard au juste équilibre à ménager entre les intérêts concurrents de l'individu et de la société dans son ensemble ; de même, dans les deux hypothèses, l'Etat jouit d'une certaine marge d'appréciation (voir, parmi d'autres, Ignaccolo-Zenide c. Roumanie, no 31679/96, § 94, CEDH 2000-I).*

79. *S'agissant de l'obligation pour l'Etat d'arrêter des mesures positives, l'article 8 implique non seulement le droit d'un parent à des mesures propres à le réunir à son enfant (ibidem) mais aussi le droit de l'enfant à des mesures propres à le réunir à son parent (voir, par exemple, Iglesias Gil et A.U.I. c. Espagne, no 56673/00, § 56, CEDH 2003-V).*

80. *Cette obligation des autorités nationales n'est toutefois pas absolue, car il arrive que la réunion d'un parent à ses enfants vivant depuis un certain temps avec l'autre parent ne puisse avoir lieu immédiatement et requière des préparatifs. La nature et l'étendue de ceux-ci dépendent des circonstances de chaque espèce, mais la compréhension et la coopération de l'ensemble des personnes concernées en constituent toujours un facteur important. Les autorités nationales doivent s'évertuer à faciliter pareille collaboration. Une obligation pour elles de recourir à la coercition en la matière ne saurait être que limitée : il leur faut tenir compte des intérêts et des droits et libertés de ces mêmes personnes, et notamment des intérêts supérieurs de l'enfant et des droits que lui reconnaît l'article 8 de la Convention. Dans l'hypothèse où des contacts avec les parents risquent de menacer ces intérêts ou de porter atteinte à ces droits, il revient aux autorités nationales de veiller à un juste équilibre (voir, parmi d'autres, Ignaccolo-Zenide, précité, § 94).*

Il y a lieu de plus de garder à l'esprit dans ce contexte que l'intérêt supérieur de l'enfant s'oppose en règle générale à ce que des mesures coercitives soient prises à son encontre (voir notamment Ignaccolo-Zenide précité, § 106, et Maire c. Portugal, no 48206/99, § 76, CEDH 2003-VII). Il peut en outre parfois commander que l'enfant ne soit pas séparé du parent avec lequel il se trouve ou qu'il ne soit pas retourné au parent qui le réclame (voir en particulier Neulinger et Shuruk précité).

81. *Selon la Cour, ces considérations valent aussi mutatis mutandis lorsqu'est en jeu le lien entre des membres d'une fratrie.*

82. *La Cour rappelle également que la Convention doit s'appliquer en accord avec les principes du droit international, en particulier ceux relatifs à la protection internationale des droits de l'homme. S'agissant plus précisément des obligations positives que l'article 8 de la Convention fait peser sur les Etats contractants en matière de réunion d'un parent à ses enfants, elles doivent s'interpréter à la lumière de la Convention de La*

Haye sur les aspects civils de l'enlèvement international d'enfants (voir, parmi d'autres, Ignaccolo-Zenide précité, § 95) et de la Convention relative aux droits de l'enfant du 20 novembre 1989 (voir, par exemple, Maire c. Portugal, no 48206/99, § 72, CEDH 2003-VII), qui mettent notamment l'accent sur le caractère primordial de l'intérêt de l'enfant (voir Neulinger et Shuruk, précité, §§ 49-56 et 137, et Karoussiotis c. Portugal, no 23205/08, § 83, CEDH 2011 (extraits)).

83. Enfin, la Cour réaffirme qu'un respect effectif de la vie familiale commande que les relations futures entre parents et enfants ne se règlent pas par le simple écoulement du temps, mais sur la base de l'ensemble des éléments pertinents ; elle peut donc aussi avoir égard, sur le terrain de l'article 8, au mode et à la durée du processus décisionnel. Ainsi a-t-elle souligné que, dans les affaires de ce type, l'adéquation des mesures prises par les autorités se juge en particulier à la rapidité de leur mise en œuvre, le passage du temps pouvant avoir des conséquences irréversibles pour les relations entre les enfants et celui des parents qui ne vit pas avec eux. La Convention de La Haye prévoit d'ailleurs un ensemble de mesures tendant à assurer le retour immédiat des enfants déplacés ou retenus illicitement dans un Etat contractant, et son article 11 précise que les autorités judiciaires ou administratives saisies doivent procéder d'urgence en vue de ce retour (voir, notamment, précités, Ignaccolo-Zenide, § 102, Maire, § 74, et Karoussiotis, §§ 84-91, et Monory c. Roumanie et Hongrie, no 71099/01, §§ 82-84, 5 avril 2005).

[Vorozhba v. Russia](#), No. 57960/11, 16 October 2014, para. 97. [Text only available in French]

97. La Cour conclut que, nonobstant la marge d'appréciation dont dispose l'État défendeur en la matière, les autorités nationales n'ont pas pris en l'espèce toutes les mesures que l'on pouvait raisonnablement exiger d'elles pour faciliter l'exécution du jugement prononcé par le tribunal du district Khassanskiy le 15 septembre 2009 en faveur de la requérante. Partant, il y a eu violation de l'article 8 de la Convention.

[Malec v. Poland](#), No. 28623/12, 28 June 2016, para. 78.

78. Having regard to the facts of the case, in particular the passage of time, and the criteria laid down in its own case-law, the Court concludes that, notwithstanding the State's margin of appreciation, the Polish authorities failed to make adequate and effective efforts to enforce the applicant's parental rights and his right to contact with his child.

[Hromadka and Hromadkova v. Russia](#), No. 22909/10, 11 December 2014, para. 168.

168. The Court further notes that the first applicant's attempts to involve other competent domestic authorities in assisting him to establish contact with his daughter were thwarted by the impossibility of locating O.H. and the child. In particular, although the conduct of O.H. gave grounds for instituting administrative proceedings under Article 5.35 § 2 of the Code of Administrative Offences (see paragraph 115 above), the failure to establish her whereabouts made it impossible in practice to do so. The first applicant's requests to the regional and Russian ombudsmen for children for assistance in establishing contact with the child yielded no results in the absence of information about O.H.'s whereabouts (see paragraphs 45-57 above). The first applicant's request of June 2012 under Article 21 of the Hague Convention for securing the effective exercise of his rights of access in respect of his daughter remained without response due to the impossibility of locating O.H. and the second applicant (see paragraphs 87-94 above).

169. Having regard to the foregoing and without overlooking the difficulties created by the resistance of the child's mother, the Court concludes that the Russian authorities failed to take all the measures that could reasonably be expected of them to enable the applicants to maintain and develop family life with each other, resulting in the disruption of the emotional ties between the father and the child, and thereby breached the applicants' right to respect for their family life, as guaranteed by Article 8.

[Giorgioni v. Italy](#), No. 43299/12, 15 September 2016, para. 75-77. [Text only available in French].

75. *En effet, les autorités n'ont pas fait preuve de la diligence qui s'imposait en l'espèce et sont restées en deçà de ce qu'on pouvait raisonnablement attendre d'elles. En particulier, les juridictions internes n'ont pas pris les mesures appropriées pour créer les conditions nécessaires à la pleine réalisation du droit de visite du père de l'enfant (Bondavalli, précité, § 81, Macready c. République tchèque, nos 4824/06 et 15512/08, § 66, 22 avril 2010, et Piazzzi, précité, § 61). Elles n'ont pas pris, dès le début de la séparation, des mesures utiles visant à l'instauration de contacts effectifs. Elles ont ensuite toléré pendant environ quatre ans que la mère, par son comportement, empêchât l'établissement d'une véritable relation entre le requérant et l'enfant. La Cour relève que le déroulement de la procédure devant le tribunal fait plutôt apparaître une série de mesures automatiques et stéréotypées, telles que des demandes successives de renseignements et une délégation du suivi de la famille aux services sociaux assortie de l'obligation pour ceux-ci de faire respecter le droit de visite du requérant (Lombardo, précité § 92, et Piazzzi, précité, § 61). Aussi la Cour estime - t - elle que les autorités ont laissé se consolider une situation de fait installée au mépris des décisions judiciaires (Fourkiotis, précité, §70).*

76. *Eu égard à ce qui précède et nonobstant la marge d'appréciation de l'État défendeur en la matière, la Cour considère que les autorités nationales n'ont pas déployé les efforts adéquats et suffisants pour faire respecter le droit de visite du requérant entre août 2006 et novembre 2010 et qu'elles ont méconnu le droit de l'intéressé au respect de sa vie familiale.*

77. *Partant, il y a eu violation de l'article 8 de la Convention.*

[Macready v. The Czech Republic](#), No. 4824/06 and 15512/08, 22 April 2010, para. 66. [Text only available in French].

66. *De plus, en vertu de l'article 16 de la Convention de La Haye, les tribunaux tchèques devaient attendre la fin de la procédure sur le retour de l'enfant avant de pouvoir statuer sur l'exercice de l'autorité parentale à l'égard de ce dernier. Pendant toute cette période, le requérant ne pouvait donc réaliser ses droits parentaux qu'en vertu des mesures provisoires lui accordant un droit de visite pendant ses séjours en République tchèque, séjours qui ne pouvaient être qu'occasionnels vu qu'il résidait et travaillait aux Etats-Unis. A cet égard, force est de constater que même s'ils ont été, certes a posteriori, informés des difficultés que le requérant rencontrait lors de ses visites, fait auquel le tribunal municipal s'est d'ailleurs référé dans son jugement du 27 avril 2005 (voir paragraphe 15 in fine ci-dessus) et que le tuteur a mentionné dans ses commentaires adressés au tribunal régional (voir paragraphe 17 ci-dessus), les tribunaux n'ont pris de leur initiative aucune mesure appropriée pour créer pro futuro les conditions nécessaires à la réalisation dudit droit de visite. Dans le contexte de l'affaire, les tribunaux auraient en effet pu envisager de prendre des mesures coercitives à l'encontre de la mère ou de chercher le concours de services sociaux, voire de pédopsychiatres ou de psychologues, pour faciliter le contact entre les intéressés. A cet égard, il convient de souligner qu'il appartient à chaque Etat contractant de se doter d'un arsenal juridique adéquat et suffisant pour assurer le respect des obligations positives qui lui incombent en vertu de l'article 8 de la Convention.*

[Bondavalli v. Italy](#), No. 35532/12, 17 November 2015, para. 81-84. [Text only available in French].

81. *Or la Cour estime qu'il aurait été non seulement dans l'intérêt du requérant mais encore particulièrement dans celui de l'enfant que les juridictions internes répondent favorablement aux demandes du requérant, qu'elles chargent un autre expert – indépendant et impartial – de réaliser une nouvelle expertise, et qu'elles confient le suivi de l'enfant aux services sociaux d'une autre commune. Sur la base de ces nouveaux rapports, le tribunal et la cour d'appel auraient pu mieux évaluer s'il était nécessaire de restreindre ou d'élargir le droit de visite du requérant, et ce en tenant également compte des expertises produites par le requérant selon lesquelles il ne souffrait d'aucun trouble de la personnalité justifiant une telle restriction du droit de visite.*

La Cour relève que les juridictions internes n'ont pris aucune mesure appropriée pour créer les conditions nécessaires à la pleine réalisation du droit de visite du père de l'enfant (Macready c. République tchèque, nos 4824/06 et 15512/08, § 66, 22 avril 2010).

82. Cela étant, elle reconnaît que les autorités faisaient en l'espèce face à une situation très difficile qui était due notamment aux tensions existant entre les parents de l'enfant. Elle rappelle cependant qu'un manque de coopération entre des parents séparés ne peut dispenser les autorités compétentes de mettre en œuvre tous les moyens susceptibles de permettre le maintien du lien familial (voir Nicolò Santilli, précité, § 74, Lombardo, précité, § 91, et, mutatis mutandis, Reigado Ramos c. Portugal, no 73229/01, § 55, 22 novembre 2005). En l'espèce, les autorités nationales sont restées en deçà de ce qu'on pouvait raisonnablement attendre d'elles dès lors que le tribunal et la cour d'appel se sont limités à restreindre le droit de visite du requérant sur la base des expertises négatives produites par les services sociaux et les psychologues travaillant dans la même structure administrative que la mère de l'enfant.

83. La Cour estime que la procédure aurait dû s'entourer des garanties appropriées permettant de protéger les droits du requérant et de prendre en compte ses intérêts. Or la Cour constate que les juridictions internes n'ont pas procédé avec la diligence nécessaire et que, depuis environ sept ans, le requérant dispose d'un droit de visite très limité. En outre, compte tenu de des conséquences irrémédiables que le passage du temps peut avoir sur les relations entre l'enfant et le requérant, la Cour estime à cet égard qu'il incomberait aux autorités internes de réexaminer, dans un bref délai, le droit de visite du requérant en tenant compte de la situation actuelle de l'enfant et de son intérêt supérieur.

84. Eu égard à ce qui précède et nonobstant la marge d'appréciation de l'État défendeur en la matière, la Cour considère que les autorités nationales n'ont pas déployé les efforts adéquats et suffisants pour faire respecter le droit de visite du requérant et qu'elles ont méconnu le droit de l'intéressé au respect de sa vie familiale.

[Cincimino v. Italy](#), No. 68884/13, 28 April 2016, para. 73-75. [Text only available in French].

73. Il en résulte ainsi que, depuis 2006, il n'y a eu aucune nouvelle expertise psychiatrique indépendante au sujet de la requérante pour évaluer si elle continuait à souffrir d'un trouble de la personnalité et, dans l'affirmative, s'il existait encore, du point de vues des intérêts de l'enfant, des raisons pertinentes et suffisantes pour des mesures ne permettant aucun contact entre la requérante et son enfant âgée désormais de douze ans. Les juridictions se sont limitées à répéter les considérations déjà faites dans les décisions précédentes, alors que des indications avaient été données – certes par des experts nommés par la requérante – que sa situation s'était entre-temps améliorée.

74. Eu égard à ce qui précède, et en particulier à l'absence d'une expertise récente et indépendante sur la requérante, force est de conclure que le processus décisionnel n'a pas satisfait aux exigences procédurales inhérentes à l'article 8 de la Convention (voir paragraphe 64 ci-dessus).

75. La Cour conclut en conséquence que l'État a méconnu à l'égard de la requérante les obligations positives mises à sa charge par l'article 8 de la Convention. Partant, il y a eu violation de cette disposition.

[Strumia v. Italy](#), No. 53377/19, 23 June 2016, para. 122-125. [Text only available in French].

122. En effet, les autorités n'ont pas fait preuve de la diligence qui s'imposait en l'espèce et sont restées en deçà de ce qu'on pouvait raisonnablement attendre d'elles. En particulier, les juridictions internes n'ont pas pris les mesures appropriées pour créer les conditions nécessaires à la pleine réalisation du droit de visite du père de l'enfant (Bondavalli, précité § 81, Macready c. République tchèque, nos 4824/06 et 15512/08, § 66, 22 avril 2010, et Piazza, précité, § 61). Elles n'ont pas pris, dès le début de la séparation quand l'enfant avait seulement trois ans et avait une attitude positive vis-à-vis du requérant, des mesures utiles visant à l'instauration de contacts effectifs et elles ont ensuite toléré pendant environ huit ans que la mère, par son comportement, empêchât l'établissement d'une véritable relation entre le requérant et l'enfant. La Cour relève que le déroulement de la procédure devant le tribunal fait plutôt apparaître une série de mesures

automatiques et stéréotypées, telles que des demandes successives de renseignements et une délégation du suivi de la famille aux services sociaux assortie de l'obligation pour ceux-ci de faire respecter le droit de visite du requérant (Lombardo, précité § 92, et Piazzzi, précité, § 61). Ainsi, la Cour estime-t-elle que les autorités ont laissé se consolider une situation de fait installée au mépris des décisions judiciaires.

123. Au final, si les tribunaux ont été inspirés dans leurs démarches par l'intérêt de la mineure dûment établi (Zavřel, précité, § 53), l'objectif poursuivi par eux n'a pas été atteint : huit ans après la séparation de ses parents, l'enfant n'a aucune relation avec son père et la seule solution envisageable consisterait en son placement en institut.

124. Eu égard à ce qui précède et nonobstant la marge d'appréciation de l'État défendeur en la matière, la Cour considère que les autorités nationales n'ont pas déployé les efforts adéquats et suffisants pour faire respecter le droit de visite du requérant et qu'elles ont méconnu le droit de l'intéressé au respect de sa vie familiale.

125. Partant, il y a eu violation de l'article 8 de la Convention.

6. UN Treaty Bodies decisions

a. UN Human Rights Committee

[M.G.C. v. Australia](#), Communication No. 1875/2009, Views adopted by the Committee at its 113th session (16 March–2 April 2015), CCPR/C/113/D/1875/2009, 7 May 2015

11.8 The Committee recalls its general comment No. 16, whereby the concept of the family is to be interpreted broadly. The concept refers not solely to the family home during marriage or cohabitation, but also to the relations in general between parents and child. The Committee cannot exclude that the author and his son had family ties beyond the biological since the author has obtained contact orders from the Federal Magistrate Court and those contact orders were not implemented for a number of reasons, including the fact that his ex-partner and the author had a strained relationship and the mere fact that the author was in immigration detention. Therefore the Committee considers that the decision of the State party to deport the author, with the effect that this may have of a permanent impact on his relationship with his son, coupled with a permanent re-entry ban, is to be considered "interference" with the family.

11.9 The issue arises as to whether or not such interference would be arbitrary and contrary to articles 17 and 23 (1) of the Covenant. The Committee recalls that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be reasonable in the particular circumstances. In the light of the information before it, the Committee finds that the State party's decision to cancel the author's visa was based on objective and reasonable grounds, namely the author's substantial criminal record, while taking into account the author's family circumstances both in the delegate Minister's decision and in the decision of the Administrative Appeals Tribunal. In the particular circumstances, the Committee considers that the author's personal family situation has been thoroughly assessed by the competent authorities and that the interference with the author's family life which has occurred is therefore not arbitrary within the meaning of article 17 of the Covenant. The Committee concludes that the facts before it do not reveal a violation of articles 17 and 23 of the Covenant.

[Juan Asensi Martínez v. Paraguay](#), Communication No. 1407/2005, Views adopted by the Human Rights Committee at its ninety-fifth session (16 March-3 April 2009), CCPR/C/95/D/1407/2005, 24 April 2009

7.2 The Committee must determine whether, in the course of the author's efforts to maintain contact with his minor daughters and exercise his right of custody, a right granted by the Spanish courts, the State party violated the right of the author and his daughters, as a family, to the protection of the State under article 23, paragraph 1, of the Covenant. The Committee notes that the author and his ex-wife were married in August 1997 and that his daughters were born in 1997 and 1999 respectively. The family first lived in Paraguay and in September 1999 moved to Spain, where the author was working. Starting in January 2001, when his ex-wife left Spain for good with their daughters, the author made numerous attempts to keep in contact with the children, obtain their return and meet their material and emotional needs. On the legal front, his efforts took the form of administrative and judicial action of various kinds, both in Spain, the last place the family lived, and in the State party. The remedies invoked in the Spanish courts gave rise to a separation order in November 2002 granting the author care and custody of the girls. In addition, the Spanish authorities made approaches to the State party with a view to protecting the author's rights under the Hague Convention on the Civil Aspects of International Child Abduction, to which both States are party.

7.3 With regard to the measures taken in the State party, the Committee notes that the author applied to the courts in proceedings of two kinds: (a) to obtain the return of the children and (b) to obtain effective access to his children and assert his right of custody. The former gave rise to judgements in three courts, of which the Appeal Court and Supreme Court rulings found against the return of the children. Both the Appeal Court and the Supreme Court state that they have taken account of the children's best interests and that taking them to Spain would in their view have put them at psychological risk given their young age. Yet the judgements do not explain what either court understands by "best interests" and "psychological risk" or what evidence was considered in reaching the conclusion that there was in fact such a risk. There is also nothing to show that the author's complaints concerning the children's unsafe living conditions in Paraguay were duly examined. The Committee also notes that the lower court judgement emphasized the need for speedy settlement of the issue of return, despite which the Supreme Court took nearly four years to hand down its ruling, too long for a case such as this.

7.4 As to the remedies invoked by the author in the State party with a view to making contact with his daughters and obtaining custody, the Committee notes that the author applied to the courts on these matters. The file shows, for example, that in March 2002 the author obtained court authorization for the girls to spend a few days with him but that the authorization could not be implemented because the mother refused to comply. The authorities did nothing to ensure that the author's ex-wife complied with the court order. The Committee also notes that, while his constitutional challenge was still pending, the author complained to the court about the neglect of the children and the situation of risk they were in, and sought temporary custody, yet he never received a reply to his application. The Committee also notes the statements by the Appeal Court and the State party to the effect that the issues relating to custody of the children should be settled in Paraguay and that denial of return did not stop the author availing himself of a visiting and access arrangement. Despite these statements, however, there has been no decision by the State party authorities on custody rights or visiting arrangements for the author.

7.5 In light of the foregoing, the Committee finds that the State party has not taken the necessary steps to guarantee the family's right to protection under article 23 of the Covenant, in respect of the author and his daughters, or the daughters' right, as minors, to protection under article 24, paragraph 1, of the Covenant.

b. UN Committee on the Rights of the Child

[Y.F. v. Panama](#), Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 48/2018, CRC/C/83/D/48/2018, 28 February 2020

8.2 The Committee notes the State party's argument that the communication is inadmissible because domestic remedies have not been exhausted, since the proceedings relating to custody, upbringing and visitation rights, in the context of which the courts are required to resolve various proceedings and appeals brought by the author, are currently at the evidence-gathering stage. It also notes that, according to the State party, the proceedings are being conducted thoroughly and conscientiously in accordance with the applicable procedures and in the best interests of the children. The Committee notes that the author has not submitted comments related to the exhaustion of domestic remedies. The Committee recalls that for the purposes of determining the effectiveness of domestic remedies, their duration is assessed in the light of the circumstances of the case, including the author's procedural activity, which may entail a delay in the resolution of the procedure by hindering or delaying the processing of the case. In this regard, the Committee notes that in the present case, in November 2016, the Court ruled on the author's request for communications with his children to be conducted in French; that on 16 February 2017, the Court ruled on a motion for annulment submitted by the author; that on 10 July 2017, the Court ruled on the author's requests that the children's mother and grandfather be held in contempt of court; that on 8 September 2017, the Court heard a new request for the mother of the children to be held in contempt; that on 8 November 2017, the Superior Court ruled on the appeal submitted by the author against the decision denying his request for communications to be conducted in French; that on 8 March 2018, the Superior Court heard an appeal against the decision rejecting the request for the penalty for contempt to be applied; that on 3 April 2018, a court ruled on a motion to remove the judge in the case; that on 20 July 2018, the Court had to rule on further proceedings brought by the author; and that on 18 September 2018, the Court had to modify the system of protection measures in place in order to restrict the communications to one hour every Saturday owing to the author's behaviour during the conversations with his children. In the light of the foregoing, the Committee concludes that the settlement of domestic remedies has not been unduly delayed.

8.3 In addition, the Committee notes that the author has not substantiated his claims regarding alleged violations of the rights contained in articles 2, 5, 8, 9, 10, 11, 16, 35 and 37 of the Convention, for which reason it declares the communication inadmissible on account of its being manifestly ill-founded, in accordance with article 7 (f) of the Optional Protocol.

8.4 In the light of the foregoing, the Committee declares the present communication inadmissible under article 7 (e) and (f) of the Optional Protocol.

[J.S.H.R. v. Spain](#), Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of communication No. 13/2017, CRC/C/81/D/13/2017, 17 June 2019

9.5 The Committee recalls that, as a general rule, it is for the national authorities to examine the facts and evidence and to interpret and enforce domestic law, unless their assessment has been clearly arbitrary or amounts to a denial of justice. It is therefore not for the Committee to take the place of the national authorities in assessing the facts of the case and the evidence but to ensure that their assessment was not arbitrary or tantamount to a denial of justice and that the best interests of the child were a primary consideration in that assessment. In the present case, the Committee notes that the author's allegations concerning the alleged abduction of his children and the lack of contact with them were subject to a detailed analysis by the Spanish courts. The Committee considers that the author has not demonstrated that the judicial examination of facts and evidence by the various courts was clearly arbitrary or amounted to a denial of justice.

9.6 Consequently, the Committee finds that the communication has not been sufficiently substantiated and declares it inadmissible in accordance with article 7 (f) of the Optional Protocol.

c. UN Committee on the Elimination of Discrimination against Women

[M.W. v. Denmark](#), Views adopted by the Committee at its sixty-third session (15 February-4 March 2016), CEDAW/C/63/D/46/2012, 21 March 2016

5.8 In those circumstances, the Committee concludes, on the basis of the information before it, that the State party has failed to exercise due diligence in preventing, investigating and punishing the acts of violence and in protecting the author and O.W. before and after the kidnapping. The Committee recalls that States parties have an obligation not to cause discrimination against women through acts or omissions and that they are obliged to react actively to discrimination against women, regardless of whether such acts or omissions are perpetrated by the State or by private actors. Similarly, States parties have an obligation to ensure that women are protected against discrimination committed by the judiciary and by public authorities. With regard to the contention of the author that she suffered discrimination as a foreign mother, the Committee further recalls that discrimination against women on the basis of sex and gender is inextricably linked with other factors that affect women, such as nationality, and that States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned, and prohibit them. Accordingly, the Committee considers that the State party has violated the rights of the author and O.W. under article 2 (d), read in conjunction with article 1, of the Convention.

5.12 The Committee notes from the copy of the decision provided by the State party that the Regional State Administration itself stated that it had made no assessment as to what would be in O.W.'s best interests in the long term. With regard to the Act on Parental Responsibility, the Committee notes that, while in all decisions the best interests of the child are a paramount principle, Danish legislation is also based on the principle that a child must have contact with both parents, a consideration which weighed heavily in the decision given by the District Court of Helsingør, which concluded that, in view of the fact that the author's actions had resulted in O.W.'s being unable to see his father for more than four months, it would be in O.W.'s best interests to have S. retain full custody in order to ensure that O.W. has stable contact with both his parents. The Committee is of the view that, in both decisions, the courts failed to give paramount consideration to the best interests of O.W. and failed to adopt a balanced approach, thereby resulting in discriminatory treatment of the author. The Committee observes that the decision of the District Court of Helsingør refers to the need for stable contact with both parents, when it is fully aware that the author lives in Austria and did not even grant her any visitation rights. The Committee recalls its interim measures dated 9 July 2013 and 4 April 2014, whereby it requested the State Party to provide the author with reasonable access to O.W. in Denmark and to ensure that all appropriate authorities facilitated such access, and notes with concern that the State party has failed to do so, purportedly on the ground that the author ought to have submitted an application for visitation to the Regional State Administration, which, under Danish law, is the only authority with the competence to make decisions concerning access and that, therefore, since 13 February 2013, the author has had no contact with her child. The Committee is further concerned that, since 1 October 2014, the situation of the author has further deteriorated following the decision of the Regional State Administration, acting on another application by S, to the effect that the author would no longer be entitled to be kept informed about her son O.W., although, under section 23 of the Act on Parental Responsibility, a parent who is not a joint custodial parent is entitled to request and receive information on the child from schools, child-care institutions, social and health sectors, private hospitals, general practitioners and dentists.

5.13 The Committee is of the view that the expression "paramount" in the Convention means that the child's best interests may not be considered on the same level as all other considerations. The Committee is also of the view that, in order to demonstrate that the right of the child to have his or her best interests assessed and taken as a primary/paramount consideration, has been respected, any decision concerning a child must be reasoned, justified and explained.

5.15 The Committee further views with deep concern the systematic rejection of the author's applications to the Appeals Permission Board, which also constituted an impediment to the author's access to justice. In applying the "general public importance rule", the State party's authorities ought to have given due consideration to the nature of the case, namely the custody of a minor child of tender age; the international dimension of the case, with conflicting decisions from two different legal systems and the substantial and broad-based impact and consequences of the issue, to be canvassed on appeal, which transcend the litigation interests of the author, O.W and S., given the repeated averments of the author that she has suffered sex-based discrimination as well as discrimination on the basis of her foreign nationality and the fact that many foreign nationals are in a similar situation and indeed the number of complaints involving foreign parents in the same situation as the author.

5.16 On the basis of the information before it, the Committee concludes that the author did not enjoy equal treatment before the Danish authorities in matters concerning her son. In the light of the foregoing, the Committee considers that the State party has violated the rights of the author and O.W. under articles 2 (d), 5 (a) and (b) and 16 (1) (d) of the Convention.

[Angela González Carreño v. Spain](#), Communication No. 47/2012, Decision adopted by the Committee at its fifty-eighth session, CEDAW/C/58/D/47/2012, 15 August 2014

9.2 The question before the Committee is that of the responsibility of the State for not having fulfilled its duty of diligence in connection with the events that led to the murder of the author's daughter. The Committee is satisfied that the murder took place in a context of domestic violence which continued for several years and which the State party does not question. This context also includes the refusal of F.R.C. to pay support and the dispute concerning the use of the family dwelling. The Committee considers that its task is to review, in light of the Convention, decisions taken by the national authorities within their purview and to determine whether, in making those decisions, the authorities took into account the obligations arising from the Convention. In the present case, the decisive factor is therefore whether those authorities applied principles of due diligence and took reasonable steps with a view to protecting the author and her daughter from possible risks in a situation of continuing domestic violence.

9.5 The Committee considers that the authorities of the State party initially took actions to protect the child in a context of domestic violence. However, the decision to allow unsupervised visits was taken without the necessary safeguards and without taking into account that the pattern of domestic violence that had characterized family relations for years, unquestioned by the State party, was still present. It is enough to recall in that regard that the judicial decision of 17 June 2002 referred to certain improper actions by F.R.C. in regard to his daughter; that at the time F.R.C. continued not to pay child support with impunity; and that he continued using the family dwelling in spite of the author's claims in that regard.

9.7 The Committee recalls that under article 2 (a) of the Convention, States parties have the obligation to ensure by law or other appropriate means the realization and practise of the principle of equality of men and women, and that pursuant to articles 2 (f) and 5 (a), States parties have the obligation to adopt appropriate measures to amend or abolish not only existing laws and regulations but also customs and practices that constitute discrimination against women. States parties also have the obligation, in accordance with article 16 (1), to adopt all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relationships. In that regard, the Committee stresses that stereotypes affect women's right to impartial judicial process and that the judiciary should not apply inflexible standards based on preconceived notions about what constitutes domestic violence. In this case, the Committee considers that the authorities of the State party, in deciding on the establishment of an unsupervised scheme of visits, applied stereotyped and therefore discriminatory notions in a context of domestic violence and failed to provide due supervision, infringing their obligations under articles 2 (a), (d), (e) and (f); 5 (a); and 16, paragraph 1 (d) of the Convention.

9.8 The Committee notes that the author of the communication has suffered harm of the utmost seriousness and an irreparable injury as a result of the loss of her daughter and the violations described. Moreover, her efforts to obtain redress have been futile. The Committee therefore concludes that the absence of reparations constitutes a violation by the State party of its obligations under article 2 (b) and (c) of the Convention.

[Isatou Jallow v. Bulgaria](#), Communication No. 32/2011, Views adopted by the Committee at its fifty-second session, 9-27 July 2012, CEDAW/C/52/D/32/2011, 28 August 2012

8.6 With regard to the author's allegation of a violation of article 5, paragraph (a), and article 16, paragraphs 1 (c), (d), (f) and (g), of the Convention, the Committee observes that it addressed those articles in its general recommendation No. 19 (1992) on violence against women. In its general recommendation No. 21, the Committee stressed that the provisions of general recommendation No. 19 had great significance for women's abilities to enjoy rights and freedoms on an equal basis with men. It has stated on many occasions that traditional attitudes by which women are regarded as subordinate to men contribute to violence against them. In respect of the case before the Committee, it notes that, in issuing the emergency protection order and taking other decisions, the State party's authorities relied on the husband's statement and actions, despite being aware of the author's vulnerable position and dependency on him. The Committee also observes that the authorities based their activities on a stereotyped notion that the husband was superior and that his opinions should be taken seriously, disregarding the fact that domestic violence proportionally affects women considerably more than men. The Committee also notes that the author was separated from her daughter for almost eight months, during which time she received no information on the care that her daughter was receiving and was granted no visitation rights. Under such circumstances, the Committee considers that both the author and her daughter are victims of genderbased discrimination because the State party failed to protect the author's equal rights in marriage and as a parent and to regard her daughter's interests as paramount. That the emergency protection order that separated the author from her daughter was issued without due consideration of earlier incidents of domestic violence and of the author's claim that she and her daughter were in fact the ones in need of protection against domestic violence, and that the emergency protection order was not removed by the Sofia Regional Court when a permanent protection order was rejected, lead the Committee to conclude that the State party failed to take all appropriate measures under article 5, paragraph (a), and article 16, paragraphs 1 (c), (d), and (f), of the Convention.

8.7 The Committee would like to recognize that the author and her daughter have suffered serious moral and pecuniary damage and prejudice. The author had to continue a relationship with a violent husband since she was in a vulnerable position and did not receive adequate protection. For a considerable period, the author and her daughter were forcibly separated. Furthermore, the Committee has taken note of the author's statement that she had to accept disadvantageous terms for a divorce by mutual consent in order to obtain custody of her daughter.