

FEASIBILITY STUDY OF A LEGAL INSTRUMENT ON THE PROTECTION OF THE BEST INTERESTS OF THE CHILD IN SITUATIONS OF PARENTAL SEPARATION



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Feasibility study of a legal instrument on the protection of the best interests of the child in situations of parental separation

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TABLE OF CONTENTS

EXECUTIVE SUMMARY.....	5
INTRODUCTION	7
1) Establishment of the CJ/ENF-ISE and background to this feasibility study	7
2) Similarities and differences between the situation of children experiencing parental separation and children in alternative care	7
3) Implications of failure to respect the rights and best interests of the child in parental separations	8
4) The rights and best interests of children experiencing parental separation in the Council of Europe Strategy on the Rights of the Child (2016-2021)	9
5) Outline of the feasibility study	11
I. WORKING METHODS TO DEVELOP THE STUDY	12
1) Meetings of the CJ/ENF-ISE.....	12
2) The Questionnaires.....	13
3) Applicable Legal Instruments	14
4) Desktop Research by the Consultants	14
II. SCOPE OF THE STUDY	16
1) The protection of the child in parental separation issues	16
2) Overlaps between the best interests of the child in care proceedings and parental separation proceedings	16
3) Main differences between the best interests of the child in parental separation proceedings and care proceedings	18
III. KEY CONCEPTS AND DEFINITIONS	19
1) Who is considered a “parent”?	19
2) What are children’s rights vis-à-vis their parents and what are the parents’ rights and duties vis-à-vis their children?	20
3) Custody.....	21
4) Residual rights in law of the child vis-à-vis the non-custodial parent	22
5) Contact/Access.....	22
6) The best interests of the child	23
7) Hearing the child’s views	23
8) How the child’s views should be heard.....	25
IV. OVERVIEW OF INTERNATIONAL AND EUROPEAN STANDARDS	26
1) Principles derived from international and European standards	27
a) Respect for the best interests of the child	27
b) Respect for the children’s right to participate in decisions affecting them	28
c) Respect for the right of the child to have contact with each parent	32
2) Lacunae in international and European standards	33
V. OVERVIEW OF THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS.....	34
1) Parentage and Parental Responsibility	34
a) The attribution of filiation and parentage	34
b) The establishment of paternity	35
2) Custody.....	36
3) Hearing the child	37
4) Additional Procedural Rights	38
5) Child Abduction	39
6) Contact.....	42
a) The inadequacy of contact arrangements	43
b) Denial of contact.....	43
c) Enforcement of contact arrangements	43
7) Education	44

8)	Religion	46
9)	Names	46
10)	Medical Treatment	47
11)	Immigration Matters	47
a)	<i>Denial of entry of a child to join a parent</i>	47
b)	<i>Expulsion of custodial parents</i>	48
c)	<i>Failure to regularise the situation of a separated parent of lawfully resident children</i>	48
12)	Children with incarcerated parents	48
VI.	OVERVIEW OF MEMBER STATES' LAWS AND PRACTICE	49
1)	National Legislation on Parentage and Parental Responsibilities	50
2)	National Legislation on 'Custody' Arrangements	53
3)	National Legislation on the Child's Procedural Rights	56
a)	<i>The Right of the Child to be heard in situations of parental separation</i>	56
b)	<i>Due Weight Given</i>	57
c)	<i>Length of Proceedings</i>	59
d)	<i>Right to Information</i>	60
e)	<i>Right to Representation</i>	63
4)	National Legislation on the Right to Maintain Contact	64
5)	Additional Key Scenarios	65
a)	<i>Child Abduction</i>	65
b)	<i>Relocation</i>	67
c)	<i>Residence</i>	67
d)	<i>Adoption</i>	68
e)	<i>Religion</i>	69
f)	<i>Education</i>	70
g)	<i>Medical Treatment</i>	71
h)	<i>Name Changing</i>	72
i)	<i>Immigration Matters</i>	73
j)	<i>Children with Incarcerated Parents</i>	74
VII.	WAYS FORWARD	75
1)	Main Gaps and Lacunae	75
2)	Possible Council of Europe instruments	76
a)	<i>A new Convention or update of existing Conventions such as the Convention on the Exercise of Children's Rights or the Convention on Contact</i>	77
b)	<i>Recommendation</i>	77
c)	<i>Guidelines</i>	79
d)	<i>A handbook</i>	79
3)	Council of Europe instrument in both parental separation and care proceedings	
	79	
	APPENDIX A: ABBREVIATIONS	80
	APPENDIX B: LIST OF INTERNATIONAL AND EUROPEAN STANDARDS THAT MAY APPLY TO SITUATIONS OF PARENTAL SEPARATION	81
	APPENDIX C: LIST OF RELEVANT ECHR CASE LAW	88
	APPENDIX D: "CUSTODY" INTERPRETATION TABLE	91
	APPENDIX E: TABLE OF CONTRIBUTIONS RECEIVED FOR THE QUESTIONNAIRES	94
	APPENDIX F: LIST OF OTHER SOURCES	98

EXECUTIVE SUMMARY

Considering the aim of the Council of Europe is to achieve greater unity between its members, in particular by promoting the adoption of common rules; and considering the necessity of ensuring the effective implementation of existing binding European and international instruments protecting children's rights, the drafting and adoption of a new measure or handbook relating specifically to the rights of children in situations of parental separation is under consideration and this study has been carried out in that context. The study was carried out and drafted by Professor Blandine Mallevaey and Ms Nuala Mole to support the work of the Committee of experts on the rights and the best interests of the child in parental separation and in care proceedings (CJ/ENF-ISE).

The sociological evolution of the family in the past 50 years has meant that more and more couples separate when they have minor children who require individual protection, who need to exercise their rights and to see their best interests properly respected. The Council of Europe is rightly concerned that this is not happening and has thus decided to ascertain whether a new instrument or practical tool should be adopted in this field, and if so what form it should take.

The needs of children being taken into public care are also great, but they are always centre stage in the proceedings concerning them, whereas children affected by parental separation are often peripheral to the disputes between the adults responsible for their well-being. The CJ/ENF-ISE therefore was entrusted to conduct a review which would identify the extent to which the needs of these children are being met by existing law, policy – and most importantly – practice and to identify the extent to which children are able to participate in these processes which will have life long consequences for them.

In Autumn 2020 a questionnaire was sent out relating to selected aspects of parental separation: law, policy and practice relating to safeguarding the best interests of the child in situations of parental separation. A total of almost 1000 responses was received from a large number of member states, albeit not all. In Spring 2021 a supplementary questionnaire was sent to legal practitioners. A total of twenty-four responses was received. The form of the content and the nature of the detail provided by each set of responses reviewing their national law and practice varied significantly both from each respondent member States and the practitioners. It has not therefore been possible for this study to form a comprehensive view of all member States's relevant laws and practices in relation to children in situations of parental separation.

A compilation was made of existing relevant legal instruments at international and European level and a review was carried out of some 100 judgements of the European Court of Human Rights from a wide range of states which together with the responses from the questionnaires provided an overview of the present situation across Europe of children whose parents are separating or who have separated.

This review indicated a disconcerting absence of common approaches to both substantive concepts such as "parent" or "custody" "contact" or even primacy of best interests and to procedural safeguards, in particular hearing the child. Specific scenarios such as relocation,

child abduction, religious upbringing, education, medical treatments are often the subject of disputes arising from the separation of parents and have been considered in this study as well e.g., as the impact on children of immigration measures imposed as a consequence of their parents' separation.

Possible instruments or practical tools – such as a new or updated Convention, a Recommendation, Guidelines and/or a handbook – have been considered, with the option of a Recommendation finding most favour.

INTRODUCTION

1. The sociological evolution of the family over the last half-century has led to the observation that more and more couples are separating in the presence of minor children. This separation may take various forms and may or may not require recourse to a judicial procedure, depending on the circumstances and the legislation in force within the States. In all cases, the children whose parents separate should be able to benefit from special protection, exercise their rights and have their best interests respected.

1) Establishment of the CJ/ENF-ISE and background to this feasibility study

2. In spite of clear international, European and national legislative principles, the Council of Europe has been rightly concerned that, within the 47 member States, the rights and best interests of the child are not always given due attention, either in law or in practice. This has led to the creation of the Committee of Experts on the Rights and Best Interests of the Child in Parental Separation and in Care Proceedings (CJ/ENF-ISE), which was set up and works under the supervision of the Steering Committee on the Rights of the Child and the European Committee on Legal Co-operation.
3. According to its terms of reference, the task of the CJ/ENF-ISE is to carry out a review of legislation, policies and practices to determine how the best interests and rights of the child are protected (i) in parental separations situations and (ii) in proceedings initiated by public authorities to limit parental responsibilities and in proceedings relating to the placement of a child. On the basis of this review, the CJ/ENF-ISE was mandated to study the need to develop instruments and /or practical tools concerning the protection of the best interests of children and their rights in the situations mentioned. The objective of its terms of reference is to provide member States and other stakeholders with practical guidance in line with international and European standards (including the UN Convention on the Rights of the Child, the case law of the European Court of Human Rights and relevant Council of Europe conventions) and to promote the implementation of good practice.
4. The present feasibility study is part of this reflection of the CJ/ENF-ISE, more specifically on the protection of the rights and best interests of the child in the context of parental separation. In parallel, another reflection was being carried out on the protection of the best interests of the child in alternative care procedures for children at risk.

2) Similarities and differences between the situation of children experiencing parental separation and children in alternative care

5. Both situations raise partly identical issues but may be the case that comparable factual situations can raise questions about the rights and best interests of the child both from the perspective of parental separations and from the apparently different scenario engaged in the perspective of alternative care for children at risk. Indeed, in many jurisdictions it is not uncommon in practice for the conflict between parents at the time of their separation or subsequently to be so acute that sometimes it may

require the child to be removed from the family and alternative care put in place. It also happens that, when the needs and the voices of children have not been taken into account in the context of parental separation, for example in decisions concerning custody or visiting rights, the children are confronted with such a deep malaise that they put themselves in danger (running away, alcohol or drug consumption, self-mutilation, suicide attempts, other dangerous behaviour, etc.). In exceptional circumstances, this situation of danger may make an alternative care procedure necessary to ensure the children's protection.

6. However, procedures following parental separation and those relating to children in alternative care also raise distinct issues in terms of respect for the rights and best interests of the child. The main difference is that in alternative care proceedings for children at risk, the children are in principle at the centre of the proceedings, as they have been initiated to ensure their protection. This has important consequences: the interests and needs of children are theoretically at the centre of everyone's concerns, the children's voices can be taken into account to ensure their protection, and the children can benefit from extensive procedural prerogatives.
7. The problem is quite different in situations of parental separation, i.e., in particular in proceedings relating to the custody of the child, access rights and any decision to be taken concerning the child which is the subject of a dispute between the parents. These situations are most often examined from the point of view of each of the separating parents and do not necessarily give the child a place in the proceedings. As a result, the child, although at the centre of the conflict, often occupies a secondary place in the decisions taken and sometimes is not involved in the proceedings. The situation of the child and the decisions taken in relation to them are usually viewed exclusively in terms of the rights of each parent - either in relation to the other parent or in relation to the child - rather than in terms of the needs, best interests and rights of the child as the primary consideration.

3) Implications of failure to respect the rights and best interests of the child in parental separations

8. This is all the more worrying given that parental separation proceedings are the first - and fortunately often the only - contact that the vast majority of children have with the law during their childhood. If their voice is not taken into account, these children may grow up with the idea that their needs do not count and are inferior to those of adults. Worse still, if children's first encounter with the law and/or the gathering of their voices are carried out in prejudicial conditions, the children could be traumatised and this could have serious long-term consequences (for example, would the children who are a victim of violence be able to denounce these facts when, during the separation of their parents, they were mistreated or their voices were neglected?).
9. It thus appears that the protection of the rights and best interests of the child in parental separation contributes to the realisation of the rights of children and the respect of their interests more generally. If children whose parents separate has been listened to, exercised their rights and had the primacy of their best interests ensured, their confidence in the legal and judicial system will encourage them to assert their rights in

their daily life or in any other event they may face, so that they are an actor in their own protection. Conversely, how can a system that fails to protect the rights and interests of children experiencing parental separation, which affects millions of children, claim to enforce these rights in all other areas of children's lives?

4) The rights and best interests of children experiencing parental separation in the Council of Europe Strategy on the Rights of the Child (2016-2021)

10. The respect for the rights and best interests of children in all aspects of their life is at the heart of the concerns of the Council of Europe Strategy on the Rights of the Child 2016-2021¹ adopted by the Committee of Ministers of the Council of Europe on 2 March 2016 (hereinafter referred to as "the Strategy"), within the framework of which the work of the CJ/ENF-ISE that led to the drafting of this feasibility study falls.
11. The present feasibility study is particularly relevant to the fourth priority area of the Strategy, which is the promotion of child-friendly justice. Indeed, it appears that there is a particular need to ensure the protection of the rights and best interests of children when their parents separate in a conflictual manner or when they encounter post-separation disputes requiring judicial intervention.
12. The Strategy also defines the promotion of children's rights within families as one of the main objectives of this fourth priority area. In this context, it is stated that particular attention will be paid to the process of assessing the best interests of the child in family matters, and that consideration should be given to how Member States could implement legislation, regulations and procedures that make the best interests of the child a primary consideration in any decision to withdraw parental custody. The aim of this feasibility study is thus to ensure that the rights and best interests of the child are effectively at the heart of judicial proceedings following parental separation, which as the law and practice stand are still too often focused on adults and their individual concerns.
13. The achievement of these objectives presupposes that the child is involved in the decision-making process. This is why, in addition to this fourth priority area, the feasibility study is also closely linked to the second priority area of the Strategy relating to the participation of all children. Indeed, whether the separation of the parents gives rise to legal proceedings, in the absence or presence of a parental agreement, or is settled amicably and without the intervention of a judge, it is essential that children be involved in the decisions that concern them and that will affect their daily life after the separation of the parents. The existence of agreements between the parents or the absence of judicial intervention should not obscure the right of children whose parents separate to take part in the decision-making process in the same way as children whose parents are in conflict.
14. Furthermore, the Strategy recalls that children should not only be allowed to express their views on all matters affecting them, but that the views of children should also be

¹ Council of Europe, Strategy for the Rights of the Child (2016-2021), available at: <http://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168066cff8>

given due weight in accordance with their age and maturity. To this end, the Strategy states that the Council of Europe will provide guidance on how to concretely and systematically integrate children's participation in all contexts affecting them. In the context of parental separations, hearing and listening to children's voices is a condition for the realisation of their rights, including the right to have their best interests as a primary consideration in decisions affecting them. This is why this feasibility study places the participation of the child as a priority objective of the measures to be taken to ensure that the rights and interests of the child are respected at the time of parental separation or afterwards.

15. This feasibility study can furthermore be linked to the third priority area of the Strategy, which sets the objective of a life free of violence for all children. All too often, parental separation is a time when domestic violence increases, particularly when the parent who initiated the separation took the decision to escape the violence he or she was experiencing and/or to protect the child who was experiencing it. Moreover, post-separation violence, whether directed at one of the parents or at the child, is often a means of maintaining a situation of control over the victim spouse/partner and/or the child. All children must be protected from such violence, which is also the aim of this feasibility study. In this regard, the feasibility study should also be considered in line with the principles resulting from the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence.²
16. As the Strategy recalls, the Council of Europe's action in favour of children's rights is based on the International Convention on the Rights of the Child and more particularly on its four general principles,³ including the right of children to have their best interests as a primary consideration in all actions concerning them and the right of children to be heard in all matters affecting them. These two principles should be given particular attention in the context of parental separation because, although children are often the subject of litigation, their rights and interests are often neglected or even sacrificed. Indeed, in order to get out of a marital/cohabiting situation that has become unbearable, out of a concern for revenge against the other spouse/partner or because a new life with another partner awaits them, parents sometimes focus only on their personal concerns and put the needs of their child in second place. Sometimes one or even all of the parents instrumentalise the child and, more or less consciously, use the child as a weapon in the war against the other parent. In situations of family conflicts which have an international dimension, this war can sometimes cause the unlawful removal by one parent of children to remove them from the other parent and the whole family environment.
17. To achieve the objective of respecting the rights and the best interests of the child in parental separations, which this feasibility study aims to do, it is necessary to put the

² The Istanbul Convention (May 11, 2011) includes in its scope all forms of domestic violence occurring within the family unit or between spouses or partners or ex-spouses or ex-partners. Article 26 aims to ensure that due consideration is given to the rights and needs of child witnesses of all forms of violence and their best interests. Article 31 aims to ensure that situations of violence are taken into account in decisions relating to custody and access rights in order to ensure that the exercise of these rights does not compromise the rights and safety of the victim, or children.

³ UN Committee on the Rights of the Child, General Comment No. 5 (2003): "General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)", CRC/C/GC/2003/5, § 12.

child back at the heart of the concerns, whether it is those of his parents or those of the justice system and any intervenor with separated families. There is also a need to train more professionals (magistrates, lawyers, guardians, mediation services, etc.), who should benefit from training that includes not only theories about the development of child, the psychology of children, adolescents and families, counseling for families in distress, but also positive practices on how to develop the best model of child-rearing in particular circumstances, without neglecting the requirement that the best interests of the child is a primary consideration. Better training for professionals should improve the access of children to their rights (without access to rights, there are no rights). Particular attention should be paid to the needs and rights of children with disabilities and with specific needs.⁴

5) Outline of the feasibility study

18. It will first be necessary to present the method used to carry out this feasibility study which, in order to allow for operational recommendations, is based on an examination of the legal instruments and on the replies to two questionnaires distributed to the Member States and professionals (I).
19. The replies to these questionnaires show that certain "key" terms in any discussion of the child in parental separation are not present in the same way in all Council of Europe member States, either because they use alternative terms or because they give them significantly different meanings. It will therefore be necessary, in a second step, to explain these differences in terminology and to consider how to deal with them so that the instruments and tools to be adopted can be implemented in a uniform way in all Member States (II).
20. Thirdly, it will be relevant to set out the framework for the protection of the rights and best interests of the child in cases of parental separation, which will involve a review of international and European standards (III) as well as the case law of the European Court of Human Rights (IV) that may apply to children in the context of parental separation or subsequently.
21. In addition, an overview of the laws and practices of the member States, as described by the institutions or professionals who responded to the questionnaires, will be proposed on the basis of several specific scenarios identified as potentially posing difficulties in respecting the rights and best interests of the child in the context of parental separations (V).
22. Finally, recommendations will be formulated to enable the Steering Committee on the Rights of the Child and the European Committee on Legal Co-operation to assess the appropriateness of adopting the most relevant instruments and tools to meet the objective of ensuring the protection of the rights and best interests of each child at the

⁴ The United Nations Convention on the Rights of Persons with Disabilities (December 13, 2006) specifies in its Article 7, devoted to the rights of children with disabilities, that their best interests must be a primary consideration in all decisions concerning them and that they have the right to the right to freely express their opinion on any matter of concern to them, the views of the child having to be duly taken into account having regard to their age and degree of maturity.

time of parental separation or in the context of subsequent disputes concerning the child (VI).

I. WORKING METHODS TO DEVELOP THE STUDY

1) Meetings of the CJ/ENF-ISE

23. The first meeting of the CJ/ENF-ISE was held on 24-25 September 2020 at which the scope of the work was discussed and a draft questionnaire was developed. It was also agreed that consultations would be held with relevant stakeholders including child participation, taking into account the experience of the Council of Europe (Children's Rights Division) in conducting consultations with children.
24. The second meeting was held on 7th October at which the draft questionnaires were adopted and authorised for dissemination with a request that they should be returned by 30th November. Consultants had been appointed in late October to support the Committee and to conduct an analysis of the member States' responses and prepare the drafting of the proposed study.
25. A third meeting was held on 14th and 18th December. The December meeting included an exchange of views with Judge Turkovic, Judge at the European Court of Human Rights (ECtHR), who presented a selection of the ECtHR' case law on the protection of children in parental separation situations and care proceedings, as well as the different standards set by the Court and good practice identified in these areas. The positive and procedural obligations under Article 8 of the European Convention on Human Rights (ECHR) in relation to situations of parental separation and care proceedings, as well as the consideration given by the Court to the best interests of the child when balancing competing interests, were underlined.
26. It was, in particular, brought to the attention of the Committee:
 - The demographics change in parental situations as an increasing number of children are born out of wedlock (42% in 2018 within the European Union);⁵
 - That the Court may refer in its judgments to non-binding legal instruments, such as the Council of Europe Guidelines on child-friendly justice; and
 - That the Court pays particular attention to new emerging principles, also known as solidarity rights, in its judgments.
27. The Committee held an exchange of views with Judge Turković, and discussed:
 - The manner in which the change in demographics of parental situations is impacting the Court's view on the best interests of the child;
 - The child's right to independent legal representation before the Court, in the light notably of the recent judgment *A and B v. Croatia*;⁶ and

⁵ See European Commission, 'Eurostat' (Eurostat, 17 July 2020), available at: <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20200717-1>.

⁶ See *A and B v. Croatia*, no. 7144/15, 20 June 2019.

- the need to protect children from duress or undue influence from their parents.
28. The Committee agreed to undertake any necessary follow-up to ensure that the results of its work reflect adequately relevant standards and identified good practices, including in the light of the Court's case law. For further consideration of the relevant ECHR case law see section V below.

2) The Questionnaires

29. A first questionnaire was circulated on selected aspects of parental separation contained in 21 questions in order to receive information from member States on their law, policy and practice relating to safeguarding the best interests of the child in situations of parental separation. A total of forty-six national responses was received⁷, out of which forty-one of the responses were from various ministries and state institutions of member States. Two responses were received from civil society organisations⁸ and another three from other observers and participants.⁹ Several Member States and international bodies did not submit any response to some of the questions or indicated that they considered them inapplicable.
30. A second questionnaire was approved in December by the CJ/ENF-ISE and disseminated to legal practitioners in the member States who work on parental separation and in particular on child participation in parental separation cases.¹⁰ A total of twenty-four responses was received. The responses received from practitioners are from sixteen different member States, as in some cases more than one practitioner from a single country responded to the questionnaire.¹¹
31. Responses came from a wide range of legal practitioners including: practising lawyers from the International Academy of Family Law (IAFL),¹² practitioners from the office of an ombudsman,¹³ practitioners from different country divisions of the International Social Service,¹⁴ practitioners of private law firms in their respective countries,¹⁵ practitioners who appear to have responded as independent legal practitioners.¹⁶
32. Most importantly, it must be noted that although the questionnaires between them provided the Council of Europe with a broad general indication of the laws and practice in member States, this working method was not without its limitations for various

⁷ For more information on the specific Member States, institutions, organisations, observers and practitioners that submitted responses to this questionnaire, as well as the questionnaire sent to practitioners below, please see Annexe E. Two sets of responses were received from Croatia and Italy. Three sets of responses were received from various State institutions of Portugal. Additionally, Scotland and Northern Ireland provided responses as a part of the UK, but no responses were received from England or Wales.

⁸ See the responses from AMU LDPSC (NGO) (France) and Sario Abogados (Spain).

⁹ See the responses from European Commission, Service Social International - Droit d'Enfance (France) and the Child Protection National Authorities of Mexico (Mexico).

¹⁰ CJ/ENF-ISE(2021)2A.

¹¹ See CJ/ENF-ISE(2021)2A, Bulgaria, Germany, Spain, Switzerland and UK.

¹² See CJ/ENF-ISE(2021)2A, Germany, Slovakia and Spain.

¹³ See CJ/ENF-ISE(2021)2A, Bulgaria and Georgia.

¹⁴ See CJ/ENF-ISE(2021)2A, France, Germany and Switzerland.

¹⁵ For example, see CJ/ENF-ISE(2021)2A, Sweden, the Netherlands, Ukraine, Switzerland, Spain, Jersey, Italy and one of the UK responses.

¹⁶ See CJ/ENF-ISE(2021)2A, Luxembourg.

reasons. The form of the content and the nature of the detail provided by each set of responses reviewing their national law and practice varied significantly both from each respondent member States and the practitioners. For example, in some responses no domestic law provision was referred to at all, or the answers provided were too vague to ascertain the law or practice of a given member States with any sort of certainty. In some cases, as noted above, respondents did not provide any answer for some of the questions.

33. From the responses received it has not therefore been possible for this study to form a comprehensive view of member States' relevant laws and practices in the situation of children in parental separation. Section VI below attempts such an overview including of those scenarios considered key.

3) Applicable Legal Instruments

34. In order to have the most precise vision possible of the rules applicable to the protection of the rights and best interests of children at the time of the separation of their parents or subsequently, the consultants proceeded to a referencing and analysis of the legal instruments likely to apply to children whose parents separate. To do this, the consultants prepared a comprehensive list of instruments and tools relevant to the protection of the rights and best interests of the child in the context of parental separation. In a third step, they analysed the applicable standards in order to be able, in a fourth step, to identify the gaps, which were presented at the meeting of 14 and 18 December 2020. These standards and their shortcomings are the subject of a dedicated section in point IV of this feasibility study.

4) Desktop Research by the Consultants

35. The consultants reviewed more than 90 relevant judgments of the ECtHR which between them covered almost all the key guiding principles and key scenarios relating to children in parental separation situations across the member States of the Council of Europe, and which provided a useful overview through the complaints brought to the ECtHR. This study of the ECHR caselaw often clearly indicated that the practice in several Council of Europe member States was different from the theoretical situation presented in the member States responses to the Questionnaires. They considered a further group of cases still pending before the ECtHR which are indicative of more contemporary issues that have not yet been adjudicated by the Court (see section V for more detail). They also read a number of reports produced by the specialised judiciary and specialised practitioners and NGO's, including the views of the affected children. They picked up some of the Concluding Observations of the UNCRC Committee on particular issues in particular with regard to Council of Europe member States. They also referenced the detailed comprehensive commentaries on children and the ECtHR and on the UNCRC as well as the most important contributions by specialists on these matters. Finally, they drew on their own experience litigating children's rights at the ECtHR in cases from several Council of Europe jurisdictions, the training sessions they had conducted for judges and legal practitioners and their ongoing work with e.g. the International Academy of Family law. They looked at the

relevant cases brought before the UNCRC Committee, their work with the Child Friendly Justice European Network, with Children and Families Across Borders (CFAB), with Equal Justice for Migrant Children and the work they had done with the Hague Conference, the materials compiled from the project “Separated Children in Judicial Proceedings” and their law reform work in the Western Balkans.

II. SCOPE OF THE STUDY

1) The protection of the child in parental separation issues

36. This study looks at the existing international and European standards and national law and practice (to the extent that this has been discernible from the responses received promoting and protecting the best interests of the child in situations of parental separation. It looks at the relevant lacunae and it considers whether the adoption at Council of Europe level of a new instrument would strengthen this protection and promotion of the child's interests and if so, how (see section VII "ways forward").
37. The relevant international and European standards are set out in section IV below.
38. From the existing standards, of specific relevance are articles 3, 5, 7, 8, 9, 10, 11, 12, 18, 20, 29 and 30 of the UNCRC (ratified by all Council of Europe member States) with particular attention needing to be paid to Arts 3, 9 and 12 (but crucially not disregarding the other, less frequently quoted, articles). The study will consider the implementation of those standards. It will also consider the relevant articles of other instruments such as the Council of Europe Convention on the Exercise of Children's Rights and the Council of Europe Convention on Contact,¹⁷ the Council of Europe Luxembourg Convention,¹⁸ the 1980 and 1996 Hague Conventions, the EU and Hague Legislation on Maintenance, and the Council of Europe Guidelines on Child Friendly Justice (see section IV).
39. Crucially, this study notes at the outset that in proceedings where children are being taken from their parents or families and placed in public care, the affected children are at the very heart of the proceedings, which are all about them. In cases of parental separation, the situation of the children is often looked at as just one of many issues (e.g. division of property, continued occupation of the family home, financial arrangements etc.) from the perspective of the separating parents. The situation of the children is often seen as rather peripheral and a matter of each parent's rights *vis-a-vis* each other and *vis-a-vis* the children rather than focussing on the children's rights and needs.

2) Overlaps between the best interests of the child in care proceedings and parental separation proceedings

40. In care proceedings the role of the state is central. Its role is to intervene – in the best interests of the child and having canvassed and given due weight to the child's views – in situations where children are (or are perceived to be) in need of protection because those who have parental responsibility for them (or parental authority over them) either themselves present a risk or they are unable to protect the children from the risks presented by others.

¹⁷ Council of Europe, European Convention on Contact concerning Children, 15 May 2003.

¹⁸ Council of Europe, European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (Luxembourg Convention), 20 May 1980.

41. The state has a duty to intervene appropriately in such circumstances and the children have a legitimate expectation under international, European and national law that such protective and proportionate intervention will be forthcoming.
42. The intervention should always foresee the return of the children to their parent(s) as soon as this is both possible and compatible with their protection needs. Sometimes this will not be feasible and the proper and durable solution for the children will be to place them for adoption in a new permanent family with or without the consent of the birth parent(s). The children are entitled to a legal remedy if the state fails them in this regard. This statement of principles in relation to care proceedings is derived from the relevant international standards (see section IV) and the cumulative jurisprudence of the ECtHR (see section V).
43. In parental separation proceedings, the role of the state (primarily the judiciary) is secondary to that of the separating parents. It is to act - in the best interests of the child and having canvassed and given due weight to the child's views - to approve, or withhold approval of child arrangements made by agreement between separating parents, or, in the absence of agreement, to determine what those arrangements should be and to make the necessary legal orders. Neither parent normally loses **all** parental responsibility or parental authority.
44. In carrying out these duties the state must then ensure compliance by both parents with any court orders regarding "custody", residence, contact/access, relocation, education, change of name or religion, or abduction (internal or international). If adoption is proposed by the new partner of one parent the consent of the other parent must be obtained or judicially dispensed with. In situations of a separated parent's imprisonment or the proposed expulsion of the parent of a child of separated parents the state must also take into account the best interests of the child and canvass and give due weight to the child's views when taking relevant decisions. This statement of principles in relation to parental separation proceedings is also derived from the relevant international standards (see section IV) and the cumulative jurisprudence of the ECtHR (see section V).
45. Absent a serious pattern of substance addiction, sexual abuse, domestic violence or other criminal conduct by the parents, it is rather rare for children to have to be taken into public care when they live in a stable, two parent cohabiting household.
46. However, children in insecure parental situations (parents separated because they never cohabited or are on the verge of separation or have already separated) may be at risk and therefore in need of the kind of protection that only state intervention can provide. Their protection needs may derive from the insecurity of their parental situation, for example the eviction by one parent of the other parent from the home with the consequent displays of violent anger and resentment. Substance or alcohol abuse and/or domestic violence (by either or both parents) may contribute to that insecurity. The parent may be unable to ensure the other parent's compliance with a "non-molestation order with a power of arrest" (un ordonnance de protection) or a court order to stay away from the family home or environment which puts the child or children

at a risk of harm and which can only be safely dealt with by taking the children into care. Their protection needs may thus derive directly from the parental separation.

47. The duty on the state to take the necessary measures to protect the children is the same whatever the source of the harm or risk of harm.
48. Examples of placing the child in care in situations of parental separation:
 - *Deticek v Sgueglia* (a CJEU case Case 403/09 PPU)¹⁹ an order of custody in favour of the father was accompanied by order placing the child in care in an institution. This prompted the international abduction of the child by the mother to prevent the implementation of the placing in care that had been ordered.
 - *V.P. v. France*²⁰ ECtHR (pending) is a case brought by child herself objecting *inter alia* to being taken from custodial father and placed in public care in an attempt to encourage a less negative attitude to her mother in order to “*donner a l'enfant un espace de temps sans contact avec ses parents pour limiter le conflit de loyauté*”.
 - *A.P. and A.M. v. the Czech Republic*²¹ is another pending case concerning *inter alia* child placed in care in the context of parental separation proceedings.

3) Main differences between the best interests of the child in parental separation proceedings and care proceedings

49. In care proceedings, the primacy of the best interests of children is assessed with a view to deciding whether the serious harm children are suffering or the risk of serious harm to which they are exposed justifies the draconian²² step of removing them from the parent(s) and the consequent placement in foster care or an institutional setting. The same assessment is then applied to the possibility of return to the parent(s) or the permanent separation from them by placing the child in long term foster care or for adoption. In the latter case the child's best interests are not primary but paramount²³.
50. Protecting the child and separation from the parent(s) who pose the risk is (normally) the immediate key issue in a best interest's assessment in care proceedings and, if children are removed from their home, ensuring that the primacy of their best interests must continue to be respected once the state assumes responsibility for the child's day to day and long-term welfare and in any decision relating to return.
51. In parental separation proceedings, the primacy of the best interests of the child is assessed with a view to deciding matters relative to maintaining the child's relationship with each parent²⁴ after separation: determining whether joint²⁵ custody or sole custody

¹⁹ *Deticek v Sgueglia*, C-403/09 PPU, Judgment of the Court (Third Chamber) of 23 December 2009.

²⁰ *V.P. v. France*, no. 21825/20, communicated on 30 September 2020.

²¹ *A.P. and A.M. v. the Czech Republic*, no. 22216/20, lodged on 27 May 2020 and communicated on 15 January 2021.

²² *K. and T. v. Finland* [GC], no. 25702/94, ECHR 2001-VII.

²³ United Nations Convention on the Rights of the Child 1989 (UNCRC), Article 21.

²⁴ See *inter alia* UNCRC, Articles 5, 8, 9 and 10.

²⁵ Where this possibility exists in national law.

is appropriate, with which parent the children should have their primary residence, the ordering of access and contact with the other parent and the enforcement of that access and contact. The judiciary (or other designated body) will also be responsible in the event of disagreement between the parents for deciding important issues such as relocation, education, medical treatment, change of name, change of religion, & maintenance payments, or the adoption by a new partner.²⁶ How, and in some intractable cases whether, to maintain the child's relationship with each parent is a key element to this best interest's assessment. The separated parents retain their responsibility for the child's day to day wellbeing and long-term welfare and the state's involvement in a best interest's assessment is confined to moderating and adjudicating disputes between them.

III. KEY CONCEPTS AND DEFINITIONS

52. The consideration of the rights of children in situations of parental separation is hampered by a lack of consistency in the vocabulary employed in different jurisdictions. This is not just a question of translation; it is that - often for historical reasons- the concepts underlying the terms are also different.

1) Who is considered a “parent”?

53. It is now 45 years since the 1975 European Convention on the Legal Status of Children born out of Wedlock²⁷ was adopted but “the disparities in the laws of member States in this field”, noted in the preamble, continue to exist.
54. In 2018, in more than 8 European states over 50% of births occurred outside marriage²⁸ but the legal status of the relationship between unmarried fathers and their children still varies widely. In surrogacy and in gender re-assignment cases the legal status of the mother is no longer as simple as was set out in Art 2 of the 1975 Convention and the maxim “mater semper certa est” no longer holds true.
55. Parents can be;
- biological (contributing gametes); and/or
 - legal (recognised as parents in law); and/or
 - social (carrying out the functions of parenthood - sometimes despite being neither biologically or legally related to the child).²⁹
56. In a traditional family based on marriage, “parents” were assumed to share all these three characteristics.
57. In present social mores, parental separation may be said to occur if:

²⁶ In that case the child's best interests are paramount not primary.

²⁷ ETS 85 adopted in 1975 but still only 22 ratifications.

²⁸ Alice Tidey, 'Number of births outside marriage rise in EU' (EuroNews, 16 April 2018), available at: <https://www.euronews.com/2018/04/16/number-of-births-outside-marriage-rise-in-european-union>

²⁹ For example, the cohabiting spouse or partner of a legal or biological parent or a kafil in a kafala arrangement or a long-term foster parent.

- (i) a child's *biological* parents have never co-habited, or have separated after cohabitation, or have been married and have separated after marriage; or
 - (ii) the child's *legal* parents have never cohabited, or have separated after cohabitation, or have been married and have separated after marriage; or
 - (iii) the child's *social* parents separate after cohabitation.³⁰
58. There remains a disparity cross Europe in the recognition of parental status - biological, legal (filiation), social. The Hague Conference on Private International law has been working for some years towards the adoption of a Convention that will ensure the mutual recognition of parentage across borders and an associated Protocol on the more difficult issue of the recognition of parentage in surrogacy situations.
59. The first concept and definition requiring clarification in any Council of Europe measure adopted (see section VII ways forward) is who should be recognised as a child's parent in situations of parental separation at the relevant time? The child's biological, legal or social parents? Without identifying who are the child's parents, none of the other measures can proceed. Any proposed measure should specify who is to be considered a parent in situations of "parental separation".

2) What are children's rights vis-à-vis their parents and what are the parents' rights and duties vis-à-vis their children?

60. A range of terms is used to describe those mutual rights: parental responsibility/parental authority/custody, care and control. But partly because of the disparities in the definition of "parent" and the absence of the terminology of "parental responsibility" in all jurisdictions, it is not always clear how they apply in practice.
61. The scope of the rights attaching to these terms differs from jurisdiction to jurisdiction and often from case to case. The Hague Conventions and BII Bis³¹ already have definitions which are applicable to proceedings governed by those instruments, but the terms used do not always apply in other situations in national law and practice and this can lead to an absence of consistency.
62. It could be helpful if any Council of Europe measure adopted (see section VII ways forward) was able to move towards a common Council of Europe terminology of parental responsibility or parental authority which could be applied in situations of parental separation and not just in the cross-border situations covered by the Hague

³⁰ By social parents is meant those who are neither biological or legal parents of children but who have acted as stable co-parents in a common household with the children. Nearly transient cohabiting partners would be unlikely to qualify.

³¹ The preamble to Regulation Brussels II bis (recast) states in recital 92: *The law applicable in matters of parental responsibility should be determined in accordance with the provisions of Chapter III of the 1996 Hague Convention. When applying that Convention in proceedings before a court of a Member State in which this Regulation applies, the reference in Article 15(1) of that Convention to 'the provisions of Chapter II' of that Convention should be understood as referring to 'the provisions of this Regulation'.*

In BII Bis, Article 2(7) and (8), the following agreed definitions exist for:

"7. The term "parental responsibility" shall mean means all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgement, by operation of law or by an agreement having legal effect. The term shall include rights of custody and rights of access;

8. the term "holder of parental responsibility" shall mean any person having parental responsibility over a child;"

and EU instruments. If no agreement can be reached as to a common Council of Europe terminology of these terms, then it would be useful to explain the meaning of each term and its use in respective member State in an explanatory report to the adopted measure.

3) Custody

63. What does “Custody” mean? Different states recognise shared custody, joint custody or sole custody, but in many jurisdictions, custody is considered an outmoded term (English law, for example provides for “child arrangements”). Custody typically includes the right to determine the child’s place of residence, which is normally with the parent who is said to have custody, particularly if there is “sole custody”. In some jurisdictions, sole custody may give the custodial parent almost plenipotentiary powers; in others those powers may be far more limited. Where there is joint or shared custody other arrangements may be in place³² (see section VI).
64. Any proposed measure must include a definition of the *content* of the concept of custody applicable across the Council of Europe even in those jurisdictions that do not use the term. However confusing it may be, the term ‘rights of custody’ must be retained with some common content in order to give practical effect to the cross border situations governed by European or international agreements³³ which would otherwise require amendment. If it is not considered desirable to address the concept of custody within the adopted instrument it is recommended that both translations and explanations of the term ‘custody’ in each respective member States is included in an explanatory report so as to guide practitioners and decision makers as to the application of the term in each jurisdiction. This would be particularly useful in cross border situations in order to ensure the smooth and consistent application of the 1980 Hague Convention and Brussels II bis.
65. Any Council of Europe instrument adopted must reflect that decisions about the “custody” of the child should only be taken after the child has been heard.

³² The content of the terminology of custody and the scope of the exclusive decision-making rights accompanying it varies considerably across the 47 Member States.

³³ In BII Bis, Article 2(9): ‘*rights of custody*’ includes rights and duties relating to the care of the person of a child and in particular the right to determine the place of residence of a child’; and the same wording is found in Article 5(a) of the Hague Convention 1980.

4) Residual rights in law of the child vis-à-vis the non-custodial parent

66. Residual rights in law of the child vis-à-vis the non-custodial parent; Normally e.g. contact, visit, holidays, access. In some jurisdictions, and some cases, the non-custodial parent may have the right to be consulted and to consent to important matters such as religion, name change, medical treatment, choice of school; in others the parent with “custody” can make all these decisions, the rights of the non-custodial parent being restricted to “contact/access”.

5) Contact/Access

67. It should be noted that the Council of Europe Convention on Contact 2003 expressly replaced the term “access to children” by the term “contact concerning children” but “access” is retained in BII Bis, including in the recast, and in the Hague Convention where it has a very specific meaning relating to taking children to a place other than their habitual residence³⁴ whereas contact in the Council of Europe Convention can include something as simple as a meeting.³⁵ The child’s right to maintain contact with each parent is enshrined in Article 9 UNCRC where it is described as “personal relations and direct contact”. The drafting of a proposed instrument may present a useful opportunity to introduce a more child-centred terminology.³⁶
68. The ECtHR insists that contact or access must be practical and effective not theoretical and illusory – that is, it must happen in practice in a meaningful way for the child /parent relationship and be enforced- where necessary- by proportionate measures. (See section V - Overview of ECHR case law)
69. Any measure adopted by the Council of Europe should identify and reconcile the disparity of scope that currently exists between “contact” and ‘access’ and the overlap or gap between rights of custody and rights of contact and access. In all cases the right of the children to have their views canvassed and heard and accorded due weight will need to be emphasised in relation to custody and contact or access proceedings.

³⁴ In BII Bis Article 2(10) ‘rights of access’ means rights of access to a child, including the right to take a child to a place other than his or her habitual residence for a limited period of time;

³⁵ Council of Europe, Convention on Contact, Article 2 provides:

For the purposes of this Convention:

“contact” means:

- i) the child staying for a limited period of time with or meeting a person mentioned in Articles 4 or 5 with whom he or she is not usually living;
- ii) any form of communication between the child and such person;
- iii) the provision of information to such a person about the child or to the child about such a person.

b. “contact order” means a decision of a judicial authority concerning contact, including an agreement concerning contact which has been confirmed by a competent judicial authority or which has been formally drawn up or registered as an authentic instrument and is enforceable;

³⁶ For example, Norway has ‘samvaer’ (being together) and other jurisdictions talk about ‘parenting time’ or are discussing to change towards the term ‘parenting time’.

6) The best interests of the child

70. Best interests as a primary/paramount consideration - in various language versions of UNCRC (e.g., French and Spanish) the words for primary and paramount do not distinguish between the two concepts although the English term paramount is only used in the context of adoption in Article 21.CRC. Both use “primordial”- and the only difference is whether an indefinite or definite article is used - that is whether best interests are to be considered “une consideration primordiale” or “la consideration primordiale”.³⁷ ECHR jurisprudence frequently states that best interests are “paramount” in circumstances in which *strictu sensu* best interests should (under UNCRC) be considered primary and not paramount. The distinction between the terms “a primary”, “the primary”, and “paramount” are much litigated in national courts and the ECtHR’s use of the term paramount – although very welcome from a child -friendly perspective - has muddied the waters.
71. Any new measure adopted by the Council of Europe will need to clarify which term is being used and how.

7) Hearing the child’s views

“Capable of forming his or her own views”

72. The English text of Article 12 UNCRC says “capable of forming his or her own views” whilst the French text says “capable de discernement”.
73. The UNCRC General Comment on Article 12³⁸ says that a child is able to *form* views from the youngest age even when unable to *express* them verbally.³⁹ The UNCRC Committee notes that it is not necessary that children have comprehensive knowledge of all aspects of the matter affecting them for children to have the right to form and express views.
74. It should be recalled that *forming* the views and *expressing* those views have been noted by the Committee to be different and that the capability of the child will be taken into consideration when determining the “due weight” to be given to those views.
75. The Council of Europe Convention on the Exercise of Children’s Rights 1996⁴⁰, Article 3, provides that a child of “sufficient understanding” has a right to be informed and to express his or her views in judicial proceedings.
76. In EU Regulation 2019/1111 (the new BII Bis) a new provision has been inserted about the mandatory hearing of the child’s views, leaving it to the court of origin to decide on the appropriate *method* for hearing the child:

³⁷ It is not the same even in the various official languages of the United Nations (Arabic, Chinese, Russian, English, French, Spanish).

³⁸ UN Committee on the Rights of the Child, *General Comment No. 12 (2009) on the right of the child to be heard*, 20 July 2009, CRC/C/GC/12.

³⁹ UN Committee on the Rights of the Child, *General Comment No. 12 (2009) on the right of the child to be heard*, 20 July 2009, CRC/C/GC/12, para 21.

⁴⁰ Ratified to date by only 20 of Council of Europe member States.

“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.”⁴¹*

77. From August 2022 when the Recast comes into force, a “decision in matters of parental responsibility” will not be enforceable in another EU member States if the child has not been heard unless the decision falls within one of these specified exceptions. As a matter of EU law all the official language versions are equally authoritative and should be applied in all member States. The terminology used in Regulation 2019/1111⁴² reflects that of the UNCRC⁴³ and General Comment 12.⁴⁴ Article 24 of the EU Charter

⁴¹ Regulation 2019/1111, Article 39(2).

⁴² Regulation 2019/1111, preamble 57: *As concerns the opportunity given to a child to express his or her views, it should be for the court of origin to decide about the appropriate method for hearing a child. Therefore, it should not be possible to refuse recognition of a decision on the sole ground that the court of origin used a different method to hear the child than a court in the Member State of recognition would use. The Member State where recognition is invoked should not refuse recognition where one of the exceptions from this particular ground for refusal as permitted by this Regulation applies. The effect of those exceptions is that it should not be possible for a court in the Member State of enforcement to refuse to enforce a decision on the sole ground that the child was not given the opportunity to express his or her views, taking into account his or her best interests, if 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 in the case of the existence of serious grounds taking into account, in particular, the urgency of the case. Such serious grounds could be given, for instance, where there is imminent danger for the child's physical and psychological integrity or life and any further delay might bear the risk that this danger materialises.*

Article 21 states:

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.*

UNCRC,

Article 26 states:

Article 21 of this Regulation shall also apply in return proceedings under the 1980 Hague Convention.

Article 39(2) states:

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 ground taking into account, in particular, urgency of the case,*

⁴³ UNCRC, Article 12 states:

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.*

⁴⁴ General Comment 12 notes at paras. 32 and 33:

of Fundamental Rights and its Explanations)⁴⁵ makes clear that EU law in relation to children is intended to mirror the UNCRC. However, it should be noted that the exceptions specified in the Regulation would appear to sit uncomfortably with Article 12 UNCRC.

78. Any new measure to be adopted by the Council of Europe should consider adopting the terminology of the UNCRC (which can be amplified by reference to GC 12) that is “capable of forming his or her own views’ rather than the terminology of the Convention on the Exercise of Children’s rights “sufficient understanding”. It should be recalled that the *forming* of views is different from the *expressing* of views and that children who are capable of forming their views may not necessarily be capable of expressing them.

8) How the child’s views should be heard

79. Most Council of Europe states are aware (at least in theory) of:
- (i) the right of children to form and express views in all matters affecting them and
 - (ii) the right to have the opportunity to be heard, directly or through a representative, in all judicial and administrative proceedings affecting them (see section VI).
80. This obviously applies to matters of parental separation, and to both separation proceedings and post separation proceedings e.g., access/contact/relocation etc. It was however unclear from the responses (see section VI) if, and how and to what extent, these rights are implemented in practice.
81. Article 21 BII Bis recast says member States must provide the child with a “genuine and effective” opportunity to express those views.

32. Article 12, paragraph 2, specifies that opportunities to be heard have to be provided in particular “in any judicial and administrative proceedings affecting the child”. The Committee emphasizes that this provision applies to all relevant judicial proceedings affecting the child, **without limitation**, (emphasis added) including, for example, separation of parents, custody, care and adoption, children in conflict with the law, child victims of physical or psychological violence, sexual abuse or other crimes, health care, social security, unaccompanied children, asylum-seeking and refugee children, and victims of armed conflict and other emergencies. Typical administrative proceedings include, for example, decisions about children’s education, health, environment, living conditions, or protection. Both kinds of proceedings may involve alternative dispute mechanisms such as mediation and arbitration.

33. The right to be heard applies both to proceedings which are initiated by the child, such as complaints against ill-treatment and appeals against school exclusion, as well as to those initiated by others which affect the child, such as parental separation or adoption. States parties are encouraged to introduce legislative measures requiring decision makers in judicial or administrative proceedings to explain the extent of the consideration given to the views of the child and the consequences for the child.

⁴⁵ 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.”

Official Journal of the European Union, C 303, 14 December 2007.

82. Any measure proposed by the Council of Europe should make clear that Article 12 CRC applies (as noted above) “without limitation” and in particular without the limitation set out in BII Bis.
83. At present children themselves (or even their views) are not routinely heard in parental separation proceedings and Article 12 UNCRC is systematically ignored.
84. Any instrument adopted by the Council of Europe should emphasise the central importance of hearing the child’s views and of clarifying what is meant by “hearing the child’s views” in any proceedings – including all aspects of parental separation and post separation proceedings - and should either prescribe methods which are considered “genuine and effective” or provide a selection of examples of good practice that states can use as a basis for developing their own practice. Examples could also be taken from the ECtHR jurisprudence on this issue. (See section V)
85. States could be re-assured as to the practical consequences of this. Compliance would not necessarily involve child participation as a *party* in all parental separation proceedings but could be satisfied by a lesser measure such as ensuring that the child’s view has been ascertained by a professional *independent of the parents* and presented by an equally independent representative (possibly the same person). However, it would nevertheless need to be recognised that in some cases the child(ren) would need to be made full parties to the proceedings and legal representation provided for them.

IV. OVERVIEW OF INTERNATIONAL AND EUROPEAN STANDARDS

86. A comprehensive list of standards that may apply to children experiencing parental separation is provided in Annex B. This list includes standards from the United Nations (Convention on the Rights of the Child, General Comments of the Committee on the Rights of the Child and the International Covenant on Civil and Political Rights), standards from the Council of Europe (treaties, guidelines, recommendations of the Committee of Ministers and resolutions of the Parliamentary Assembly),⁴⁶ standards from the European Union (Charter of Fundamental Rights, regulations and directives) and standards from the Conventions of the Hague Conference on Private International Law.
87. In this section, reference will be made to international and European standards that are particularly relevant to the protection of the rights and best interests of children whose parents separate. These standards have been analysed in order, firstly, to identify the main principles that should be respected for the benefit of the child at the time of parental separation or subsequently (1) and, secondly, to be able to identify the gaps (2).

⁴⁶ The study of standards from the Council of Europe is complemented in the next section by an analysis of the judgments of the European Court of Human Rights concerning the protection of the rights and best interests of the child upon or after parental separation.

1) Principles derived from international and European standards

88. The international and European standards analysed show that, of all the rules that may apply when a child's parents separate, three can be considered as guiding principles that must be respected by any person or authority making decisions: the best interests of children must be a primary consideration in decisions affecting them (a); the child has the right to participate in the making of those decisions (b); the separation of the parents does not affect the right of the child to maintain relations with each of them (c).

a) Respect for the best interests of the child

89. A very large majority of the international and European standards analysed refer to the best interests of the child. Foremost among these standards is Article 3.1 of the Convention on the Rights of the Child, adopted on 20 November 1989 by the United Nations General Assembly (UNCRC). It states that in all actions concerning children, the best interests of the child shall be a primary consideration, whether those actions are undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies.
90. According to the UN Committee on the Rights of the Child, the best interests of the child is one of the four general principles of the UNCRC⁴⁷ and should therefore guide the interpretation and implementation of all rights enjoyed by children. The Committee added that the best interests of the child is a threefold concept, i.e. it is a substantive right, a procedural rule and a fundamental interpretative legal principle.⁴⁸ The assessment of the best interests of the child must be made on a case-by-case basis and in accordance with the circumstances and the various parameters and elements listed by the Committee, including the views of the child and the principle of preservation of the family environment and ties,⁴⁹ which will be developed further.
91. Under the impetus of the UNCRC, the right of children to have their best interests be a primary consideration has also been enshrined by the Council of Europe. Thus, the preamble of the Convention on Contact concerning Children (2003) recognises that the best interests of the child shall be a primary consideration, which implies, according to Article 7 of the same Convention, that when judicial authorities are seized of contact cases, they shall ensure that they have sufficient information to make a decision in the best interests of the child. Similar provisions are contained in Article 6 of the European Convention on the Exercise of Children's Rights (1996) according to which, before making a decision, the judicial authority shall consider whether it has sufficient information to make a decision in the best interests of the child. In the context of the Guidelines on child-friendly justice (2010), the Committee of Ministers of the Council of Europe went further by stating that "member states should ensure the effective implementation of the right of children to have their best interests taken into account in all matters affecting them directly or indirectly". Thus, the best interests of the child

⁴⁷ Committee on the Rights of the Child, General Comment No. 5 (2003): "General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)", CRC/C/GC/2003/5, § 12.

⁴⁸ 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 be a primary consideration, CRC/C/GC/14, § 6.

⁴⁹ *Ibid*, § 46 ff.

should not be a primary consideration among others, but should, according to these Guidelines, take precedence over all other considerations.

92. The primacy of the best interests of the child is also reflected in the standards of the European Union. Thus, the Charter of Fundamental Rights of the European Union (2000) states, in Article 24 specifically devoted to the rights of the child, that the best interests of the child must be a primary consideration in all actions concerning children, whether taken by public authorities or private institutions. The Brussels IIa Regulation of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility refers to the best interests of the child as one of the grounds for non-recognition of judgments relating to parental responsibility: Article 23(a) states that a judgment relating to parental responsibility shall not be recognised if it is contrary to public policy in the State addressed having regard to the best interests of the child. This ground is also included in Articles 39 and 68 of the Brussels II bis (recast) Regulation of 25 June 2019 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the international abduction of children, among the grounds for refusing to recognise decisions, authentic instruments or agreements concerning a child.⁵⁰
93. The principle that the best interests of the child shall be a primary consideration still appears in the Hague Conventions, for example in the preamble to the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (1996). Also, the Washington Declaration on International Family Relocation (2010) - of the Hague Conference on Private International Law and the International Centre for Missing and Exploited Children - states in its paragraph 3 that the best interests of the child shall be the primary consideration in any application for international relocation and specifies that this is the "primary" primary consideration, again implying that it takes precedence over all other considerations.

In the context of parental separations, the right of children to have their best interests as a primary consideration applies to all decisions, acts and measures affecting them, directly or indirectly, at the time of separation from their parents and thereafter. This principle is binding on the parents themselves, in particular in the context of amicable processes for the settlement of parental separation or parental disputes, as well as on any administrative or judicial authority intervening at the time of or following the separation of the parents of children.

b) Respect for the children's right to participate in decisions affecting them

94. Most of the international and European standards analysed recognise the right of children to participate in decisions affecting them, which is envisaged as a condition for the realisation of their right to have their best interests be a primary consideration. Indeed, in order for the best interests of children to be effectively taken into account in decisions affecting them, it is important that the children can be involved in the

⁵⁰ The Brussels II bis (recast) Regulation of 25 June 2019 will enter into force on 1 August 2022.

decision-making process. To this end, Article 12 of the UNCRC establishes the principle that children capable of forming their own views have the right to express those views freely in all matters affecting them. This text specifies that the views of the child shall be given due weight in accordance with the age and maturity of the child (Article 12.1). The effectiveness of this principle requires, *inter alia*, that children be given the opportunity to be heard in any judicial or administrative proceedings affecting them (Article 12.2).

95. The right of children to express their views freely in all matters affecting them is also, according to the Committee on the Rights of the Child, one of the four general principles of the UNCRC.⁵¹ This right must therefore be implemented in order to respect all the rights recognised by the Convention. On several occasions, the Committee on the Rights of the Child has highlighted the close links between Articles 3 and 12 of the Convention, as the expression of children should enable them to participate in the determination of their best interests so that the decision most in line with their interests can then be taken. In 2009, the Committee considered that Articles 3 and 12 of the Convention are complementary, the former setting out the objective of seeking the best interests of the child, the latter indicating the method to be followed to achieve this objective, which means that the application of Article 3 requires that children's right to express themselves be respected and thus that the best interests of the children be established in consultation with them.⁵² In 2013, the Committee re-emphasised the inextricable links between the two articles, recalling that the assessment of the best interests of the child requires respect for children's right to express their views freely and to have them given due weight.⁵³ Thus, the Committee considers that decisions that do not take into account children's views do not respect the principle that the children should have the opportunity to influence the determination of their best interests. In 2016, the Committee added that States parties must ensure that due weight is given to the views of the young person as they gain in understanding and maturity.⁵⁴
96. It is important to recall that the right of the child to be heard is a right and not an obligation. This is clear from GC 12 which makes clear that the child has the right not to exercise this right. Expressing views is a choice for the child, not an obligation. However, States parties have to ensure that children receive all the information and advice necessary to make this decision about exercising that choice. States parties must be aware of the potential negative consequences of an inconsiderate practice of this right, particularly in cases involving very young children, or in instances where the child has been a victim of a criminal offence, sexual abuse, violence, or other forms of mistreatment. States parties must undertake all necessary measures to ensure that the right to be heard is exercised ensuring full protection of the child. The right to express those views "freely" means that children can express their views without pressure and can choose whether or not they want to exercise their right to be heard. "Freely" also means that the child must not be manipulated or subjected to undue

⁵¹ Committee on the Rights of the Child, General Comment No. 5 (2003) : "General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)", § 12.

⁵² Committee on the Rights of the Child, General Comment No. 12 (2009) on the right of the child to be heard, CRC/C/GC/12, § 74 and § 71.

⁵³ 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 be a primary consideration, § 43.

⁵⁴ Committee on the Rights of the Child, General Comment No. 20 (2016) on implementing child rights during adolescence, CRC/C/GC/20, § 22.

influence or pressure in making this decision or in the views they express. “Freely” is further intrinsically related to the child’s “own” perspective: children have the right to express their own views and not the views of others. The Committee recognises the “hearing” of a child is a difficult process that can have a traumatic impact on the child and that States parties must ensure conditions for expressing views that account for the child’s individual and social situation and an environment in which children feel respected and secure when freely expressing their opinions. The Committee consequently also emphasizes that a child should not be interviewed more often than necessary, in particular when harmful events are being explored.⁵⁵

97. The idea that the participation of children in the decision-making process is a guarantee that decisions taken about them will respect their best interests is also reflected in standards from the Council of Europe, which recognise the right of children to be involved in decisions affecting them. This is particularly true of the European Convention on the Exercise of Children’s Rights, the purpose of which, according to its preamble and Article 1, is precisely to enable children to exercise their rights so that their best interests are respected. Accordingly, Article 3 of the Convention recognises the right of children who are considered by national law as having sufficient understanding to receive all relevant information in proceedings affecting them before a judicial authority and to be consulted and express their views. The Convention specifies the modalities of implementation of this right: children may request to be assisted by a person of their choice, including a lawyer (Article 5.b), they are entitled to exercise the prerogatives of a party to the proceedings (Article 5.c) and they have the right to request the appointment of a special representative in case of conflict of interests with their parents (Article 4). In order to make the rights of the child effective, Article 6 specifies the obligations of the judicial authority: before taking any decision affecting children, it must ensure that children considered to have sufficient understanding has received the necessary information, it must allow children to express their views and consult them personally, and it must then give due weight to the views expressed by the children. The judicial authority must also ensure that it has sufficient information to take a decision in the best interests of the child. These provisions have been partly taken up by the Convention on contact concerning children, which provides in Article 6 that children considered as having sufficient understanding has the right to receive all relevant information, to be consulted and to express their views, unless this is manifestly contrary to their best interests. The text adds that due account should be taken of the child’s views, wishes and feelings, thus emphasising the weight that the child’s voice should have on decisions affecting them. The Council of Europe Guidelines on child-friendly justice also promote, quite logically, the child’s right to participation: this implies that every child has the right to be informed of their rights, to have appropriate access to justice, and to be consulted and heard in proceedings affecting them directly or indirectly. The Guidelines further provide that, for child participation to be meaningful, the views of the child should be taken into account, taking into account the child’s maturity and possible communication difficulties. The Guidelines detail the adaptations needed in the case of a confrontation of the child with the justice system, to ensure that the rights of the child are respected. In 2012, the Recommendation of the Committee of Ministers to member states on the

⁵⁵ Committee on the Rights of the Child, General Comment No. 12 (2009) on the right of the child to be heard, 20 July 2009, CRC/C/GC/12, paras. 16 and 21-24.

participation of children and young people under 18 years of age reiterated some of the principles contained in previous texts, such as the right of children to be heard in all matters affecting them and the right to have their views given due weight in accordance with their age and degree of maturity. This Recommendation also develops the idea of children's increasing influence on decisions affecting them as they grow and develop their capacities, as the Committee on the Rights of the Child did in 2016.

98. At EU level, Article 24 of the Charter of Fundamental Rights affirms that children have the right to express their views freely and to have those views taken into account on matters affecting them, in accordance with their age and maturity. This article is based on the provisions of the UNCRC, except that it does not require capacity of discernment as a condition for children's right to express their views. Thus, children are given an unconditional right to express their views and it is only with regard to the influence of those views on the decision affecting them that their age and maturity must be taken into account. The child's right to participation is also recognised by the Brussels IIa Regulation, from which it follows that non-recognition of decisions on parental responsibility may be based on the fact that the decision was given without the child having had the opportunity to be heard (Article 23). More specifically, judgments on rights of access are enforceable in all Member States only under certain conditions, in particular that the child has been given an opportunity to be heard, unless a hearing was considered inappropriate having regard to their age and degree of maturity (Article 41). The same provisions apply to the return of a child wrongfully removed to or retained in another Member State (Article 42). The Brussels II bis (recast) Regulation goes further in recognising children's right to express their views, which is enshrined in Article 21. According to this text, courts deciding on parental responsibility must give children who is capable of forming their own views a real and effective opportunity to do so, either directly or through a representative or an appropriate body. The text adds that where children have expressed their views, the court shall give due weight to the views of the child having regard to their age and degree of maturity. It specifies that the opportunity to be given to children to have their voice heard must be real and effective. Since the capacity of the child to understand is, according to the Regulation, the condition for the child to be heard in proceedings relating to parental responsibility, Article 39 logically refers to the fact that a judgment in this matter was given without children capable of understanding having had the opportunity to express their views as a ground for refusing to recognise it. The same applies to Article 68 on the grounds for refusing to recognise or enforce an authentic instrument or agreement in matters of parental responsibility which has been registered without children having had the opportunity to express their views. The latter provisions are of particular importance insofar as, although increasingly encouraged, out-of-court methods of taking decisions relating to the child do not necessarily make room for the expression of the child's views, which may pose problems for the recognition of acts and agreements after the entry into force of the Brussels II bis (recast) Regulation.

In the context of parental separations, children have the right to participate in all decisions taken concerning them at the time of the separation of their parents and
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subsequently, regardless of the persons or authorities responsible for taking these decisions and regardless of their subject matter (parental responsibility, custody of the child, visiting rights, decisions relating to religion, health, schooling, the child's leisure activities, etc.) The right of children to participate in decisions taken at the time of or following the separation of their parents implies, in particular, that the views of children should be ascertained and that the persons or authorities in charge of such decisions should take due account of the views expressed by children. The participation of children may take the form of a hearing in the context of judicial proceedings affecting them or in the context of an amicable process for the settlement of parental separation or disputes.

c) *Respect for the right of the child to have contact with each parent*

99. While children's right to have their best interest's paramount and to participate in decisions affecting them may be undermined in the context of parental separation, this is even more the case for the child's right to maintain a relationship with each parent, which may be threatened when parents live separately, especially in the event of conflict between them. For this reason, the standards analysed firmly affirm the principle that parents have the primary responsibility for the upbringing and education of their child and that they have a common and equal responsibility in this role. Therefore, their separation should not affect either their rights and duties towards their children or children's right to maintain personal relations and direct contact with both parents, unless their interests require otherwise.
100. This principle is primarily reflected in the UNCRC, Article 9 of which states that children should not be separated from their parents, unless such separation is necessary in the best interests of the child, for example, where the parents live separately and a decision has to be made concerning the children's place of residence. In such cases, the interested parties must be given the opportunity to participate in the deliberations and to make their views known, and the child has the right, when separated from one or both parents, to maintain personal relations and direct contact with both parents on a regular basis, unless this is contrary to the best interests of the child. What is a right for children is at the same time a recognised prerogative for the benefit of each of their parents, since it is presumed to be in the children's best interests that they occupy an equivalent place in their life? Thus, Article 5 of the UNCRC affirms that the upbringing of the child is a responsibility, a right and a duty of the parents. According to Article 18, both parents have a common responsibility for the upbringing of their child. This principle cannot be affected by parental separation: even if separated, parents must take decisions together and in an equal manner concerning the upbringing of their child, whether these concerns, in particular, the child's education, schooling, religion, sports, cultural, artistic or other leisure activities. The parent who does not live with the child has the same decision-making power as the other parent – subject to any decision of the court in the best interests of the child – although they do not share the child's daily life. Furthermore, the non-custodial parent is also entitled to receive all information concerning the child's upbringing, whether from the other parent or from persons or authorities involved in the upbringing (school, doctors, educators, etc.) provided this is in the best interests of the child.

101. Among the Council of Europe standards, the Convention on Contact concerning Children is naturally the one which contains specific provisions designed to ensure the maintenance of contact between parents and children in the event of parental separation. Thus, Article 4 of this Convention states that child and their parents have the right to maintain contact on a regular basis and that such contact may only be limited or terminated if it is justified by the best interests of the child. It also envisages the possibility of supervised contact between parents and children where this is necessary in the best interests of the child. Thus, only the best interests of the child can affect the right of children to maintain relations and be brought up by each of their parents. In this sense, the Convention on Preventing and Combating Violence against Women and Domestic Violence (2011) admits that offenders may be subject to forfeiture of parental rights if the best interests of the child cannot be guaranteed in any other way (Article 45.2).
102. The Charter of Fundamental Rights of the European Union recalls in Article 24 that every child has the right to maintain personal relations and direct contact with both parents on a regular basis, unless this is contrary to the child's interests.

In the context of parental separation, particular attention should be paid to the respect of the child's right to maintain personal relations and contacts with each parent. Only the best interests of the child can be an obstacle to this right, which should require a rigorous demonstration and motivation by the decision-making authority.

2) Lacunae in international and European standards

103. The main gap that emerges from the analysis of the standards studied is that, while each of them expresses a genuine concern for the rights and best interests of the child, which can be implemented in particular in situations of parental separation, no text envisages all the problems and difficulties that children and their families may face in such a context. It is only by juxtaposing the principles emanating from all these norms that we can truly outline the rules aimed at protecting the rights and best interests of children whose parents separate. However, the dissemination of these principles between the different bodies of law and the absence of a legal instrument specifically devoted to the protection of the rights and best interests of children whose parents separate are not likely to promote respect for the rights of children in this situation. The development of legal instruments, applying specifically to the child in parental separation, would have the merit of focusing on and promoting the rights and best interests of the child at the time of parental separation and thereafter, considering all possible issues and circumstances.⁵⁶
104. Beyond this central difficulty, other shortcomings can be mentioned, such as the fact that some treaties have not been widely enough ratified by Council of Europe member states. This is particularly true of the European Convention on the Exercise of Children's Rights and the Convention on Contact concerning Children, the application of which would be essential to ensure the protection of the rights and best interests of

⁵⁶ These have been listed under key scenarios : see below, section VI.

the child in the context of parental separations, in particular when they are conflictual and the rights and interests of the child are more at risk.

105. On the other hand, a clear lack of harmonisation of laws and practices within the Member States could be observed when examining the responses to the two questionnaires,⁵⁷ which show that laws and practices within the States vary greatly, even for those international and Council of Europe standards that apply in all Member States. This lack of harmonisation between States may also result from a lack of harmonisation of international and European standards on certain points (e.g., the participation of children in decisions affecting them is, depending on the texts, subject to children's capacity of discernment, or to their age and degree of maturity, or is not limited by any conditions).
106. Finally, the responses to the questionnaires also revealed that the standards identified have not necessarily been incorporated by States and/or are not applied in practice. The existence of legal instruments on the rights and best interests of children experiencing parental separation should help to fill these gaps.

In the context of parental separation, the applicable principles are scattered among different legal instruments, without any of them being specifically applicable to the child of separating parents, which does little to promote respect for the rights and best interests of the child. The development of specific instruments, addressing all situations and difficulties that may arise in the event of parental separation, is a prerequisite for the protection of the rights and best interests of the child at the time of and following parental separation.

V. OVERVIEW OF THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

1) Parentage and Parental Responsibility

a) The attribution of filiation and parentage

107. The maxim “*mater semper certa est*” is no longer of clear application⁵⁸ – if it ever was.
108. Anonymous births:

Several Council of Europe jurisdictions still recognise the possibility for a mother to give birth anonymously (e.g., “*accouchement sous X*” in France). A child may have no means of finding out even who the mother is, much less the father, in such circumstances. Typically, but not exclusively, anonymous births occur when a child is born out of wedlock, or outside an ongoing relationship - that is when the couple who created the child have separated. The ECtHR has considered this phenomenon in two

⁵⁷ See section VI below.

⁵⁸ We have not explored the situation which arose in the English case of TT (subsequently R (On the Application of) *McConnell v the Registrar General for England and Wales*) UKSC 2020/0092) where the parent who gestated and gave birth to the child was a female to male transsexual individual who sought to be named on the birth certificate as “father” after his relationship with his partner had broken up.

key cases: *Odièvre v. France*⁵⁹ and *Godelli v. Italy*.⁶⁰ In *Odièvre*, it found (by a majority) that there was no violation because the child could access non-identifying information about her origins whilst in *Godelli* there was a violation as the child could not access even non-identifying information, even if the mother later consented.

b) The establishment of paternity

109. The Court has also considered several cases about the establishment of paternity particularly in those cases where the irrebuttable presumption that the child is the child of his mother's legal husband flew in the face of social reality (e.g., *Kroon and others v. the Netherlands*⁶¹). In *Kroon and others*, the child's social and biological parents had formed a family for years but as the mother was unable to find her husband to divorce him the child was still deemed to be the child of the mother's husband. (see also e.g., *Sporer v. Austria*⁶², *Nekvedavičius v. Lithuania*⁶³ and many others).
110. In *Nazarenko v. Russia*⁶⁴ the child had been born during the marriage and even after divorce had lived primarily with her father (the applicant). When a custody battle erupted with his ex-wife a paternity test showed that he was not the biological father. In national law he thus lost all parental rights including rights of custody or even the right to contact and visits. A violation was found.
111. *Anayo v. Germany*⁶⁵ involved many issues including paternity, separation, contact, and immigration. Twins were born as the result of an affair between a married woman and the father. Contact had originally been ordered to enable the children to understand their African German heritage but overturned on appeal. Without contact with his children a decision was made to expel the father from Germany. A violation of the right to respect for private (not family) life was found. The children were not parties and neither they – nor their views/interests were represented although they were by then 5-years old.
112. *Rozanski v. Poland*⁶⁶, *Ahrens v. Germany*⁶⁷ and *Mandet v. France*⁶⁸ all concerned the recognition of biological paternity when there was already a legal father. Mandet found that the child's interests lay in knowing the truth about his origins.

⁵⁹ *Odièvre v. France* [GC], no. 42326/98, ECHR 2003-III.

⁶⁰ *Godelli v. Italy*, no. 33783/09, 25 September 2012.

⁶¹ *Kroon and Others v. the Netherlands*, 27 October 1994, Series A no. 297-C.

⁶² *Sporer v. Austria*, no. 35637/03, 3 February 2011.

⁶³ *Nekvedavičius v. Lithuania*, no. 1471/05, 10 December 2013.

⁶⁴ *Nazarenko v. Russia*, no. 39438/13, §66, 16 July 2015.

⁶⁵ *Anayo v. Germany*, no. 20578/07, 21 December 2010; Research carried out by the court on the attitude to biological fathers where they are different from the legally recognised father is referred to in paras 32-40 of the *Anayo* judgment. The legal parents were admitted as third parties to the case and were represented but the children were not.

⁶⁶ *Róžański v. Poland*, no. 55339/00, 18 May 2006.

⁶⁷ *Ahrens v. Germany*, no. 45071/09, 22 March 2012.

⁶⁸ *Mandet v. France*, no. 30955/12, 14 January 2016.

113. *Mikulić v. Croatia*,⁶⁹ *Jäggi v. Switzerland*⁷⁰ and *A.M.M. v. Romania*,⁷¹ *Mifsud v. Malta*⁷² all concerned children's right to determine their biological origins in situations of relationship breakdown.

2) Custody⁷³

114. It is only exceptionally that the ECtHR revisits the decisions of national courts concerning "custody" (in jurisdictions where this concept exists; where it does not exist, "residence" will typically be the term). The Court is more disposed to scrutinise other associated decisions – see below.
115. In *Babayeve v. Azerbaijan*⁷⁴ the Court repeated its view that the task of the ECtHR in cases concerning custody and residence is restricted to ascertaining whether the domestic authorities "*conducted an in-depth examination of the entire family situation and a whole series of factors, in particular factors of a factual, emotional, psychological, material and medical nature and made a balanced and reasonable assessment of the respective interests of each person*". The domestic authorities must assess the parenting abilities of each parent, the children's attachment to each parent and where best the children will be able to develop and thrive.
116. *Zelikhha Magomadova v. Russia*⁷⁵ also covers, not just custody and residence, but contact, enforcement of contact orders, alienating parents, the weight to be given to the child's views and inaction on the part of the authorities when it was needed – leading ultimately to the loss of the mother's parental authority/responsibility. All of these issues combined in this case found a violation of the mother's rights. The children were not represented nor were their views sought in the litigation.
117. In *Lyubenova v. Bulgaria*⁷⁶ the child had lived with the paternal grandparents whilst the parents worked abroad. When the parents separated the mother returned to Bulgaria and wanted the child to live with her but the (absent) father refused to agree. The ECtHR found that the state had an obligation not only to respect the mother child relationship but in doing so must take preparatory steps to make any change less traumatising for the child.⁷⁷ The children were not represented, nor their views sought in the ECHR litigation.
118. Several cases have come before the court alleging *discrimination in the award of custody*. In *Salgueiro da Silva Mouta v. Portugal*⁷⁸ a father had originally had custody

⁶⁹ *Mikulić v. Croatia*, no. 53176/99, ECHR 2002-I.

⁷⁰ *Jäggi v. Switzerland*, no. 58757/00, ECHR 2006-X.

⁷¹ *A.M.M. v. Romania*, no. 2151/10, 14 February 2012.

⁷² *Mifsud v. Malta*, no. 62257/15, 29 January 2019.

⁷³ It should be noted that these cases often involve not only "custody" – as in fixing the child's residence and principal responsibility with one or other parent – but often also concern "parental authority" or "parental responsibility".

⁷⁴ *Babayeve v. Azerbaijan*, no. 57724/11, 30 January 2020.

⁷⁵ *Zelikhha Magomadova v. Russia*, no. 58724/14, 8 October 2019.

⁷⁶ *Lyubenova v. Bulgaria*, no. 13786/04, 18 October 2011.

⁷⁷ *N.Ts. and Others v. Georgia*, no. 71776/12, 2 February 2016.

⁷⁸ *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, ECHR 1999-IX; The AIRE Centre drafted Mr Mouta's submissions in that case.

transferred to him because of the mother's obstruction and inability to provide proper care. He then lost custody because he was in a gay relationship. The Lisbon Court of Appeal found a violation – noting however that “children should not grow up in the shadow of abnormal situations”.

119. In 2010 in *P.V v. Spain*⁷⁹ the Court considered a case where the applicant had fathered a son before the marriage was dissolved and on separation the mother was granted custody/residence and the parents were awarded joint parental authority. After the father's male to female gender re-assignment the contact/ visit regime was restricted. As joint parental authority was retained, the ECtHR found no violation. The child was not represented, nor his views sought in the Strasbourg litigation although he was 12 by that time.
120. In *Mamchur v. Ukraine*,⁸⁰ after the parents separated, the mother died and the child lived with her maternal grandmother. A decision was made to appoint the grandmother as the child's “tutor”, and on the grounds inter alia of the father's disability. She obstructed the child's contact with the father. The Court found a violation of Article 8.
121. In relatively rare cases custody of siblings may be given to different parents rather than keeping the siblings together. In *Mustafa and Armagan Akin v. Turkey*⁸¹ the Court found a violation because of this.

3) Hearing the child

122. *M and M v. Croatia*⁸² the Court found a violation of Article 3 and Article 8 as the case concerned protracted custody proceedings in which the authorities had failed to hear the child. By ignoring a child's wishes and feelings, “the rule that the views of the child must be given due weight would be rendered meaningless”.⁸³
123. *Mustafa & Armagan Akin v. Turkey*⁸⁴ concerned order which effectively prevented siblings from spending time together. The Court found a violation of Article 8 as the State did not discharge its positive obligation and failed to have due regard to the best interests of the family.
124. *Plaza v. Poland*⁸⁵ concerns the failure of the Polish authorities to enforce the applicant's right of contact with his daughter. As the child matured, she had the capacity to make her own decisions regarding contact with her father and over time refused to see him. The child's hostility towards her father was told to the Court by experts, rather than directly by the child herself, but the Court held that “*the approach of the domestic courts, which considered that it was of the greatest relevance to the custody and access issues to establish the psychological situation of the child and take*

⁷⁹ *P.V. v. Spain*, no. 35159/09, 30 November 2010.

⁸⁰ *Mamchur v. Ukraine*, no. 10383/09, 16 July 2015.

⁸¹ *Mustafa and Armağan Akin v. Turkey*, no. 4694/03, 6 April 2010.

⁸² *M. and M. v. Croatia*, no. 10161/13, ECHR 2015 (extracts).

⁸³ *M. and M. v. Croatia*, no. 10161/13, §185, ECHR 2015 (extracts).

⁸⁴ *Mustafa and Armağan Akin v. Turkey*, no. 4694/03, 6 April 2010.

⁸⁵ *Plaza v. Poland*, no. 18830/07, 25 January 2011.

her wishes into consideration cannot be open to criticism".⁸⁶ Accordingly, the Court found no violation of Article 8.

125. *C v. Finland*⁸⁷ concerns the decision to grant custody over two children to the mother's female partner with whom the children resided, following the death of the mother. The right of a child to have their views given due weight does not mean that their views will coincide with their best interests. The Court held that domestic courts will not strike a proper balance between respective interests if children are given "an unconditional veto power".⁸⁸
126. *Gajtani v. Switzerland*⁸⁹ concerns return proceedings of two children from Switzerland to the former Yugoslav Republic of Macedonia under the 1980 Hague Convention. The opinion of the eldest son (aged 11 at the time) was not taken into account and resulted in their return to FYROM. The Court held that the Swiss court of appeal had satisfied the requirements of Article 8 and so could not criticise the domestic court for refusing to give due weight to the eldest child's views. No violation of Article 8.
127. *N.Ts. and others v. Georgia*⁹⁰ concerns the return of three minor boys from their maternal aunt to their father against their will. In *N.Ts. and others* the Court noted that "*whilst Article 8 contains no explicit procedural requirements, the applicant must be involved in the decision-making process, seen as a whole, to a degree sufficient to provide him or her with the requisite protection of his interests, as safeguarded by that Article. In the case of children, the above principle is exercised through their right to be consulted and heard.*"⁹¹ To be effectively heard, it is important that a child involved in proceedings is effectively represented. In *N.Ts. and others* the Court found fault in the child applicants' indirect representation by the SSA and did not consider it to constitute adequate and meaningful representation. As a result of this flawed representation and the failure to hear the children's views the Court found a violation of Article 8.
128. *Raw and others v. France*⁹² concerns the failure to execute a judgment that confirmed an order to return minor children to their mother from France to the United Kingdom. The Court held a violation of Article 8. With regard to representation, in this case the mother was considered to have *locus standi* and was able to represent the children in Strasbourg, complaining about the children's non-return to the United Kingdom despite the fact that one of the children had physically attacked the mother in an attempt to resist the return.

4) Additional Procedural Rights

⁸⁶ *Plaza v. Poland*, no. 18830/07, §86, 25 January 2011.

⁸⁷ *C. v. Finland*, no. 18249/02, 9 May 2006.

⁸⁸ *C. v. Finland*, no. 18249/02, §58, 9 May 2006.

⁸⁹ *Gajtani v. Switzerland*, no. 43730/07, 9 September 2014.

⁹⁰ *N.Ts. and Others v. Georgia*, no. 71776/12, 2 February 2016.

⁹¹ *N.Ts. and Others v. Georgia*, no. 71776/12, §72, 2 February 2016.

⁹² *Raw and others v. France*, no. 10131/11, 7 March 2013.

129. In litigation before the ECtHR the necessity for suitable representation for children is illustrated in the landmark case of *A and B v. Croatia*⁹³ where the Court requested separate legal representation for the child, in order for her interests, wishes and feelings to be represented independently from her mother's. The Court considered the mother to have *locus standi* but did not consider her an appropriate representative of the child's views and interests and so appointed independent representation for the child. Judges Koskelo, Eicke and Ilievski in their concurring opinion recognised that independent representation for a child to be effectively heard before the ECtHR does not address the absence of this separate representation throughout lengthy preceding domestic proceedings and so was ineffective in protecting the best interests of the child.⁹⁴
130. A more recently communicated case *A.P. and A.M. v. the Czech Republic*⁹⁵ concerns a complaint of a violation of both Articles 6 and 8 brought by a parent and a minor applicant on the basis that the minor was not directly heard during custody proceedings and that her wishes were not respected. It is understood that the Government has asked the Court to appoint separate representation for the child in the Strasbourg proceedings.
131. The pending case of *V.P. v. France*,⁹⁶ concerns a domestic court decision to place the applicant (aged 11 years old) in public care in order to try and remove her from a parental conflict. In this case the child is the only applicant before the Court and so her views and interests will clearly be independently represented.⁹⁷ The applicant complains of the disproportionate nature of the care placement measure and the limitations on her rights to contact and visitation with her father who is not a party.

5) Child Abduction

132. Even if a country is not a party to the 1980 Hague Convention on International Child Abduction it must provide an alternative framework to deal with child abduction (*Bajrami v. Albania*⁹⁸).
133. Parties to the Hague Convention are required to order prompt return so that the courts of the country from which the child was abducted can deal with any issues of custody or residence. This does not imply that the child is to be returned to the left- behind parent and the abducting parent can accompany the child on return until the national courts decide on custody and residence. In *B. v. Belgium*⁹⁹ the Court seemed, as national courts often are, to be under the misapprehension that a Hague return would involve the separation of the child from his abducting mother.

⁹³ *A and B v. Croatia*, no. 7144/15, 20 June 2019.

⁹⁴ *A and B v. Croatia*, no. 7144/15, 20 June 2019, concurring opinion of Judges Koskelo, Eicke and Ilievski, paragraph 20.

⁹⁵ *A.P. and A.M. v. the Czech Republic*, no. 22216/20, communicated on 15 January 2021.

⁹⁶ *V.P. v. France*, no. 21825/20, communicated on 30 September 2020.

⁹⁷ The AIRE Centre has sent submissions as a third-party intervenor in this case.

⁹⁸ *Bajrami v. Albania*, no. 35853/04, ECHR 2006-XIV (extracts).

⁹⁹ *B. v. Belgium*, no. 4320/11, 10 July 2012.

134. The case law is extensive (as at 2019 there were more than 70 such cases) and here again most cases have been brought by parents. In very few of the abduction cases is the child represented (except sometimes by one parent) or their views heard – though this may change with the coming into force of Reg 2019/ 1111. (see section III). The role of the 1980 Hague Convention (and BIBis) is to ensure that a child who is wrongfully removed or wrongfully retained will be returned **to the other jurisdiction** so that the courts there can make the necessary and appropriate decisions about custody, residence, contact and if appropriate lawful relocation. The Court frequently encounters cases where the national courts *wrongly* assume that it is a return to the left behind parent or removal from the abducting parent.
135. The case of *Ignaccolo Zenide v. Romania*¹⁰⁰ was the first international child abduction judgment. It importantly held that coercive measures such as the enforcement of arrest warrants may be necessary to secure the left behind parent's rights¹⁰¹. The children were not applicants and majority judgment does not deal with the children's rights as such.
136. *Neulinger and Shuruk*¹⁰² was a landmark but also much criticised judgment. It concerned an order for the return of the children to Israel whence the mother had clandestinely removed them. The Court accepted that, at the time it was made, the return order complied with the Convention but that by the time the Grand Chamber ruled three years later the child was too well settled in Switzerland for a return to be in his interests. The judgment suggested that an "in depth examination" of all the circumstances was appropriate whilst the philosophy of Hague 1980 is that such an examination is inappropriate for the summary nature of Hague proceedings and should be left to the national courts on return. The only challenges to return under Hague are found in Articles 12, 13 and 20. The child was an applicant in the Strasbourg proceedings (albeit represented by the mother) and the father was given leave to intervene as a third party before the chamber but failed to comply with the procedural conditions to intervene before the Grand Chamber.
137. In *X v. Latvia*,¹⁰³ (which came after *Neulinger*) the Latvian courts had ruled that the child should be returned to Australia from where she had been abducted by the Latvian mother. Here again the Court looked at the question of whether an in-depth hearing had to take place in the requested state and concluded that a thorough examination of

¹⁰⁰ *Ignaccolo-Zenide v. Romania*, no. 31679/96, ECHR 2000-I.

¹⁰¹ One of the partly dissenting opinions noted: "I think that not only parents but also children should benefit from Article 8. I would go further: they are and should be the first beneficiaries where the interests of their parents are in conflict and they are mature enough to express clearly their own preferences...Due weight should also be given to children's views (see the European Convention on the Exercise of Children's Rights, European Treaty Series no. 160). Consequently, where parents' interests conflict, the views and preferences of children must be properly heard and taken into account in proceedings and in the making of decisions concerning them.

It is clear from the case file that the children have been living for a long time with their father. From the standpoint of the best interests of the child, it is not of decisive importance under what circumstances that came about or what role in that situation was played by each of their parents or by the public authorities. It is also clear that the children in the instant case expressly preferred to live with their father; and their preference must have been taken into account. I much regret that this circumstance was disregarded both in the domestic and in the foreign judicial proceedings, and enforcing an old judicial decision against the will of those who were the subjects of that decision comes close to doing violence."¹⁰¹

¹⁰² *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, ECHR 2010.

¹⁰³ *X v. Latvia* [GC], no. 27853/09, ECHR 2013.

any allegations of the grave risk referred to in Article 13 Hague had failed to take account of a psychologist report saying that the separation of mother and child would cause trauma. The Latvian Courts should have explored whether the mother could return to Australia with the child (the mother was a dual Latvian Australian citizen). As controversial as *Neulinger, X v. Latvia* was decided by 9 votes to 8. The child was not a party to the proceedings at the ECtHR

138. In *Gajtani v. Switzerland*¹⁰⁴ the Court having considered the need to hear the child and held:

111. In view of the certain margin of appreciation enjoyed in this area by the domestic authorities, who are in a better position than the Court, the Court of Appeal could reasonably consider that it was neither necessary nor appropriate to hear the son again, especially as he was caught up in a conflict of loyalties and such hearings can have a traumatic impact on a child and considerably delay the proceedings.

112. As to the couple's daughter, who was 5 years old at the time, it does not appear that she was heard by the authorities of the canton of Ticino. The Court recalls in this connection that in the Eskinazi and Chelouche case (decision cited above) it stressed that it was not for it to substitute its own assessment for that of the national courts as to the appropriateness of a hearing, which is a delicate process, nor to review the interpretation and application of the provisions of international conventions, in this case Article 13 of the Hague Convention and Article 12 § 1 of the Convention on the Rights of the Child, except in cases of arbitrariness (a position confirmed in the case of Maumousseau and Washington v. France, no. 39388/05, § 79, 6 December 2007). It should also be noted that in the recent case of X v. Latvia, cited above, the Grand Chamber endorsed the view of the Latvian authorities that the child's young age - approximately 4 years at the time - prevented him from validly expressing his preference as to his place of residence (§§ 112 and 22)

139. *K.J. v. Poland*¹⁰⁵ is a case brought by the left behind father. The Court found that the mother's feelings about the breakdown of the marriage were insufficient to justify a non-return and considered the Polish courts' assessment that sending the child back to the UK against the mother's wishes was "misguided" and that the Polish Courts reluctance to rule against the Polish mother was inappropriate. The child was four when the application was lodged and 6 by the time it was decided. The child was not an applicant. The Court found a violation of Article 8.
140. More recently *O.C.I. and others v. Romania*¹⁰⁶ the Romanian courts had discounted the fact that the child might be subject to "occasional acts of violence" from the father in Italy and held that the Romanian authorities had a positive obligation to protect this child against a known risk. The children (albeit represented by their mother) were applicants in this case. Both the national courts and the Strasbourg court appear to have considered that a Hague return would mean returning the children to the care of

¹⁰⁴ *Gajtani v. Switzerland*, no. 43730/07, §§111-112, 9 September 2014.

¹⁰⁵ *K.J. v. Poland*, no. 30813/14, 1 March 2016.

¹⁰⁶ *O.C.I. and others v. Romania*, no. 49450/17, 21 May 2019.

the left behind father and not just to the jurisdiction from which they had been abducted for those courts to decide on residence and contact.

141. Finally, a number of abduction cases have raised the allegation that the national authorities inappropriately favoured the retention of the child in their state. In *Rinau v. Lithuania*¹⁰⁷ (where the child was an applicant albeit represented by the father) the Lithuanian Government took steps to keep the child in Lithuania following court orders for her return and supported the Lithuanian mother in litigation at the CJEU. The Court found “the Lithuanian authorities did not ensure the fair decision-making process in the applicants’ case in the phase of execution of the Court of Appeal judgment of 15 March 2007 that was indispensable for the discharge of the respondent State’s duties under Article 8 of the Convention”.¹⁰⁸ (see also e.g., *Sneersone and Campanella v. Italy*¹⁰⁹)
142. In *M.K. v. Greece*¹¹⁰ (a “wrongful retention” Hague Convention case) the child in question (by the relevant time aged 12) had very strongly expressed the view that she wanted to live in Greece with her father and siblings. The Court found no violation in the complaint brought by the mother that the Greek courts had failed to enforce her return: “Furthermore, it should be emphasised that at the time of the above-mentioned events, A. had reached the age of discretion and her clearly expressed wish to remain in Greece could not but weigh heavily on the choices available to the authorities. As a general rule, the best interests of the child preclude coercive measures being taken against him. The Court notes, moreover, that Article 13 of the Hague Convention, invoked by the applicant, provides that the judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects and has reached an age and maturity at which it is appropriate to take account of that opinion.”¹¹¹

6) Contact

143. The child’s right to maintain contact with the non-custodial divorced/separated parent has long been recognised (see *Hendriks v. the Netherlands*¹¹²). It is now also recognised that a presumption against contact for an unmarried father is a violation. Contact with other family members such as grandparents (*Manuello and Nevi v. Italy*¹¹³) and siblings (*Mustafa and Armagan Akin v. Turkey*¹¹⁴) may be essential for the wellbeing of the child.
144. Many cases come before the court in which an aggrieved parent is complaining about either:
- (i) inadequate contact arrangements or
 - (ii) denial of contact
 - (iii) failure to enforce contact ordered by a court.

¹⁰⁷ *Rinau v. Lithuania*, no. 10926/09, 14 January 2020.

¹⁰⁸ *Rinau v. Lithuania*, no. 10926/09, § 212, 14 January 2020.

¹⁰⁹ *Sneersone and Campanella v. Italy*, no. 14737/09, 12 July 2011.

¹¹⁰ *M.K. v. Greece*, no. 51312/16, 1 February 2018.

¹¹¹ *M.K. v. Greece*, no. 51312/16, §88, 1 February 2018.

¹¹² *Hendriks v. the Netherlands*, no. 8427/78, §124, Report of 8 March 1982.

¹¹³ *Manuello and Nevi v. Italy*, no. 107/10, 20 January 2015.

¹¹⁴ *Mustafa and Armağan Akin v. Turkey*, no. 4694/03, 6 April 2010.

145. It appears that none of these cases concerned complaints by the affected children themselves. Relatively few cases concern the actual award of contact by the court - most are about the practical implementation of such awards.

a) *The inadequacy of contact arrangements*

146. *Kacper Nowakowski v. Poland*¹¹⁵ concerned a family all of whom suffered from different hearing impairments. The parents divorced but for communication purposes the mother was present at contact sessions to interpret for the son despite her hostility to the father. The Court found a violation *inter alia* because of the absence of steps taken by the state to facilitate the father/son contact visits taking into account difficulties arising from disability and conflict with the mother. The child was not a party.
147. In *Gluhakovic v. Croatia*¹¹⁶ court repeatedly ordered detailed contact arrangements which the father could not meet because of his work schedule and which were required to be held in the kitchen and offices of the Social Welfare Centre. The Court found a violation. The child was not a party.

b) *Denial of contact*

148. In *Anayo v. Germany*¹¹⁷ twins fathered by Mr Anayo were born out of wedlock after the end of his relationship with their mother. She was married to someone else so that the husband was their legal father. The married couple could and did refuse any contact to Mr Anayo who was then deported because he could not show that he had enjoyed contact with his children. The Court found a violation of his private life. No attempt was made to join the children as parties.

c) *Enforcement of contact arrangements*

149. Once the details of contact arrangements have been agreed (or imposed) then comes the problem of enforcing them, particularly when encountering an implacably hostile parent. The Court has considered dozens of cases where it was alleged that the state failed to take the steps required of it to ensure that contact ordered by the courts took place in practice. This is of course a rule of law issue under Article 6 concerning the enforcement of judgements as well as Article 8 right to respect for family life.
150. Positive obligations under Article 8 – *Amanalachioai v. Romania*¹¹⁸, concerned lack of action on part of authorities including absence of counselling led to complete integration of child with grandparents and complete rupture of relationship with birth parent (violation). the child was not a party. In *Santos Nunes v. Portugal*¹¹⁹, lack of diligence, *inter alia*, in tracing absconding parties led to over four years delay (and a finding of a violation) must be contrasted with the older case of *Glaser v. the United*

¹¹⁵ *Kacper Nowakowski v. Poland*, no. 32407/13, 10 January 2017.

¹¹⁶ *Gluhaković v. Croatia*, no. 21188/09, 12 April 2011.

¹¹⁷ *Anayo v. Germany*, no. 20578/07, 21 December 2010.

¹¹⁸ *Amanalachioai v. Romania*, no. 4023/04, 26 May 2009.

¹¹⁹ *Santos Nunes v. Portugal*, no. 61173/08, 22 May 2012; This was a case about enforcing custody not contact but the principle is the same.

*Kingdom*¹²⁰ – where mother went into hiding and there was no violation of the state's positive obligations.

151. However, in *V.A.M. v Serbia*¹²¹, failure by the state for several years to use the enforcement procedures that existed in national law led to a finding of a violation
152. The Court has, in extreme situations, even upheld a prison sentence (2 months) for non-compliance with contact orders in *Mitrova and Savik v. FYROM*¹²² where the mother had persistently failed to comply with contact orders and had ignored previous criminal convictions including a suspended sentence (two judges dissented). The national courts had found the measure necessary to ensure contact with the father. Although mentioned *en passant* in the facts the Court does not seem to have attached importance to the fact that at the time the mother was taken to prison she claimed to be still breastfeeding the child. The child was joined as an applicant in the complaint to Strasbourg but no separate consideration was given to her complaint. The court noted: *"The obligation of the national authorities to take measures to facilitate reunion or contact by a non-custodial parent with children after divorce is not, however, absolute. The nature and extent of those measures will depend on the circumstances of each case, but the understanding and cooperation of all concerned are always important ingredients. In addition, when difficulties arise, the appropriate authorities should impose adequate sanctions for any lack of cooperation and, whilst coercive measures are not desirable in this sensitive area, the use of sanctions must not be ruled out in the event of manifestly unlawful behaviour by the parent with whom the child lives"*.
153. In *Fourkiotis v. Greece*¹²³, the Court considered that the imposition of fines and the threat of imprisonment were inappropriate and in *Moog v. Germany*¹²⁴, no violation was found when a 3000 fine that had been imposed was cancelled.
154. A prison sentence may seem excessive but too lenient measures may not have the necessary effect. The court found fines of 300 euros (*Kuppinger v. Germany*¹²⁵) and 1000 PLN (*Z. v. Poland*¹²⁶) were too low to have the required compulsive effect.

7) **Education**

155. Article 2 of Protocol No. 1 ECHR provides: *"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"*. The second paragraph refers to the duty on the state to respect the right of parents. There is no comparable duty in the text of Article 2 of Protocol No. 1 to respect the rights or

¹²⁰ *Glaser v. the United Kingdom*, no. 32346/96, 19 September 2000.

¹²¹ *V.A.M. v. Serbia*, no. 39177/05, 13 March 2007.

¹²² *Mitrova and Savik v. the former Yugoslav Republic of Macedonia*, no. 42534/09, 11 February 2016.

¹²³ *Fourkiotis v. Greece*, no. 74758/11, 16 June 2016.

¹²⁴ *Moog v. Germany*, nos. 23280/08 and 2334/10, 6 October 2016.

¹²⁵ *Kuppinger v. Germany*, no. 62198/11, 15 January 2015.

¹²⁶ *Z. v. Poland*, no. 34694/06, 20 April 2010.

views of the children. This is an issue much litigated in national courts particularly by parents but also by children.

156. Several issues relevant to parental separation have come before the Court, though only some have been brought by separated parents. It is easy to see from the case law below that the cases are about disagreement with state policies on education. However, it is clear that where the state (in the person of the judiciary) is required to rule on a disagreement between the parents or between one parent and the child, decisions about education become more complex. The following situations may cause particular difficulties where the parent with “full” custody disagrees with the other parent (see section III) and/or with the views of the affected child:

- (i) home schooling: *Konrad v Germany* (admissibility decision, 35504/03 2006) The complaint was brought by the parents in their own right and on behalf of their children. The Court held that German denial of right to home schooling was within the margin of appreciation.
- (ii) schooling in a chosen language: the Belgian Linguistics Case¹²⁷ concerned the lack of provision of French language provision in the Flemish speaking parts of Belgium; see also *Cyprus v. Turkey*¹²⁸, *Catan and others v. Moldova and Russia*¹²⁹).
- (iii) sexual education: *Kjeldsen, Busk Madsen and Pedersen v. Denmark*¹³⁰ parents were refused permission to have their child exempted from sex education. The Court found no violation as it fell within the margin of appreciation
- (iv) religious education: these cases are mainly about exemption from compulsory religious education, (*Folgerø and others v. Norway*¹³¹; *Hasan and Eylem Zengin v. Turkey*¹³²)
- (v) display of religious symbols in school: *Lautsi and others v. Italy*¹³³ complaint by the mother (joined by the children) that the state school displayed crucifixes in the classroom¹³⁴ are but a few examples.

¹²⁷ *The Belgian Linguistic case (No. 2)*, nos. 1474/62 1677/62 1691/62 1769/63 1994/63 2126/64, 23 July 1968.

¹²⁸ *Cyprus v. Turkey* [GC], no. 25781/94, ECHR 2001-IV.

¹²⁹ *Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04 and 2 others, ECHR 2012 (extracts).

¹³⁰ *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976, Series A no. 23.

¹³¹ *Folgerø and Others v. Norway* [GC], no. 15472/02, ECHR 2007-III.

¹³² *Hasan and Eylem Zengin v. Turkey*, no. 1448/04, 9 October 2007.

¹³³ *Lautsi and Others v. Italy* [GC], no. 30814/06, ECHR 2011 (extracts).

¹³⁴ § 78: The Court considers that, when read as it should be in the light of Article 9 of the Convention and the second sentence of Article 2 of Protocol No. 1, the first sentence of that provision guarantees schoolchildren the right to education in a form which respects their right to believe or not to believe. It therefore understands why pupils who are in favour of secularism may see in the presence of crucifixes in the classrooms of the State school they attend an infringement of the rights they derive from those provisions.

However, it considers, for the reasons given in connection with its examination of the first applicant's case, that there has been no violation of Article 2 of Protocol No. 1 in respect of the second and third applicants. It further considers that no separate issue arises in the case under Article 9 of the Convention.

8) Religion

157. The above cases on religious education connect with the issue of religious upbringing. The leading cases are:

- *Hoffman v. Austria*,¹³⁵ where a violation was found when the father was granted sole custody because of the mother's religion.
- *Palau-Martinez v. France*¹³⁶ similarly found a violation because the national courts had focussed on the philosophical tenets of Jehovah's Witnesses rather than the mother's conduct.
- *Ismailova v. Russia*¹³⁷ where the Court found that the domestic courts had based their decisions on the concrete effect that the mother's religion had on the children's daily life.

158. All three cases concerned separated parents who were Jehovah's Witnesses.

9) Names

159. The Court's caselaw on names and name changing has primarily been about the names that parents are permitted to use officially for their children, or the refusal to permit adults to change their names

160. The European Court of Human Rights recalls that names are not only a form of personal identification but also constitute a link with the family and allow, at a certain level, the right to establish relations with third parties.¹³⁸ In 2015, an unmarried adoptive parent was refused the replacement of the child's biological mother's name with his own on the child's birth certificate.¹³⁹ The Court considers that the family name must be preserved not only as a component of the child's identity, but also as a link with the parents, in application of children's right to know their parents, guaranteed by Article 7 of the UNCRC.

161. The Court found no violation in *Guillot v. France*¹⁴⁰ where the parents could not give the child the name they wanted but found a violation in *Johansson v. Finland*¹⁴¹ in comparable circumstances. Neither of those cases involved separated parents but the principle could be applied in such cases if there was a dispute over a child's name. In *Garnaga v. Ukraine*¹⁴² there was a violation when the child of separated parents (by then an adult) was unable to change her patronymic¹⁴³ from that of her birth father to that of her stepfather.

¹³⁵ *Hoffmann v. Austria*, 23 June 1993, Series A no. 255-C.

¹³⁶ *Palau-Martinez v. France*, no. 64927/01, ECHR 2003-XII.

¹³⁷ *Ismailova v. Russia*, no. 37614/02, 29 November 2007.

¹³⁸ *Stjerna v. Finland*, 25 November 1994, Series A no. 299-B.

¹³⁹ *Gözüm v. Turkey*, no. 4789/10, 20 January 2015.

¹⁴⁰ *Guillot v. France*, 24 October 1996, *Reports of Judgments and Decisions* 1996-V.

¹⁴¹ *Johansson v. Finland*, no. 10163/02, 6 September 2007.

¹⁴² *Garnaga v. Ukraine*, no. 20390/07, 16 May 2013.

¹⁴³ Patronymics are part of full name and obligatory in formal messages. They are frequent in common speech, e.g., to call a person in respectful manner (in form of name followed by patronym) and to accent an informal message

162. In *Henry Kismoun v. France*¹⁴⁴, an applicant registered in France under his mother's name was then brought up by his father in Algeria under his father's name the State's interest in the legal certainty of names was outweighed by his personal interest in having a single name – that of the father who had brought him up. There was also no violation when a woman was prevented from using her ex-husband's name as her legal name (*Taieb dit Halimi v. France*¹⁴⁵). The CJEU has also considered the issue of names (see the cases of *Garcia Avello*¹⁴⁶ and *Giangounidis*¹⁴⁷).

10) Medical Treatment

163. In situations of parental separation, decisions relating to medical treatment for the child may give rise to parental disputes. The leading cases on medical treatment contrary to parental wishes are:
- Vaccinations: In *Vavříčka and Others v. the Czech Republic*¹⁴⁸ the Grand Chamber the court found no violation of an imposed fine on parents and the exclusion of children from nursery as a result of non-compliance with the statutory duty to vaccinate children.
 - Administration of drugs / 'Do not resuscitate': In *Glass v. the United Kingdom*¹⁴⁹ the Court held a violation of Article 8 where the mother's wishes and objections relating to medical treatment of the child were overridden by the hospital without a court decision to resolve the dispute between the mother and the hospital.

11) Immigration Matters

164. The Court's case law in immigration matters involving children is extensive and only a few sample cases are set out below. (See section VI for further discussion).

a) Denial of entry of a child to join a parent

165. *Ahmut v. Netherlands*¹⁵⁰ concerned the refusal of admission of the child to join his (by this time a Dutch Citizen) father in the Netherlands. The Court found by 5 to 4 that no violation occurred.¹⁵¹ However, in *Tuquabo-Tekle v. the Netherlands*¹⁵² the Court found a violation when a 16-year-old girl had been taken out of school and was at risk of being married off by her uncle and grandmother and reunification with her mother in

in formal environment, such as between colleagues who have good relationships at work (in form of patronym without name and family name).

¹⁴⁴ *Henry Kismoun v. France*, no. 32265/10, 5 December 2013.

¹⁴⁵ *Taieb dit Halimi v. France* (dec.) 50614/99, 20 March 2001.

¹⁴⁶ *Carlos Garcia Avello v Belgian State*, C-148/02, Judgment of the Court of 2 October 2003.

¹⁴⁷ *Giagounidis v Reutlingen*, C-376/89, Judgment of 5 March 1991.

¹⁴⁸ *Vavříčka and Others v. the Czech Republic* [GC], nos. 47621/13, 3867/14, 73094/14 et al., 08 April 2021.

¹⁴⁹ *Glass v. the United Kingdom*, no. 61827/00, ECHR 2004-II.

¹⁵⁰ *Ahmut v. the Netherlands*, 28 November 1996, *Reports of Judgments and Decisions*, 1996-VI.

¹⁵¹ One dissenting judge noted: "few rights are as important as an adolescent son's right to live with his father and to take advantage of the atmosphere of affection as well as of the father's help and advice" but his view did not prevail.

¹⁵² *Tuquabo-Tekle and Others v. the Netherlands*, no. 60665/00, 1 December 2005.

the Netherlands was refused. In *I.A.A. v. the United Kingdom*¹⁵³ the mother had left the children of her previous marriage behind to travel to the UK with her new husband, and waited 2 years before applying for them to join her. The Court found no violation when this was refused although the national courts had recognised that reunification would be in the children's best interests.¹⁵⁴

b) Expulsion of custodial parents

166. Where the custodial parent is threatened with expulsion it will be assumed that the child or children will accompany him or her. However, in *Nunez v. Norway*¹⁵⁵ the mother had "sole custody" of children aged 3 and 4 which was then transferred to the father not on the basis of the children's best interests generally but largely because the mother was being deported. Although the children were not parties to the case the Court relied on the UNCRC to find that her deportation would be a violation.

c) Failure to regularise the situation of a separated parent of lawfully resident children

167. *Ajayi v. the United Kingdom*¹⁵⁶ concerned the proposed deportation to Nigeria of the mother of a British Citizen child whose father had abandoned them. The case was declared inadmissible, the Commission holding that the child was not required to move to Nigeria as the Government had pointed out that it was the mother's "choice" to take the child with her rather than placing her in care.
168. Most deportation cases that come to the court concern expulsions following criminal convictions. Only some of these cases involve separated parents, for example *Udeh v. Switzerland*¹⁵⁷ where the applicant was separated from his wife with whom he had two daughters and the Court found they could not be expected to follow him to Nigeria.
169. Nevertheless, the children's best interests (in remaining in the country with their custodial or with access to their non-custodial parent) will rarely weight heavily against the State wish to deport a criminal.

12) Children with incarcerated parents

170. Under the ECHR the right to respect for family life imposes a positive obligation on member States to enable and assist detainees to maintain contact with their close family.¹⁵⁸ This was considered by the European Court of Human Rights in the case of *Horych v. Poland*, where the applicant complained that due to the unsatisfactory conditions for visits the applicant's children were negatively affected and he was deprived of sufficient physical contact with them for the duration of his detention. The

¹⁵³ *I.A.A. v. the United Kingdom*, no. 25960/13, 31 March 2016.

¹⁵⁴ In UK law the primacy given to the best interests of the child only applies to children who are in the UK.

¹⁵⁵ *Nunez v. Norway*, no. 55597/09, 28 June 2011.

¹⁵⁶ *Ajayi v. the United Kingdom* (dec.), no. 27663/95, 22 June 1999.

¹⁵⁷ *Udeh v. Switzerland*, no. 12020/09, 16 April 2013.

¹⁵⁸ *Horych v. Poland*, no. 13621/08, and §131, 17 April 2012; See also *Khoroshenko v. Russia* [GC], no. 41418/04, §123, 30 June 2015; *Kungurov v. Russia*, no. 70468/17, §18, 18 February 2020; *Lebois v. Bulgaria*, no. 67482/14, §61, 19 October 2017; *Ciupercescu v. Romania* (no. 3), no. 41995/14 *et al.*, §105, 7 January 2020.

Court found that even if a detainee has not been arbitrarily denied visits from family members there will be a violation of Article 8 in the absence of adequate arrangements to enable prisoners to be visited by their children.

171. In *Hagyó v. Hungary*,¹⁵⁹ again only the (high profile) imprisoned parent was the applicant. The Court seems to have accepted (without explaining why) that he could not have face-to-face visits from his 11-year-old daughter because of her health problems. The Court made no comment on the child's rights to contact with her father.
172. In *Polyakova and Others v. Russia* the Court noted the European Prison Rules provide for the prevention of breakdown of family ties, thus only narrow margin of appreciation will be afforded.¹⁶⁰ It was found that there had been a violation of Article 8 due to the lack of due regard to impact on family life when allocating prisoners to remote penal facilities.
173. It should be noted that all of the cases mentioned above are rather narrowly focussed on the rights of prisoners when considering restrictions on visiting rights. The impact such restrictions have on the children of imprisoned parents and the interference with the child's Article 8 right to family life is yet to be properly addressed by the Court.

VI. OVERVIEW OF MEMBER STATES' LAWS AND PRACTICE

174. This section aims to provide an overview of Council of Europe Member States' laws and practice in situations of parental separation where possible.
175. Before addressing the key themes identified as relevant to this field in light of MS laws and practice, it is very important that to note that in this section, as well as the rest of the study, it has not been possible, from the responses received, to reach definitive conclusions as to the national laws and the practice relating to situations of parental separation in each respondent member State.¹⁶¹ The observations below are based primarily on the information provided in the responses from member States and practitioners to the questionnaires. referred to in Section I above.
176. From reviewing the responses provided from both member States and practitioners as to their national laws and practice relevant to situations of parental separation¹⁶² there are several key scenarios can be identified as relevant to discussions on designing and adopting a Council of Europe measure that covers, at least in part, rights of the child specifically in the context of parental separation.¹⁶³

¹⁵⁹ *Hagyó v. Hungary*, no. 52624/10, 23 April 2013.

¹⁶⁰ *Polyakova and Others v. Russia*, no. 35090/09 *et.al.*, §89, 7 March 2017.

¹⁶¹ Please see paragraph 31 in Section I above referring to the limitations of the questionnaires sent to MS and practitioners.

¹⁶² See Section I and Annexe E.

¹⁶³ It should be noted that there are possibly other laws and practices identified by MS in their responses but due to space constraints of the study this section shall only cover a few selected key scenarios.

177. The responses only covered a number of scenarios including: parentage and parental responsibilities, 'custody' arrangements, procedural rights of the child, and the right to maintain contact.
178. The above scenarios have been selected because they show that there is: no common approach across member States that should be addressed; there may appear to be a problem *in practice* identified by some member States' responses; and that the key scenarios are of utmost importance to this study and to the discussion of protecting the best interests of the child in situations of parental separation.
179. Other key scenarios that are considered important which were not addressed by the responses but are included here are residence, relocation, child abduction, adoption, religion, education, medical treatment, name changing, immigration matters and children with incarcerated parents.

1) National Legislation on Parentage and Parental Responsibilities

a. Parentage

180. As discussed in section III, there does not appear to be any common standard or procedure for recognising parentage (filiation).
181. **The recognition of parentage and legal parenthood and the acquisition or deprivation of parental responsibility all have very grave consequences for the children involved and their rights particularly when the "parents" separate.** Till now it is more usually looked at as an issue of the affected parent(s)'s rights. It can affect whether or not the parent is required to contribute financially to the child's maintenance and upbringing and will have attendant consequences for the child's welfare.
182. The recognition of filiation prior to the recognition of parental responsibility seems to be required by some member States, that is to say it is not possible in some jurisdictions to acquire parental responsibility prior to filiation.
183. In France, it is suggested that both parents shall exercise 'parental authority'¹⁶⁴ jointly, but in cases where filiation for one of the parents (usually the father)¹⁶⁵ is not recognised until the child is more than one-year old both parents shall not jointly exercise parental authority. In these circumstances the father may be able to exercise parental authority under certain conditions.¹⁶⁶ (See Article 372 of the French Civil Code)
184. In Georgia, the Georgian Civil Code governs relationships between parents, children and other relatives. Pursuant to Article 1187 of the Georgian Civil Code: "the reciprocal

¹⁶⁴ Please note that in French law there is no legal concept of 'parental responsibility'. See Section III above.

¹⁶⁵ This tends to be the case as the biological mother is automatically granted parental authority from the birth and her name is registered on the child's birth certificate.

¹⁶⁶ See CJ/ENF-ISE(2021)2A, France.

rights and duties of parents and their children shall arise from the parentage (filiation) of the children, proved in accordance with the procedure prescribed by law.”¹⁶⁷

185. It is known from other sources, including in particular the ECtHR case law, that there are complex problems in the recognition of filiation in cases of surrogacy.

b. Parental responsibility/ authority

186. Parental Responsibility (which normally follows from legal parenthood) is typically attributed to both parents if the parents are married, and to both parents – whether married or not - under certain conditions in most Council of Europe jurisdictions.
187. “Parental responsibility” is the legal term which means that individual adults have (parental) rights, duties, powers and responsibilities in respect of a child. In most jurisdictions the birth mother always has parental responsibility as does the father if the couple are married. Unmarried fathers may have to go through specified procedures to acquire parental responsibility. In some jurisdictions people other than parents (such as grandparents) may be granted parental responsibility by a court or parental responsibility can be shared with a public authority if a child is taken into public care. As far as it has been possible to ascertain across the Council of Europe States only a court can deprive a parent who *has* parental responsibility of that responsibility – and this normally only occurs for exceptionally serious reasons. Parents *may* lose all parental responsibility when a child is adopted, but this will depend on the type of adoption. In several Council of Europe States there are two forms of adoption (simple adoption and full adoption - “*adoption simple*” and “*adoption plénière*”).
188. It would seem that under Italian law following the separation of parents, whether married or unmarried, both parents retain parental responsibilities. Articles 337 *bis* – 337 *octies* of the Italian Civil Code govern parental responsibilities in situations of parental separation. According to Italian law both parents must jointly make important decisions regarding the care and upbringing of the child in the exercise of joint parental responsibility (see Article 337-ter).
189. The Greek Civil Code (Article 1510) provides that ‘parental care’ (Γονική μέριμνα) is a duty and a right of both parents to exercise jointly.¹⁶⁸
190. Bearing in mind filiation discussed above, the practitioners’ responses offered some interesting insight into the treatment of parents and the exercise of parental responsibility based on their marital status.
191. When considering LGBTI non-biological parents,¹⁶⁹ practitioners state that an LGBTI non-biological parent can have the same rights and responsibilities as their spouse in certain circumstances as a non-LGBTI couple, such as being married, or by court

¹⁶⁷ See CJ/ENF-ISE(2021)2A, Georgia.

¹⁶⁸ See CJ/ENF-ISE(2021)03A, Greece.

¹⁶⁹ A number of cases considering the recognition of parenthood of children born by surrogacy are currently pending before the ECtHR and judicial clarification is awaited.

order.¹⁷⁰ Nonetheless, it would appear that approximately half of the practitioners suggest that in their respective legal systems, LGBTI non-biological parents do not have the same parental rights and responsibilities as their spouse for reasons such as the LGBTI couples' union is not recognised by the State.¹⁷¹

192. The parental rights and responsibilities of unmarried parents varies across member States. Whilst some of the practitioners' responses seem to suggest that in their respective jurisdictions unmarried parents may possibly automatically share parental responsibility,¹⁷² other practitioners indicated that parental responsibility – particularly that of the father – is not automatic when a couple are unmarried.¹⁷³
193. For example, it would appear in some member States that the sharing of parental responsibility of unmarried parents will only be established when both parents are registered on the child's birth certificate, or more accurately, that the father be registered in addition to the mother who will have automatic parental responsibility.¹⁷⁴
194. In situations of parental separation, it should be reiterated that the concept of "parental responsibility" is distinct from the concept of "custody"¹⁷⁵ but these issues sometimes overlap and can become intertwined.¹⁷⁶ As far as it has been able to ascertain, this distinction is applied in various member States legal orders. From the review of national legislation and practice, it would appear from responses received from the practitioners of various member States jurisdictions that in cases of sole custody, the 'non-custodial' parent (the parent with whom the child does not reside) continues to benefit from the exercise of parental rights and responsibilities.¹⁷⁷ It is acknowledged by some practitioners that parental rights and responsibilities derive from parental responsibility, not the residence of the child.¹⁷⁸ This is echoed by other responses suggesting that 'custody' does not automatically have an impact on parental responsibility in their legal systems.¹⁷⁹
195. With regard to the deprivation of parental responsibility and custody proceedings, at present there is possibly a common approach, or at least understanding, across member States. From most of the practitioners' responses that addressed whether deprivation of parental responsibility was a distinct procedure to a decision determining sole custody it seems that across member States the deprivation of parental responsibility is a completely separate procedure and will only occur where necessary in the best interests of the child e.g., in cases of abuse, neglect.¹⁸⁰

¹⁷⁰ See CJ/ENF-ISE(2021)2A, Germany, Sweden and the Netherlands.

¹⁷¹ See CJ/ENF-ISE(2021)2A, Georgia, Jersey, Slovakia.

¹⁷² See CJ/ENF-ISE(2021)2A, Bulgaria.

¹⁷³ See CJ/ENF-ISE(2021)2A, Germany, Jersey, Northern Ireland and Switzerland.

¹⁷⁴ See CJ/ENF-ISE(2021)2A, England, Georgia, Slovakia and UK.

¹⁷⁵ See Section III above.

¹⁷⁶ See below for further discussion on custody.

¹⁷⁷ See CJ/ENF-ISE(2021)2A, Northern Ireland, Spain, UK and Ukraine.

¹⁷⁸ See CJ/ENF-ISE(2021)2A, Jersey.

¹⁷⁹ See CJ/ENF-ISE(2021)2A, Spain, UK and Germany.

¹⁸⁰ See CJ/ENF-ISE(2021)2A: Approximately 75% of the practitioners' responses indicated that a non-custodial parent is not deprived of parental responsibility.

196. Moreover, it would appear that in some jurisdictions it is possible for a mother to create obstacles for a father (who is without parental responsibility but seeking to be granted the right to exercise it) by refusing to enter a parental responsibility agreement¹⁸¹ or not registering the birth with the father's name.¹⁸² Nonetheless, as indicated above, overall the responses from the practitioners do not suggest that it is possible under their respective States' laws for one parent to prevent the other parent from acquiring parental responsibility unless there is an exceptional circumstance.¹⁸³
197. When couples have a child together and cohabit happily questions of legal filiation and parental responsibility can always arise for bureaucratic reasons but are largely confined to specific scenarios. If, however, they separate it becomes essential to determine if the "social" father (or mother in surrogacy cases) is also the legal parent and whether or not s/he has parental responsibility/authority over the child. This will be essential to determining issues such as custody, contact/access and maintenance payments. A lack of consistency can be damaging to the child.

2) National Legislation on 'Custody' Arrangements

198. Custody is a somewhat outmoded term as it emphasises that the parent with "custody" is the holder of rights over the child. More modern thinking makes reference to concepts such as parental responsibility, residence, "child arrangements", contact, or access¹⁸⁴ and thus has moved (somewhat) towards seeing the situation from the child's perspective. As far as it can be ascertained from the practitioners' responses the term 'custody' is generally understood in the context of decisions relating to the determination of the residence of child but it may include much wider and further reaching rights. The best interests of the child must be the primary consideration in decision making¹⁸⁵
199. As with parental responsibility discussed above parents who are married and not separated will both have "custody" of their child but the position of unmarried fathers in respect of "custody" may differ from one jurisdiction to another.
200. Separated parents typically have either joint or sole custody. According to Norwegian law, section 36 of the Norwegian Children Act, "the parents may jointly decide that the child shall reside either with both of them (joint custody) or with one of them (sole custody)".
201. Generally, where there is joint custody the division of rights and responsibilities and the range and scope of each parent's decision-making powers will either be decided by law or *ad hoc* for each situation.
202. An Italian Law, Law 54/2006 introduces a joint custody regime as the default arrangement following parental separation unless a Court considers that joint custody

¹⁸¹ See CJ/ENF-ISE(2021)2A, Jersey.

¹⁸² See CJ/ENF-ISE(2021)2A, Jersey, Spain and UK.

¹⁸³ See CJ/ENF-ISE(2021)2A, Bulgaria, France, Georgia, Luxembourg and Slovakia.

¹⁸⁴ In England and Wales for example the term "child arrangements" is used.

¹⁸⁵ See CJ/ENF-ISE(2021)2A, Ukraine.

is contrary to the best interests of the child (see also Article 337-quarter of the Italian Civil Code).¹⁸⁶

203. It would appear that in Cyprus, the Relations between Parents and Children (Law 216 of 1990) Act governs custody matters and it is suggested that the law provides that parental care of a child is to be determined by a family court in situations of parental separation. Prior to a decision being reached it seems that both parents continue to enjoy joint parental care of the child.
204. The concept of “joint custody” thus appears to exist in certain Council of Europe Member States’ legal orders but not in all of them.
205. Under the German Civil Code, the concept of (physical) custody is not in place. Section 1627 states: *“The parents must exercise the parental custody on their own responsibility and in mutual agreement for the best interests of the child. In the case of differences of opinion, they must attempt to agree.”*
206. According to Section 1626a of the German Civil law, joint decision-making authority of unmarried parents can be established by two matching declarations (Sorgeerklärungen”) made by each parent. If the parents do not agree, each parent may apply to the court which will grant joint decision-making authority unless this would contradict the best interests of the child. However, as long as the father remains inactive, the mother will have sole decision-making authority.
207. Generally, it would appear across various Council of Europe member States that unmarried parents with shared parental responsibility will not have *automatic* joint custody.¹⁸⁷ Joint parental responsibility does not connote joint custody, such that these are distinct concepts in theory and in practice.
208. Where there is sole custody given to one parent it appears that the sole custodial parent has plenipotentiary powers to make all decisions concerning the child, subject only to such decisions as are reserved (such as e.g., the duration, location and dates of contact arrangements with the other parent or sometimes a prohibition on relocation outside the jurisdiction).
209. It would seem that some member States may only have a sole custody regime for separated parents as the concept of ‘joint custody’ does not appear to exist in the State’s legal order.¹⁸⁸ Article 65 (3) Family Code of Russia seems to allow a shared residence of the child, but only by means of agreement of the parents, the court can only order the child’s residence with one of them (the second will have contact). It seems to be discussed from time to time, but has not gained much attention. But here again – there is no custody concept (at least in child-parent-relations, in guardianship cases there seems to be custody).

¹⁸⁶ See CJ/ENF-ISE(2021)03A, Italy.

¹⁸⁷ See CJ/ENF-ISE(2021)2A, Bulgaria, France, Luxembourg, Northern Ireland, Switzerland, and UK.

¹⁸⁸ See CJ/ENF-ISE(2021)03A, Bulgaria.

210. Alternatively, the term custody may not be used. In Luxembourg the term ‘parental authority’ is applied pursuant to Article 372 of the Luxembourg Civil Code. It would seem that it is suggested by a practitioner in response to the questionnaire distributed in Spring 2021 that ‘sole parental authority’ may be understood as one parent being able to take all decisions concerning the child independently and without seeking consent or consultation with the other parent.¹⁸⁹
211. Similarly, in Switzerland ‘sole custody’ does not appear to be defined in the Swiss legal system. Instead, the concept of “garde de fait” and ‘obhut’ seems to be used. It would appear that these terms can be understood from the daily supervision of the child, with whom the child lives and the parent that exercises duties relating to care and education.¹⁹⁰
212. As far as it has been possible to be ascertained it would seem that in cases of sole custody many member States have provisions in place which grant the other parent, who does not have ‘custody’ rights, the right to maintain contact and communication with the child.¹⁹¹ (See below for more on the right to maintain contact)
213. For example, it would seem that according to Article 17 of the Cypriot Law 216/90 that in situations where one parent is granted sole custody, the other parent has a right to personal communication with the child.¹⁹²

Examples of Legal Practice: Assistance available in situations of parental separation

- **Sweden:** It would appear that pursuant to Chapter 6 Section 18 of the Swedish Children and Parents Code, parents may be provided with assistance from the Swedish Social Welfare Committee to reach an agreement in custody proceedings in the form of cooperation discussions pursuant to Chapter 5 section 3.1 of the Swedish Social Services Act.
- **Austria:** An Austrian association supported by the Austrian ministry, appears to offer “support for parents and children in situations of separation and divorce through therapy-based and educational children’s groups, in addition to working with children or parents individually and assisting them as a couple or individually.”¹⁹³

214. Any Council of Europe measure adopted should seek to address any gaps that may exist due to the lack of a common European standard on custody proceedings and arrangements. It may be desirable to develop the types of assistance available and the ways in which it can be accessed to both parents and children in custody disputes. Strengthening assistance mechanisms may enable parties to better understand and accept sole custody and/or joint custody decisions. Please see Section VII below for further discussion.

¹⁸⁹ See CJ/ENF-ISE(2021)2A, Luxembourg.

¹⁹⁰ See CJ/ENF-ISE(2021)2A, Switzerland.

¹⁹¹ See CJ/ENF-ISE(2021)2A, Cyprus and Switzerland.

¹⁹² See CJ/ENF-ISE(2021)2A, Cyprus.

¹⁹³ See CJ/ENF-ISE(2021)03A, Austria.

3) National Legislation on the Child's Procedural Rights

a) The Right of the Child to be heard in situations of parental separation

215. A child's right to be heard is absolutely central to this project.
216. In public law proceedings children's views and interests will normally (at least in principle) be heard in some way, even if inadequately¹⁹⁴, and importantly the public purse will meet these costs.
217. In private law proceedings, instead of automatically being joined as **parties** in cases which determine the children's "civil rights and obligations" as may be required by Article 6 ECHR (see Section V above) all too often they are not only *not* parties to the proceedings but their views are not even heard (either directly or indirectly). One parent – often the parent with whom the child lives, will seek to assert, if asked, that s/he can relay children's views to the court but that parent is unlikely to relay views that will not assist their claims. For children's views to be properly heard, they need be assisted by a fully independent advisor, and/or heard directly by the judge or some other modalities must be in place to ensure that the child's own views are heard by the court.
218. National laws may include provisions that protect a child's right to be heard. These types of laws relating to a child's right to be heard appear to be varied across member States, regarding the ways in which the child's views are heard (or not heard) in private law proceedings.¹⁹⁵ This disparate range of mechanisms is behind the stipulations in Reg 2019/1111 (BII Bis recast) that the Regulation only requires that the child has been heard and does not specify how this has been achieved. For example, some member States suggest that the child shall be heard so long as the minor has capacity¹⁹⁶ whilst other member States imply that the child's views shall only be heard if the child has explicitly voiced their desire to be heard.¹⁹⁷ Others appear to suggest that it is mandatory to hear a child.¹⁹⁸
219. Moreover, it cannot be ascertained that there is consensus amongst member States as to the professional considered best placed to hear the views of the child. As mentioned above, to facilitate a child's views being fully heard they should ideally be directly heard by a judge.¹⁹⁹ National laws may stipulate that expert reports are used as a tool to facilitate domestic courts "hearing" the views child.²⁰⁰ An expert report can

¹⁹⁴ See e.g. *N.Ts. and Others v. Georgia*, no. 71776/12, 2 February 2016.; see also *A.V. v. Slovenia*, no. 878/13, 9 April 2019.

¹⁹⁵ It should be noted that not all of the MS referenced below referred to their relevant domestic legislation when detailing the practice of hearing the views of the child in their legal order in response to the questionnaire. Therefore, it is unclear and cannot be ascertained to what extent these supposed practices are provided for in all of the responding MS national laws.

¹⁹⁶ See CJ/ENF-ISE(2021)03A, Germany and Finland.

¹⁹⁷ See CJ/ENF-ISE(2021)03A, Latvia.

¹⁹⁸ See CJ/ENF-ISE(2021)03A, Georgia.

¹⁹⁹ See CJ/ENF-ISE(2021)03A, Austria, Croatia, Czech Republic, Cyprus, Greece and Italy.

²⁰⁰ See CJ/ENF-ISE(2021)03A, Finland, Greece and Iceland.

assist the court in hearing the views of a child, but sometimes a child will need to be directly heard (in a child friendly manner) by the court. see section III above)

220. Furthermore, national laws *may* provide for the appointment of a competent professional to support a child in having their views heard. However, in order to guarantee that children's right for their views (and not the views of others) to be heard is protected the appointment of a fully independent advisor – whether a *guardian ad litem*²⁰¹ or other competent professional²⁰² – should be guaranteed.
221. When the child is heard there is no consensus as to who should be present across member States. The child may be supported by the presence of a social worker according to some member States laws,²⁰³ whereas others appear to provide for the opportunity for the child to be heard without the presence of others in order to protect the child from being unduly influenced.²⁰⁴ Other member States regulations apparently allow the presence of a parent, albeit only in exceptional circumstances.²⁰⁵
222. National laws tend to require that a child's views are taken into account.²⁰⁶ However, whilst member States appear to have national laws in place for obtaining the views of a child, it seems that these rules and procedures are not always being applied in practice.²⁰⁷

Examples of National Laws: Appointment of a Guardian Ad Litem

Germany, Fam FG:

It seems that pursuant to German law a *guardian ad litem* is to be appointed by the court in many proceedings concerning personal matters relating to a child in order to represent the child and protect the child's interests. (See Section 158)

Scotland, Children (Scotland) Act 2020 [not yet in force]:

It seems that legislation has recently been introduced – but is not yet in force, in Scotland that amends the Children (Scotland) Act 1995 in order to include a provision to specifically govern the appointment of a *curator ad litem* in order to protect the child's interests in cases under s11 of the 1995 Act. (See s17 of the 2020 Act)

Slovakia, Internal Standard No. 039/2018:

It would appear that in Slovakia there is an internal standard that governs the role and purpose of *guardians ad litem* in matters concerning child protection.

b) Due Weight Given

²⁰¹ See CJ/ENF-ISE(2021)03A, Germany, Scotland, Croatia.

²⁰² Such as a social worker (CJ/ENF-ISE(2021)03A, see Bulgaria)

²⁰³ See CJ/ENF-ISE(2021)03A, Bulgaria.

²⁰⁴ See CJ/ENF-ISE(2021)03A, Czech Republic, Estonia and Greece.

²⁰⁵ See CJ/ENF-ISE(2021)03A, Latvia.

²⁰⁶ See CJ/ENF-ISE(2021)03A, Northern Ireland.

²⁰⁷ See CJ/ENF-ISE(2021)03A, Iceland.

223. The weight that is to be given to the child's views must be evaluated including a discussion of the undesirability of the "unconditional veto."²⁰⁸
224. Pursuant to Article 12 UNCRC, a child's right to be heard requires their views to be given "due weight in accordance with the age and maturity of the child". The CRC clarifies in General Comment No. 12 "that age alone cannot determine the significance of a child's views",²⁰⁹ and age limits imposed by national laws should not restrict a child's Article 12 right being exercised.²¹⁰ These principles are reiterated in the Parliamentary Assembly of the Council of Europe's Recommendation 1864 (2009) on promoting the participation by children in decisions affecting them which "calls on all decision makers to consider seriously the opinions, wishes and feelings of children, including very young children."²¹¹
225. Most Member States of the Council of Europe seem to have national laws requiring that a child's views are to be taken into account, often dependent on their age and maturity. Additionally, in most States it would seem that there is a minimum age rule imposed by national laws as a means to determine when a child is to be heard in proceedings. The minimum age varies from one member State to another. It would appear from the review of national legislation that Norway imposes one of the youngest age-limits of 7 years-old.²¹² In Germany a child of any age has to be heard, if the affection, will or bindings of the child are significant for the decision to be made and if the child has the capacity to express him or herself. An Act adopted by the Federal Parliament (Bundestag) recently strengthens these requirements.²¹³ (see section III above)
226. Other member States that imposes an age threshold in national law tend to consider children aged 10 to 12 to be of a suitable age for courts to be obliged by law to hear their views, (but not necessarily to hear the child him or herself directly).

Examples of National Legislation: Domestic laws regarding the age of children in ascertaining their views, but appears to include a degree of flexibility

Bulgaria, Article 15(1) and (2) of the Child Protection Act:

(1) All cases of administrative or judicial proceedings affecting the rights and interests of a child should provide for a mandatory hearing of the child, provided he or she has reached the age of 10, unless this proves harmful to his or her interests.
(2) In cases where the child has not reached the age of 10, he or she may be given a hearing depending on the level of his or her development. The decision to hear the child shall be substantiated.

Finland, Section 11 of the Finnish Act on Child Custody and Rights of Access:

²⁰⁸ See *C. v. Finland*, no. 18249/02, 9 May 2006.

²⁰⁹ UN Committee on the Rights of the Child, *General Comment No. 12 (2009) on the right of the child to be heard*, 20 July 2009, CRC/C/GC/12, para 29.

²¹⁰ UN Committee on the Rights of the Child, *General Comment No. 12 (2009) on the right of the child to be heard*, 20 July 2009, CRC/C/GC/12, para 21.

²¹¹ Council of Europe, Parliamentary Assembly Recommendation 1864 (2009), paragraph 5.

²¹² See CJ/ENF-ISE(2021)03A, Norway.

²¹³ See CJ/ENF-ISE(2021)03A, Germany.

Ascertaining the child's views:

In a matter concerning child custody and right of access, the child's own wishes and views shall be ascertained and taken into account in so far as this is possible considering the age and stage of development of the child.

The views of the child shall be ascertained tactfully and in a manner that takes the child's stage of development into consideration and does not harm the relationship between the child and his or her parents. The purpose of ascertaining the child's views and the related procedure shall be explained to the child.

c) Length of Proceedings

227. Excessively lengthy proceedings in order to determine the custody, residence and contact rights of a child may have serious detrimental effects on a parent-child relationship and are likely to be contrary to the best interests of the child. Good practice requires for member States to act speedily and avoid an unreasonable passage of time in private law proceedings involving children in family disputes.²¹⁴ It should also be kept in mind when considering length of proceedings that the passage of time is perceived differently by a child from the way that it is perceived by an adult.
228. The length of private law proceedings falls within the ambit of the procedural rules of every given member States national laws. Therefore, there is no common standard applied in law or in practice across all member States on the length of proceedings in situations of parental separation. This includes divorce proceedings as well as those related to the 'custody', residence and contact rights of the child.
229. It should be noted that the majority of responses from member States indicate that in many of their legal orders there are laws setting out time-limits relating to proceedings concerning parental separation.²¹⁵ However, a few member States appear to have no time-limits *specifically* for parental separation proceedings prescribed by law.²¹⁶ Although some member States laws seem to suggest that proceedings for parental separation should be executed "within a reasonable time", unfortunately it cannot be ascertained what all member States laws consider a "reasonable time frame" to be.²¹⁷
230. It can be derived from the responses that in the event that no decision is reached some domestic courts consider a period of 6 months to be considered a reasonable time to conduct proceedings.²¹⁸ Meanwhile in other domestic legislation it appears to require the application of the principle of urgency in family proceedings concerning a minor.²¹⁹

²¹⁴ See *Pisică v. the Republic of Moldova*, no. 23641/17, §66, 29 October 2019; See also European Convention on the Exercise of Children's Rights, Article 7 (duty to act speedily).

²¹⁵ See CJ/ENF-ISE(2021)03A, Northern Ireland, Portugal.

²¹⁶ See CJ/ENF-ISE(2021)03A, Cyprus, Denmark, Greece, Hungary, Italy, Scotland, Sweden.

²¹⁷ See CJ/ENF-ISE(2021)03A, Moldova.

²¹⁸ See CJ/ENF-ISE(2021)03A, Austria, Bulgaria and the Czech Republic.

²¹⁹ See CJ/ENF-ISE(2021)03A, Croatia.

231. A prompt procedure seems to be prescribed by many member States laws, thus possibly recognising the irreversible effects the passage of time can have on child-parent relationships as acknowledged by the ECtHR.²²⁰
232. Where proceedings on custody, residence and contact cannot be agreed between parents or there is a possibility of lengthy proceedings the use of provisional measures may be appropriate in order to establish temporary stability for a child and reduce disruption to their daily life that may be caused by proceedings.²²¹
233. Whilst a prompt procedure which allows for proceedings relating to children to be dealt with as a priority seems to be the most common approach, there is no consensus across member States as to the specific time-frame suitable for proceedings involving children in parental separation cases to be conducted nor is there a commonly applied definition or indication as to what the parameters of a reasonable time-frame are, or should be at a national level in each member States.

Examples of Legal Practice: The use of provisional measures to protect the best interests of the child during proceedings

- **Autria:** In Austrian law, paragraph 180 of ABGB seems to allow for a provisional measure for a period of 6 months to be ordered by the court in the child's best interests if no agreement has been reached regarding the custody of the child during parental separation proceedings.
- **Estonia:** Pursuant to § 551 and § 447 (1) of the Estonian Code of Civil Procedure it would appear provisional legal protection measures may be adopted in family dispute proceedings to protect a child-parent relationship
- **Germany:** Section 156 para. 3 s.1 and Section 49 ff of the German FamFG is indicated to provide for a discussion and subsequent application of a provisional order in family proceedings where an early agreement has not been reached between the participants.

234. It is recommended that any Council of Europe measure adopted encourages swift private law proceedings to be carried out in the best interests of the child and considers the possible practice of using provisional measures to protect the child and a child-parent relationship. It may also be desirable to address the possible lack of clarity as to what a reasonable time-frame is considered to be amongst member States either by establishing a definition or expanding upon and detailing within a single provision any currently existing European and international standards on what a reasonable time is considered to be. Please see Section VII below for further details on these proposals.

d) Right to Information

235. In addition to hearing the child's views, wishes and feelings in simple separation proceedings – or in any of the other matters discussed in this section, children need to

²²⁰ See CJ/ENF-ISE(2021)03A, Estonia, Finland, Germany, Iceland, Latvia, Poland, Romania, Serbia, Slovakia, Slovenia, Spain.

²²¹ See CJ/ENF-ISE(2021)03A, Austria, Estonia, Germany, European Commission.

have procedural rights in other situations that frequently occur in separation proceedings e.g., hearing the child's evidence in civil cases involving allegations of emotional or physical abuse by one parent about the other. And delivering in all cases where a child's future is determined a child friendly judgment (for child friendly judgments see e.g., the Peter Jackson letter)²²²

236. A child's-rights based approach should be adopted in proceedings concerning children and their interests. This may be best achieved where the child's right to participation is facilitated which can be done in various ways. As discussed above, ensuring that a child's views are heard *may* be best achieved by a judge directly hearing the child, in a suitably child-friendly environment, and with the appropriate and necessary support from a qualified and competent professional. To achieve a child's-rights based approach in procedural matters would require domestic authorities to adopt child-friendly resources which can assist with the child being adequately informed on matters concerning him or her.
237. When a child is considered to have the necessary maturity and capacity to express their views, it is pivotal that they are provided with the necessary information to form those views and to express themselves properly. In all proceedings concerning children, including situations of parental separation, children should be adequately – and appropriately – informed of their rights in such proceedings and of the range of support available to them to exercise these rights, as well as how the proceedings will be conducted.
238. A child friendly approach and the use of child friendly materials is increasingly being addressed by various Council of Europe work.²²³ This is pivotal to the child's understanding of proceedings affecting them. There is no common approach adopted across all member States on how to inform the child in proceedings concerning parental separation.
239. However, some Member States of the Council of Europe have indicated that they have developed, or are developing, positive initiatives in practice to better improve children being informed in a child-friendly manner.²²⁴
240. In Finland, the “*Turvassa*” project seems to be in place in order to further develop the Finnish system to support children in situations of parental separation. As a part of this project a child-friendly video was created with the aim of explaining to children, situations of parental separation and what custody proceeding disputes are.²²⁵ It was also indicated that the Finnish National Child Strategy is currently being prepared.²²⁶

²²² Re A (Letter to a Young Person) [2017] EWFC 48, available at: <https://www.bailii.org/ew/cases/EWFC/HCI/2017/48.html>

²²³ See for example, Council of Europe Recommendation on children's rights and social services friendly to children and families (2011)12.

²²⁴ It is suggested that an Austrian Directive on Family Mediation is an example of a positive initiative in practice to improve children to be better informed.

²²⁵ See CJ/ENF-ISE(2021)03A, Finland.

²²⁶ See CJ/ENF-ISE(2021)03A, Finland.

241. In Norway, it appears that the Directorate for Children, Youth and family Affairs intends to make a child-friendly short movie as a tool to facilitate children to be informed on their rights in parental separation disputes as well as the services available to them, such as the opportunity to attend mediation.²²⁷
242. It is indicated that in the Slovenian Ministry for Justice has issued child-friendly brochures on various thematic issues. For example, a brochure which appears to be named “Preparing a Child for Court” was issued in 2017.
243. It should be noted that it is suggested in some of the member States responses, that children’s understanding in matters of parental separation may be improved by the introduction of further specialist training for professionals in guardianship and custody proceedings in order to promote good practice.²²⁸
244. Where it appears to be believed that some member States have no initiatives currently being introduced on children’s rights to be informed in their legal order it seems to be acknowledged that it is important to improve the legal system.²²⁹
245. National laws appear to be in place regarding a child’s right to information in several states across Council of Europe member States.
246. For example, it would appear that pursuant to Chapter 11 Section 10 of the Swedish Social Services Act [2001:453], a child has the right to receive all necessary information in proceedings concerning him or her.
247. However, there does not appear to be a common approach taken across all member States regarding who is best placed to inform the child. Whilst there may be national laws in place in many member States the provisions vary considerably.
248. In Hungary, the Hungarian Civil Code (Section 4:148) provides that it is the obligation of the parents to inform the child of any decisions concerning him or her. It would appear that this may be the approach taken by other member States as well.²³⁰
249. Meanwhile many other jurisdictions seem to require judges or other authorities involved to inform the child.²³¹
250. It is proposed that any Council of Europe measure adopted re-enforces the necessity child-friendly resources for a child’s right to information to be guaranteed. The measure should also seek to develop a common standard across member States in determining who is best placed to inform the child in order to ensure all of the child’s procedural rights are protected. Please see Section VII below for further discussion.

²²⁷ See CJ/ENF-ISE(2021)03A, Norway.

²²⁸ See CJ/ENF-ISE(2021)03A, Poland.

²²⁹ See CJ/ENF-ISE(2021)03A, Latvia.

²³⁰ See CJ/ENF-ISE(2021)03A, the Czech Republic.

²³¹ See CJ/ENF-ISE(2021)03A, Estonia, Italy, Romania.

e) Right to Representation

251. In situations of parental separation, good practice requires a child to be independently represented by a competent independent professional, and not their parents. It should be understood that parents are not always best placed to represent the child and the child's best interests as there is an obvious risk that they may conflict with their own.
252. National laws may regulate who is considered competent to represent children in proceedings as well as determine whether a child may be a formal party to proceedings – or is not a party to proceedings. This can affect how effectively a child is represented.
253. It would appear under German law that a child from 14 years of age may be a formal party to proceedings concerning him or her (see section 9(1) No. 3 of the FamFG). This provides children with rights related to participation and representation in proceedings, such as the right to get the decision and to file a complaint on appeal. (see in particular section 60 and section 164 of the Fam FG)²³²
254. Conversely, it seems that in Danish law a child will not be a formal party to proceedings.²³³ Additionally, in light of Polish case law, the child does not seem to be considered a formal party in proceedings and so may not have recourse to remedies and appeals (see the Supreme Court decision of 16 December 1997, case no. III CZP 63/97).²³⁴
255. Additionally, several member States appear to have domestic provisions regulating who can represent the child and seem to recognise that it may not be appropriate for a parent to be the child's representative. For example, it seems that under Georgian law (Articles 1200 and 1201 of the Georgian Civil Code) a court may suspend a parent from acting as a child's representative in court proceedings if there is a family dispute ongoing.
256. At present, there is no common approach adopted across Council of Europe Member States as to who is responsible to bear the costs for a child to receive independent representation. Some practitioners' responses suggest that the responsibility to bear the cost of fees for a child's representation in parental separation proceedings will vary between the State and the parents' dependent on the situation.²³⁵
257. Moreover, according to the practitioners' responses in some member States it would seem parents must bear the cost of fees for a child's representation in parental separation proceedings.²³⁶ Meanwhile other practitioners seem to suggest that the State will bear the cost of fees for a child's representation in these proceedings.²³⁷

²³² See CJ/ENF-ISE(2021)03A, Germany.

²³³ See CJ/ENF-ISE(2021)03A, Denmark.

²³⁴ See CJ/ENF-ISE(2021)03A, Poland.

²³⁵ See CJ/ENF-ISE(2021)2A, Luxembourg, Germany and UK.

²³⁶ See CJ/ENF-ISE(2021)2A, Germany and Switzerland.

²³⁷ See CJ/ENF-ISE(2021)2A, Jersey, Northern Ireland, Slovakia, Spain, the Netherlands and UK.

258. This is a complex matter as situations of parental separation concern private rather than public law proceedings. Therefore, the obligation on a State to provide financial resources appears to be rather unclear in many jurisdictions. The implications for the financial resources of the State of hearing the child effectively need to be explored and discussed, including whether the parents should share the costs of the child being heard.
259. The instrument proposed to be adopted should include recommendations about child participation in private law court proceedings concerning all aspects of parental separation (custody, contact and maintenance payments) affecting them as well as the availability of legal aid – or an indication of how the costs are to be met- to make that participation effective. This must be one of the most fundamental issues addressed. Please see Section VII below for further details on these proposals.
260. It would also be beneficial if the proposed instrument were to consider and determine a common standard as to who is best placed to represent the child that may guide domestic decision-makers and legislators.

4) National Legislation on the Right to Maintain Contact

261. As noted above the Court rarely challenges decisions concerning custody/residence/parental authority and accords States a significant “margin of appreciation” in such cases as long as the necessary procedural safeguards for the parents have been in place and observed. Importantly for this feasibility study, the Court is less vigilant in ensuring the observance of Article 12 UNCRC and the procedural safeguards to which the children are entitled; see below for the Court’s jurisprudence on hearing the child’s views). Whilst deciding which parent has “custody” is a key usually single issue, and in the best cases may be relatively simply agreed, contact and access arrangements are often fragmented and frequently highly contentious. Practitioners of family law are often at their busiest in the time just before Christmas, Muslim holy days, Jewish high holidays and parents and children’s birthdays. Where particularly volatile situations are involved only supervised contact will be permitted with the child and parent sometimes even being prohibited from conversing in their mother tongue.
262. The child’s right to maintain contact with the non-custodial divorced/separated parent has long been recognised (see *Hendriks v. the Netherlands*²³⁸). It is now also recognised that a presumption against contact for an unmarried father is a violation. Contact with other family members such as grandparents (*Manuello and Nevi v. Italy*²³⁹) and siblings (*Mustafa and Armagan Akin v. Turkey*²⁴⁰) may be essential for the wellbeing of the child. In the latter (*Akin*) case brought by the father and son (aged 15 at the time the complaint was lodged) the Court noted that “the Ödemiş Court did not only fail to seek the opinion of the children but also failed to base its decision on any evidence, such as psychological and other expert assessments, despite the fact that

²³⁸ *Hendriks v. the Netherlands*, no. 8427/78, §124, Report of 8 March 1982.

²³⁹ *Manuello and Nevi v. Italy*, no. 107/10, 20 January 2015.

²⁴⁰ *Mustafa and Armağan Akin v. Turkey*, no. 4694/03, 6 April 2010.

it was informed by the applicants that the situation had been causing them psychological problems.”

263. Therefore, in accordance with ECtHR case law, domestic authorities are obliged to consider the best interests of the children in maintaining contact with both of their parents in cases of parental separation.²⁴¹
264. Many Council of Europe member States have national laws and measures in place to protect and guarantee children's right to maintain contact with their parents. At present, it does not appear that there is necessarily a gap *in law* with regard to ensuring child-parent contact in situations of parental separation but rather *in practice*. That is to say, it would seem that issues may arise across member States in the *implementation* of their national laws and measures.
265. In particular, it has been indicated from practitioners that the enforcement of contact rights measures could be improved *in practice*. Some practitioners' responses seem to describe the enforcement of contact rights in some cases as ineffective,²⁴² a frustrating experience²⁴³ and that such enforcement measures may give rise to further issues.²⁴⁴
266. It may be of interest to also note that with regard to fees and costs in the context of contact rights, all 24 practitioner responses indicate that a non-custodial parent with no contact rights is obliged to pay maintenance and provide that the custody/contact decision is unrelated to maintenance support.²⁴⁵
267. Any measure adopted by the Council of Europe on the topic of children's right to maintain contact in situations of parental separation must address the financial burden of contact visits and travel costs and determine whether public funding or shared parental financial contributions must secure this right.

5) Additional Key Scenarios

a) Child Abduction

268. The influence of the UNCRC on the decisions and judgments of the ECtHR derives from Article 53 ECHR. Other international agreements which frequently come before the Court – and to which Article 53 ECHR applies – are the Hague Convention on the Civil Aspects of International Child Abduction, (“Hague 1980”) its EU parallel instrument Reg 2201/2003, commonly known as BIIBs, and its recast Reg 2019/1111 and (sometimes) the Hague Convention on the Protection of Children (Hague 1996).
269. A detailed analysis of the interface between the ECHR and these three instruments is beyond the scope of this study. Some key points should be noted:

²⁴¹ *Anayo v. Germany*, no. 20578/07, 21 December 2010.

²⁴² See CJ/ENF-ISE(2021)2A, Georgia, UK and Spain.

²⁴³ See CJ/ENF-ISE(2021)2A, UK.

²⁴⁴ See CJ/ENF-ISE(2021)2A, UK.

²⁴⁵ See all 24 answers given to CJ/ENF-ISE(2021)2A, Question 5.

- (i) Hague 1980 only applies to children up to the age of 16, whereas Hague 1996 and BII Bis apply to children up to the age of 18 (as does the UNCRC)
 - (ii) BII Bis only applies in EU member States. Where BII Bis applies it takes priority, as a matter of EU law, over the Hague Conventions.
270. Even if a State is not a party to the 1980 Hague Convention it must provide an alternative framework to deal with child abduction (*Bajrami v. Albania*²⁴⁶)
271. Child abduction means the wrongful removal or wrongful retention of a child in breach of rights of custody in the state where the child was habitually resident before the removal or retention. Mention has been made above of the different terminology used in different jurisdictions (such as parental authority, parental responsibility, custody, access) Hague 1980 and BII Bis include definitions of “parental responsibility”²⁴⁷, “custody”²⁴⁸ and “rights of access”²⁴⁹.
272. The Recast Reg 2019 /1111 importantly emphasises in Article 21 that:
- 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.*
273. A “wrongful removal” occurs when a child is removed from a jurisdiction in breach of rights of custody -broadly without the consent of a holder of rights of custody.
274. A “wrongful retention” occurs when a child has been lawfully removed from a jurisdiction – broadly with the consent of a holder of rights of custody - but is not then returned to the jurisdiction at the agreed time.

²⁴⁶ *Bajrami v. Albania*, no. 35853/04, ECHR 2006-XIV (extracts).

²⁴⁷ Article 2(7), Reg 2019/1111:

'parental responsibility' means all rights and duties relating to the person or the property of a child which are given to a natural or legal person by a decision, by operation of law or by an agreement having legal effect, including rights of custody and rights of access;

²⁴⁸ Article 5, Hague Convention 1980: For the purposes of this Convention:

a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

Article 2(9), Reg 2019/1111: 'rights of custody' includes rights and duties relating to the care of the person of a child and in particular the right to determine the place of residence of a child;

²⁴⁹ Article 5, Hague Convention 1980: For the purposes of this Convention:

b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

Article 2(10), Reg 2019/1111: 'rights of access' means rights of access to a child, including the right to take a child to a place other than his or her habitual residence for a limited period of time

275. Parties to the Hague Convention are required to order prompt return so that the courts of the country from which the child was abducted can deal with any issues of custody or residence. This does not imply that the child is to be returned to the left- behind parent and the abducting parent can accompany the child on return until the national courts decide on custody and residence. [In *B v. Belgium*, for example the Court seemed to be under the misapprehension that a Hague return would involve the separation of the child from his abducting mother.
276. Any Council of Europe measure should include reference to the provision on children's objections in Article 13(2) of the 1980 Hague Convention.

b) Relocation

277. Relocation is a key contentious issue (as was clear for the discussions preparatory to the Council of Europe Recommendation on Relocation).²⁵⁰ This is so whether it is merely to a different part of the same town, to a different part of the country, or to another jurisdiction. It will frequently have major consequences not only for the child to continue or cease to enjoy easy visiting/contact with the other parent, but also for a child's continuity of education, separation from friends, cessation or change of other social activities (e.g., ballet, football, rock band, drama group to name but a few), relationships with the wider family. In many cases it will be prompted by the parent's desire to establish or consolidate a new partnership with all the psychological and emotional consequences this has for the child. Inappropriate decisions may trigger abduction.
278. Any instrument adopted (referencing the Council of Europe Recommendation of 2015²⁵¹) should recommend that the views of the child should be canvassed heard and weighed all in all proceedings involving relocation and not just, as is often the case at present, when leave is being sought to remove a child from the jurisdiction where it is present and habitually resident or to otherwise relocate to a distant location within the same jurisdiction.

c) Residence

279. When one parent is given "custody" this typically means that the child will reside with that parent. As noted elsewhere in many jurisdictions what used to be called "custody" is now often referred to as "a residence order" or a "child arrangements order". If there is joint custody the child may "reside" some of the time with one parent and some with the other for example staying every other week or every other weekend with the other parent. This may be described as shared residence or may be seen as an aspect of contact and visit right for both child and parent. National rules and *ad hoc* decisions will determine the extent of the exclusive decision making accorded to

²⁵⁰ Council of Europe Committee of Ministers, CM/Rec(2015)4 *Recommendation of the Committee of Ministers to member States on preventing and resolving disputes on child relocation* (Adopted by the Committee of Ministers on 11 February 2015 at the 1219th meeting of the Ministers' Deputies).

²⁵¹ Council of Europe Committee of Ministers, CM/Rec(2015)4 *Recommendation of the Committee of Ministers to member States on preventing and resolving disputes on child relocation* (Adopted by the Committee of Ministers on 11 February 2015 at the 1219th meeting of the Ministers' Deputies).

one parent and whether one parent can change the child's residence without the other parent's consent – for example to move in with a new partner.

280. There is a need to consult and hear the child about all issues concerning the determination or change of residence.

d) Adoption

281. Adoption, discussed in Article 21 UNCRC, is the only provision of the UNCRC in which the child's best interests are not just a primary consideration but the paramount consideration that is they must be the "determining factor" and take precedence over all other interests and considerations. UNCRC General Comment 14 emphasises the importance of Article 12 (the right to respect for the views of the child) in making a best interest's assessment. Article 21 specifies that 'persons concerned' should give their informed consent. However, the Article makes no *specific* mention that the child's views must be canvassed or heard or that their consent must be given in adoption proceedings although children fall within the category of 'persons concerned'.²⁵² Meanwhile, the Hague Convention on Inter-Country Adoption²⁵³ does refer to requiring the child's consent in adoption proceedings. We can only infer the need to hear the child's views from Article 12 itself and General Comments 12& 14. However, the practice in several Council of Europe jurisdictions is to hear a child of an appropriate age (see *Eski v. Austria* below).
282. There are different kinds of adoption in the different jurisdictions of the Council of Europe. In some countries (like England and Wales) there is only one kind and it severs all legal ties between children and their birth parents and wider family – including inheritance rights – and creates new and complete legal ties with the adoptive parents. In some other jurisdictions there are two kinds of adoption: simple adoption and full adoption ("adoption simple" and "adoption plénière") The first kind creates a new permanent legal family for the child but does not necessarily sever all links with the birth parent. Sometimes such adoptions are "open adoptions" in that the child is fully informed about the adoption and often maintains contact with the birth parent. Such an adoption was the hope (and even expectation) of the mother in *IS v Germany* summarised below. In the second kind all legal links with the birth parent are severed. In all jurisdictions the consent of a parent who has parental rights (see the section on parentage) and is to be deprived of them by the adoption must be obtained or that consent must be formally dispensed with. Adoption is prohibited in Islam which has instead the institution of Kafalah which provides a permanent legal tie between the child and the kefils (new parents) but does not sever links with the birth family. There are *many* different kinds of kafalah (see CJEU Case 129/18 SM(Algeria)). The one practised in Algeria for example is almost identical to "*adoption simple*".
283. Adoption in the context of parental separation has enormous legal, social and psychological consequences for the child(ren) both in terms of severing the links with

²⁵² See the UN Convention on the Rights of the Child: A Commentary, ed. John Tobin (Oxford University Press 2019).

²⁵³ Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, 29 May 1993.

the birth parent(s) and creating a link with the new parent(s). In most jurisdictions it is irrevocable. Despite the absence of any express stipulation in Article 21 UNCRC, given that the best interests of the child must be the paramount consideration, the views of the child must be canvassed and weighed and particular weight attributed to them. This should be reflected in any Council of Europe instrument adopted.

e) Religion

284. Article 12 of the UNCRC recognises the right of children who are capable of forming their own views to express those views freely in all matters affecting them, the views of the children to be given due weight in accordance with the age and maturity of the children. This right of the child is of particular importance in religious matters, as the child is recognised by Article 14.1 of the UNCRC as having the right to freedom of thought, conscience and religion. This right is binding on the parents responsible for making decisions relating to the child and on any authority, in particular a judicial authority, which is called upon to settle a dispute between the parents concerning the child's religion. Disputes concerning the child's religion often arise between parents at the time of their separation or subsequently, particularly when they are of different faiths: disputes arise concerning the child's choice of religion, the child's religious practice and upbringing, the wearing of religious clothing, diets related to religious practice, circumcision, etc.
285. Article 14.2 of the UNCRC also recognises the role of parents in guiding the child's exercise of freedom of thought, conscience and religion. The Committee on the Rights of the Child clarifies, however, that it is the child, not the parents, who should exercise the right to freedom of religion. It adds that the role of the parents necessarily diminishes as the role of children increases and the children become more active in exercising their freedom of choice throughout adolescence.²⁵⁴
286. As with any decision concerning the child, parents have a joint responsibility to make decisions about their child's religion and religious practice. The fact that custody of the child has been awarded to one parent does not automatically give the other parent less power in these decisions.
287. It follows from the case law of the European Court of Human Rights that decisions on parental responsibility, custody and contact cannot be based on the religious practice of one of the parents, unless the interests of the child so require.²⁵⁵
288. The responses to the questionnaires show that in most cases issues relating to the child's religion are only taken into account in a secondary manner: the issue is either subsumed under the common and shared responsibility of parents to make decisions concerning their child, or under the right of children to have their best interests as a primary consideration in decisions affecting them, or even to participate in decisions affecting them. The responses to the questionnaires do not mention specific

²⁵⁴ General Comment No. 20 on the implementation of children's rights during adolescence, 2016, § 43.

²⁵⁵ *Hoffmann v. Austria*, no. 12875/87, 23 June 1993, Series A no. 255-C; *Palau-Martinez v. France*, no. 64927/01, ECHR 2003-XII; *Vojnity v. Hungary*, no. 29617/07, 12 February 2013.

legislation, procedures or practices regarding the child's religion and the difficulties that may arise in this regard at the time of parental separation or afterwards. However, we know that in some Member States the law provides that the child cannot be imposed a religious practice beyond a certain age, or even can freely consent to a religion beyond an age threshold. In these situations, the role of the parents is limited or even set aside in favour of the child's right to freedom of thought, conscience and religion.

- 289. Respect for the rights and interests of the child in religious matters should be given particular attention in the context of parental separations. In all decisions relating to the child's religion, it is important that children are consulted, can express their views and that their opinions are taken into account.
- 290. The equality of parents in decisions concerning the religion of their child should be ensured at the time of separation or afterwards. The parent who does not live with the child should be able to participate in decision-making on an equal basis with the parent who has custody of the child.
- 291. Parents should not be granted rights or be deprived of rights on the basis of their religious practice, unless that practice, assessed in concreto, is contrary to the interests of the child and may put the child at risk.

f) Education

- 292. Article 5 of the UNCRC affirms that the upbringing of the child is a responsibility, a right and a duty of the parents. According to Article 18, both parents have a common responsibility for the upbringing of their child. This principle cannot be affected by parental separation: even if separated, parents must take decisions together and in an equal manner concerning the upbringing of their child, whether these concern instruction, schooling, sports, cultural, artistic or other leisure activities.²⁵⁶ The parent who does not live with the child has equal decision-making power with the other parent, although he or she does not share the child's daily life.
- 293. The non-custodial parent is also entitled to receive all information concerning the upbringing of the child, whether from the other parent or from persons or authorities involved in the upbringing. For example, the parent who does not live with the child should be informed of decisions taken by the school concerning the child's educational orientation or the child's academic performance.
- 294. In all decisions relating to children's education, the child should be able to participate and be heard so that their views are taken into account, in accordance with Article 12.1 of the UNCRC. The Committee on the Rights of the Child recalls the right of children to participate in all decisions concerning their schooling or their recreational, sporting or cultural activities, for example in matters relating to the pupil's educational orientation or the choice of courses of study, which directly affect the best interests of the children.²⁵⁷

²⁵⁶ The spiritual and religious education of the child is dealt with in a specific section : see below.

²⁵⁷ General Comment No. 12 on the right of the child to be heard, 2009, § 113.

295. In the context of a parental dispute, decisions concerning the child's education may be taken by a judicial authority. In this case, children should have the opportunity to be heard by the judge and to make their views known, as required by Article 12.2 of the UNCRC.
296. The responses to the questionnaires mostly recall the right of the child to education and instruction. They also reiterate that the child's education is the responsibility of the parents and that they have equivalent decision-making power, which is affirmed in many laws. Several States indicate that the educational capacities of the parents are taken into account by the judicial authority when making custody decisions.
297. However, beyond these general statements, the issue of the rights and interests of the child and the rights of separated parents in relation to the child's schooling and out-of-school activities are hardly addressed. Issues relating to children who are particularly vulnerable because of school drop-out or drop-out of school have not been addressed. It is not specified what is done in practice to enable the parent who does not live with the child to take an active role in the child's education.
298. On the basis of the responses provided, we suggest that a section be included in the Council of Europe's work on the education of the child to affirm the right of children to participate, to be heard and to have their views taken into account in all decisions relating to their education and guidance at school as well as to their out-of-school activities.
299. It is also important to ensure the equality and joint responsibility of parents in all decisions relating to the child's education, especially decisions concerning the child's schooling. While each parent has a role to play in exercising their rights and respecting those of the other, it is also essential that the school respects the rights and duties of each parent, for example by providing equivalent information to both parents, including the parent who does not live with the child, and by allowing the child to be involved in school activities and outings.

g) Medical Treatment

300. The protection of the child's health is an essential part of parenting. As with the child's education and religion, it is the responsibility of parents to make decisions about their child's health and to provide appropriate guidance and advice on the exercise of rights in a manner consistent with the child's evolving capacities, in accordance with Article 5 of the UNCRC. Parents thus have a central role in child health, which the Committee on the Rights of the Child believes should be better recognised.²⁵⁸
301. Parents are thus responsible for making decisions regarding the child's health in terms of prevention, screening, diagnosis, treatment or intervention. Again, as parents have joint parental responsibility, they are equal in making decisions, without the custodial parent being able to claim superior decision-making power. Similarly, each parent

²⁵⁸ General Comment 15 on the right of the child to the highest attainable standard of health, 2013.

should be given equivalent information and it is the responsibility of health professionals to ensure that both parents have received information about their child's care so that they can make informed decisions.

302. In the area of health, the Committee on the Rights of the Child recalls that the right of children to express their views freely and to have those views given due weight, as provided for in article 12 of the UNCRC, is essential to ensure the right of adolescents to health and development.²⁵⁹ Thus, parents must involve their child in decisions that affect the child and the child is given autonomy in decision-making in health matters.
303. As an exception, the rights of children and their parents are limited in health matters when screening or treatment procedures are imposed by law.²⁶⁰
304. The responses to the questionnaires contain very little information on how decisions are made about the child's health in the event of parental separation. They contain general statements about the child's right to health and the fact that parents have to ensure the health protection of the child. It is also mentioned that the decisions of the judicial authority in cases of parental separation take into account the ability of each parent to provide the best possible care for the child, particularly in terms of health.
305. However, the answers do not make it possible to know how things work, for example, in the event of disagreement between the parents on the medical treatment or end of life of their sick child, or in the event of refusal of treatment, vaccination or screening by one of the parents, even though these questions are essential, particularly in the event of a global pandemic.
306. It is therefore recommended that the Council of Europe pay particular attention to these issues, as all too often decisions relating to children's health do not sufficiently involve the main person concerned: children not always given information about their state of health and their consent is not necessarily sought. The involvement of the child in decisions taken concerning the child's health is all the more important in view of the intimate dimension of their implementation and the fact that they are likely to affect the child's future. Parents themselves may also be insufficiently informed and not involved in the decision-making process, particularly when they are separated.
307. Health professionals need to be made aware of the rights of each parent and of the child and be better trained to ensure that these rights are respected.

h) Name Changing

308. National rules regarding names and name changes vary enormously. Some countries have very strict rules and some are very relaxed, particularly about first names. The rules are often stricter about surnames.

²⁵⁹ General Comment No. 4 on adolescent health and development in the context of the Convention on the Rights of the Child, 2003, § 43.

²⁶⁰ ECHR, 10 December 1984, *Acmanne and Others v. Belgium*, no. 10435/83.

309. In most jurisdictions in order to change the name of a child, the consent of everyone having parental authority (or parental responsibility or joint custody – whatever is the applicable national term) is required, although in some jurisdictions, children between the age of 16 and 18 can change their own names. In all cases in which a change of a child's name is proposed the views, wishes and feeling or a child capable of forming them must be listened to.
310. Article 7 of the UNCRC recognises the right of children to a name. As well as the right to know their parents. Children also have the right to protection of their identity, guaranteed by Article 8 of the UNCRC; identity includes name, nationality and family relations. This protection also requires States to act to restore these elements of children's identity when they are unlawfully deprived of them.
311. The responses to the questionnaires show that issues related to the determination and change of a child's name are only rarely addressed: only one mentions a possible change of name after the parents' separation. However, we know that States have a great deal of latitude in setting the rules for the transmission and determination of the child's name; these rules vary greatly from State to State: some have very strict rules on the name and others very flexible rules.
312. Most States the change requires the agreement of the holders of parental responsibility and in some States, children are required to consent to the change of their name or may apply for a change of name if they are over 16 years of age. In some States, such consent of the child is not provided for.
313. The preservation of the child's identity is likely to be undermined by parental separation and should be given particular attention. The change of a child's name following parental separation, which may involve a change of parentage, may be a source of trauma for children, who is known in society, in their family, at school, etc. under a certain identity. For all decisions relating to children's names, it is important that children are consulted, can express their opinions and that they are taken into consideration.

i) Immigration Matters

314. Immigration measures can affect the children of separated parents²⁶¹ in several ways ranging from the admission of children to join one of their parents to the effect that the expulsion of a parent (custodial or otherwise) can have on the affected children. There is a current movement (Equal Justice for Migrant children led by former senior immigration judges and child law experts) to ensure that judicial immigration decisions concerning children are taken by specialist judges trained in child law as conflicts can sometimes arise between immigration/asylum and e.g., Hague Convention law²⁶² or a parent otherwise eligible to be given custody of a child is threatened with expulsion.

²⁶¹ The discussion here is confined to parents who are separated from each other, not parents who are together but separated from their children by immigration.

²⁶² See for example, *G (Appellant) v G (Respondent)*, UKSC [2021] UKSC 9.

315. In cases concerning immigration and separated parents the children's views are very rarely sought or presented to the courts.
316. Decisions, in cases involving the immigration situation of one or other of the separated parents or of the children themselves need to be heard and decided by judges familiar with – and with expertise in – both areas of the law. It may be recommended that there should be dedicated courts within the family court system, as well as within the immigration courts to ensure that the relevant expertise is brought to bear on the issues. Questions related to parental separations should be given priority over those related to immigration procedures.²⁶³

j) Children with Incarcerated Parents

317. Imprisoned separated parents (this section is restricting itself to looking at the situation of children whose parents are already separated or divorced – or who become separated or divorced whilst imprisoned. It is not primarily looking at the separation of parents which occurs as a consequence of imprisonment.)
318. The adverse effect of the imprisonment of a parent on children is extensively documented and the work of COPE (Children of Prisoners Europe)²⁶⁴ and other NGOs has made significant contributions to drawing attention to (and ameliorating) their situation. The UNCRC Committee devoted a Day of Discussion to the children of incarcerated parents in 2011 but has not yet followed this up with a General Comment.
319. Two points should be noted at the outset: the first is that offender parents are less likely to receive a custodial sentence (or may receive a shorter one) if they are in a stable relationship with a partner and children and the second is that being in a such a stable relationship is a huge factor in reducing the risk of recidivism after they are released. Society at large, and not just the affected children, thus has a significant interest in supporting fragile relationships through the difficult period of the imprisonment of partners and parents.
320. Key to this is the provision of relationship counselling and support to both parents (see, *mutatis mutandis*, *Cengiz Kiliç v. Turkey*²⁶⁵ and *Bergmann v. Czech Republic*²⁶⁶ discussed elsewhere) as well as to the children. Well organised child friendly prison visits are crucial. Where the parents are formally separated, it will be more challenging for the state to make the – necessary- arrangements for the children to be taken to visit the incarcerated parent. This is essential to meet the state's positive obligations (when it has imprisoned one parent) to ensure compliance with Article 9 and in particular Article 9(3) UNCRC.

²⁶³ In 2018 a Protocol was adopted in England on communication between judges of the Family Court and the Immigration Tribunals when family and immigration proceedings are taking place concurrently. In principle immigration proceedings should be postponed pending the outcome of family proceedings. The family court is the specialist court for considering and protecting the welfare of children and the immigration court should await the decision of the family court before carrying out its assessment of the child's best interests which will be a factor which it must take into account in making its decision on the immigration matter.

²⁶⁴ COPE – www.childrenofprisoners.eu.

²⁶⁵ *Cengiz Kiliç v. Turkey*, no. 16192/06, 6 December 2011.

²⁶⁶ *Bergmann v. the Czech Republic*, no. 8857/08, 27 October 2011.

321. It should be noted from the responses that imprisonment or other forms of deprivation of liberty are mentioned by several States and practitioners as a possible sanction to be imposed where contact and residence orders are obstructed by a parent, which would add further complications and hurdles to a situation of parental separation and the exercising of the rights of a child.²⁶⁷
322. As in so many other instances the relevant ECHR jurisprudence focuses on the right of prisoners to maintain relationships with their children rather than the rights of the children.
323. The instrument should emphasise that children's rights under Article 9(3) UNCRC and Article 8 ECHR do not cease on the imprisonment of one parent particularly if that parent is separated from the other parent.

VII. WAYS FORWARD

1) Main Gaps and Lacunae

324. **At international level:** the UNCRC committee has never held a “Day of Discussion” on children in situations of parental separation or adopted a General Comment dedicated to this topic. This means that although the Committee has considered this phenomenon in its Concluding Observations when examining national periodic reports, it has not adopted an initiative dedicated to children in situations of parental separation. Some other GC's particularly GC 14 & GC 12 have of course referred to the situation of these children, but only in the context of the wider issues they were addressing. The most recent UNCRC general comment (GC No. 24 (2019) on children's rights in the child justice system) refers only to “the legislation, norms and standards, procedures, mechanisms and provisions specifically applicable to, and institutions and bodies set up to deal with, children considered as offenders”. The UNCRC committee's Day of Discussion foreseen for September 2021 will be devoted to children being placed in alternative care – the companion project to this study. No other international initiative dedicated to children in situations of parental separation seems to be planned at present.
325. **At Council of Europe level:** no convention, or recommendation or guidelines exist which specifically bring together and address the needs and interests of children in situations of parental separation. The closest instruments are the Convention on the Exercise of Children's Rights, the Convention on Contact, the Recommendation on policy to support positive parenting (2006)¹⁹, the Recommendation (2012) 2 on the participation of children and young people under the age of 18. The “participation recommendation” nowhere specifically addresses the needs and interests of children in parental separation situations.
326. It should be noted that the “participation recommendation” in its preamble expressly “instructs the Secretary General to encourage the participation of children and young

²⁶⁷ See paragraphs 147-152 above.

people in the Organisation's standard-setting, co-operation and evaluation activities" and any measures to be prepared or adopted in the context of taking the work of this study forward will need the participation of the children who have or are affected. It was not possible for this to have taken place to date.

327. As noted above in section III there is no common standard of who is to be considered a parent for the purposes of ascertaining and respecting children's needs in parental separation or of which "parents" are deemed to have parental responsibility or parental authority. and no consistency in the rights and responsibilities of those parents who are designated "non-custodial".²⁶⁸
328. At national level, despite all member States being parties to the UNCRC, as far as could be ascertained from the responses received, the participation of the affected children in parental separation proceedings is the exception rather than the rule. In some states there is good practice but, in many cases, they receive no information about the proceedings, their views are not canvassed, their wishes and feelings are not heard, their views are not expressed either directly or by a representative independent of their parents, their views are not given due weight and where their views are heard, the decision that emerges at the end of the proceedings is often not communicated to the affected children themselves but only to their parents, does not indicate what weight has been given to their views, or why a decision contrary to their wishes has been taken.
329. As noted above in section III, in addition there is an absence of common terminology as well as a lack of common legal concepts. These lacunae assume increasing importance given the incidence of cross border relationships.
330. All these gaps and lacunae could be usefully addressed in a new Council of Europe instrument or handbook.

2) Possible Council of Europe instruments

331. Considering the aim of the Council of Europe is to achieve greater unity between its members, in particular by promoting the adoption of common rules; and considering the necessity of ensuring the effective implementation of existing binding European and international instruments protecting children's rights, the drafting and adoption of a new measure or handbook relating specifically to the rights of children in situations of parental separation is under consideration. Any instrument should be conscious of the rapidly evolving nature of the law and practice applicable in this field. To take but one example surrogacy and other forms of assisted reproductive technology are developing rapidly. What follows considers the possible options:

²⁶⁸ See paragraphs 55, 57 and 59.

a) *A new Convention or update of existing Conventions such as the Convention on the Exercise of Children's Rights or the Convention on Contact*

332. The existing relevant Council of Europe Conventions are set out above (section IV). The most important one is of course the ECHR and in the light of the absence (for historical reasons) of specific provisions on children's rights there have been from time-to-time thoughts about a Protocol on Children's Rights. Such a Protocol, however desirable, would have to reach far beyond the scope of the two themes of the present exercise and so is not discussed here.
333. It has been noted elsewhere in this study that some of the Council of Europe Conventions have only a very few ratifications - often fewer than half the member States of the Council of Europe (See section III above). This may suggest that states would be reluctant to sign (and/or ratify) a Convention especially in an area as delicate and case specific as parental separation. If the content of any proposals is going to be enshrined in a Convention that is to be meaningful for children across the Council of Europe it may require changes in national substantive law (e.g., parentage, which may in some cases be very controversial) and in national legal procedure (e.g., improved procedures for hearing the child's views) as well as the allocation of significant new budgetary resources. It would appear from the responses received from both member States and practitioners that the problems for children arise mainly from the practice rather the law itself (although as has been noted elsewhere, it has not always been possible to ascertain from the responses what some States' legal provisions were.) A new Convention would thus appear the least attractive option. Updating the old Convention on the Exercise of Children's Rights or the convention on Contact would meet the same pitfalls.

b) *Recommendation*

334. The existing relevant Council of Europe Recommendations are set out above (section IV)²⁶⁹. Of significance historically is the 1984 recommendation on parental responsibilities, now almost 40 years old, but of more recent importance are Recommendation (2006)19 on policy to support positive parenting²⁷⁰ and Recommendation (2012)2 on the participation of children and young people under the age of 18 ("the participation recommendation"). The latter instrument nowhere specifically addresses the needs of children to participate in parental separation proceedings.

²⁶⁹ Recommendation No. R 84(4) of the Committee of Ministers on parental responsibilities; Recommendation Rec(2006)19 on policy to support positive parenting; Recommendation CM/Rec(2009)10 on integrated national strategies for the protection of children from violence; Recommendation CM/Rec(2010)7 on the Council of Europe Charter on Education for Democratic Citizenship and Human Rights Education; Guidelines of the Committee of Ministers of the Council of Europe on Child-friendly Justice (2010); Parliamentary Assembly Recommendation 1864 (2009) on "Promoting the participation by children in decisions affecting them"; Recommendation 128 (2003) of the Congress of Local and Regional Authorities of the Council of Europe on the revised European Charter on "The Participation of Young People in Local and Regional Life".

²⁷⁰ The only specific reference to separated parents is in para. 7: *In the case of separated parents, support policies should be aimed in particular at maintaining links between children and both their parents, unless this is contrary to the child's best interests. Access to professional counselling should be provided and attention should be paid to cases where the parents have different cultural backgrounds or are of different nationalities.*

335. An appropriate Recommendation could be drafted in legally correct but child friendly language and produced in a child friendly format for distribution to all children affected by parental separation proceedings (or a child friendly explanatory report could accompany it).
336. The Recommendation (and its accompanying Explanatory Report) would address, in the context of children's rights in parental separation, several topics.
337. Each topic would, discretely, address the hearing of children's views, giving them due weight and informing them of the decisions taken:
 - i. Who is to be considered a parent, including, crucially, which people do the affected children themselves consider to be their "parents" at the relevant time?
 - ii. Which "parents" have parental authority or parental responsibility and how are the children's views canvassed and given due weight in decisions attributing parental authority and/or responsibility?
 - iii. What is meant by "custody" – shared, joint or sole? What decisions are exclusively the prerogative of the parent with "custody" and what decisions must be taken in consultation or with the consent of the non- custodial parent? When can that consent be dispensed with? and how are the children's views canvassed and given due weight in this process?
 - iv. What is the scope of the children's right to contact / access? Which term should be used? How are the children's views canvassed and given due weight in deciding this?
 - v. When contact/access arrangements are not observed, how should they be enforced by the State, particularly in cases of child abduction? How are the children's views canvassed and given due weight in this process?
 - vi. A number of other different discrete scenarios which cause conflict in situations of parental separation should also be addressed such as religious upbringing, education, medical treatment, relocation, naming and name changes. How are the children's views canvassed and given due weight in this process?
 - vii. Special situations which arise in parental separation cases in connection with the exercise of state powers in relation to separated parents such as immigration (exclusion and expulsion) and prison regimes. How are the children's views canvassed and given due weight in this process?
 - viii. Resource implications: as these are normally private law proceedings, who should bear the costs of hearing and informing the affected children?
 - ix. The length of proceedings in parental separation cases and its effect on children
338. On the whole a Recommendation would appear to be the most suitable vehicle for drawing the attention of the policy makers and other stakeholders to the importance of the wide range of scenarios affecting children in parental separation and the absence of any measure dedicated to them.

c) Guidelines

339. Since the issues which need to be addressed are already covered in international agreements and their associated literature (such as General Comments) guidelines would seem to have little added value and might devalue the importance that the Council of Europe attaches to these issues.

d) A handbook

340. Whatever instrument (or none) is decided on, a handbook bringing together all the scenarios discussed in this study – with contributions from and the participation of the affected children – would be an invaluable tool for highlighting the importance of this work. Such a handbook could ensure that all professionals working with children in situations of parental separation would be aware of the standards in the fields tangential to their own: so that e.g., immigration lawyers or decision makers were kept abreast of family law issues. A child friendly version for distribution to all affected children would also be essential and faithful to the spirit of this work.

3) Council of Europe instrument in both parental separation and care proceedings

341. Much attention has been (rightly) given to the best interests and needs of children being (or, sometimes worse, not being) taken into care. The upcoming Day of Discussion on this theme at the UNCRC Committee will (also rightly) focus on these children. This means however that children's needs and best interests in parental separation are less visible and their voices are less audible, if heard at all.
342. It is clear that some principles such as the primacy of best interests and the importance of hearing the child's views are common to both scenarios and that – where feasible – maintaining contact and relationships with the parent(s) with whom the child no longer lives is an important goal if this can be achieved whilst respecting best interests. Unlike children being taken into care and children in conflict with the law, children in situations of parental separation would often not otherwise be the subjects of state interference in their lives and for this reason their situation is often overlooked. It might be that two recommendations could be worked on simultaneously (as was done recently with the two joint comments of the UNCRC and UNCRMW committees²⁷¹).

²⁷¹ UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration*, 16 November 2017, CMW/C/GC/3-CRC/C/GC/22; UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23.

APPENDIX A: ABBREVIATIONS

BII Bis / Brussels II bis	Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000
CFAB	Children and Families Across Borders
CJEU	Court of Justice of the European Union
CRC	Committee on the Rights of the Child
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ETS	European Treaties Series
EU	European Union
GC	General Comments (of the United Nations Committee on the Rights of the Child)
Hague Convention (1980)	Hague Convention on the Civil Aspects of International Child Abduction, 25 October 1980
IAFL	International Academy of Family Law
NGO	Non-governmental organisation
PACE	Parliamentary Assembly of the Council of Europe
UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child

**APPENDIX B: LIST OF INTERNATIONAL AND EUROPEAN STANDARDS THAT MAY
APPLY TO SITUATIONS OF PARENTAL SEPARATION²⁷²**

Plan:

I- Standards from the United Nations

- I-1. Convention on the Rights of the Child
- I-2. General Comments of the Committee on the Rights of the Child
- I-3. Joint General Comments of the Committee on the Rights of the Child and Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families
- I-4. International Covenant on Civil and Political Rights

II- Standards from the Council of Europe

- II-1. Treaties
- II-2. Recommendations
- II-3. Guidelines
- II-4. Resolutions

III- Standards from the European Union

- III-1. Charter of Fundamental Rights
- III-2. Regulations
- III-3. Guidelines

IV- Standards from the Hague Conference on Private International Law

I- Standards from the United Nations

I-1. Convention on the Rights of the Child

United Nations Convention on the Rights of the Child, 1989. In particular, the following provisions may apply to children whose parents separate: Articles 1 to 12, 14-16, 18, 27, 30, 42.

I-2. General comments of the Committee on the Rights of the Child

General Comment No. 5 (2003): "General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6). In particular, the following paragraphs may be relevant to a child whose parents separate: Paragraph 12.

General Comment No. 12 (2009) on the right of the child to be heard. In particular, the following paragraphs may apply to children experiencing parental separation: Paragraphs 51, 52, 70, 71, 74

²⁷² It should be noted that the provisions listed below are a selection of the key articles, paragraphs and principles considered relevant to situations of parental separation. This is not an exhaustive list.

General Comment No. 14 (2013) on the right of the child to have his or her best interests be a primary consideration. In particular, the following paragraphs may apply to children experiencing parental separation: 6, 43, 52-54, 60, 67, 70.

General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), 17 April 2013, CRC.C.GC/15. In particular, the following paragraphs may apply to the child in situations of parental separation: 6, 13, 18, 31, 61, 67, 78

General Comment No. 20 (2016) of the UN Committee on the Rights of the Child on implementing child rights during adolescence. In particular, the following paragraph may apply to the child whose parents separate: 18.

1-3. Joint General Comments of the Committee on the Rights of the Child and Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families

Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, 16 November 2017, CMW/C/GC/3-CRC/C/GC/22. In particular, the following paragraphs are likely to apply to the child in situations of parental separation: §§ 27-33; §§ 34-39.

Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23. In particular, the following paragraphs are likely to apply to the child in situations of parental separation: §§ 20-21, §§ 27-38.

I-4. International Covenant on Civil and Political Rights

United Nations International Covenant on Civil and Political Rights, 1966. In particular, the following provisions may apply to children whose parents separate: Article 17, Article 18.4, Article 23, Article 24.

II- Standards from the Council of Europe

II-1. Treaties

European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950. In particular, the following provisions may apply to children whose parents separate: Article 6 , Article 8, Article 9, Article 13, Article 14, Article 53.

Additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No 11, 1994. In particular, the following provision may apply to a child whose parents separate: Article 2.

Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1963. In particular, the following provisions may apply to a child whose parents are separating: Article 2, Article 3.

Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1984. In particular, the following provisions may apply to a child whose parents are separating: Article 5.

Revised European Social Charter, 1996. In particular, the following provisions may apply to the child of separating parents: Part I: § 7, 17 ; Article 17 ; Article 19, Article 27.

European Convention on the Exercise of Children's Rights, 1996. In particular, the following provisions may apply to children whose parents separate: Preamble, Article 1, Article 3, Article 4, Article 5, Article 6, Article 7, Article 8, Article 9, Article 10, Article 11, Article 13, Article 14.

Convention on Contact concerning Children, 2003. In particular, the following provisions may apply to a child whose parents separate: Preamble, Article 4, Article 5, Article 6, Article 7, Article 8.

Convention on Preventing and Combating Violence against Women and Domestic Violence, 2011. In particular, the following provisions may apply to a child whose parents separate: Article 26, Article 31, Article 45.2, Article 48, Article 56.

European Convention on recognition and enforcement of decisions concerning custody of children and on restoration of custody of children, 1980. In particular, the following provisions may apply to a child whose parents separate: Article 4, Article 7, Article 14, Article 15.

European Convention on the Legal Status of Children born out of Wedlock, 1975. In particular, the following provisions may apply to a child whose parents separate: Article 6, Article 7, Article 8, Article 9, Article 10.

II-2. Recommendations

Recommendation CM/Rec(2018)5 of the Committee of Ministers to member states concerning children of prisoners. In particular, the following paragraphs are likely to apply to children whose parents separate: Part II on fundamental principles, in particular § 2.

Recommendation CM/Rec(2015)4 of the Committee of Ministers to member States on preventing and resolving disputes on child relocation. In particular, the following paragraphs may apply to the child in situations of parental separation: Preamble, Appendix to the recommendation, in particular § 4.

Recommendation CM/Rec(2012)2 of the Committee of Ministers to member states on the participation of children and young people under the age of 18. In particular, the following paragraphs may apply to children whose parents separate: Preamble, Part II on principles, Part III on measures.

Recommendation CM/Rec(2011)12 of the Committee of Ministers on children's rights and social services friendly to children and families. In particular, the following paragraphs may apply to the child in situations of parental separation: Part III Fundamental principles, Part IV General elements of child-friendly social services.

Recommendation CM/Rec(2010)7 of the Committee of Ministers on the Council of Europe Charter on Education for Democratic Citizenship and Human Rights Education In particular, the following paragraphs may apply to the child in situations of parental separation: *Section II Objectives and Principles*.

Recommendation CM/Rec(2009)10 of the Committee of Ministers on integrated national strategies for the protection of children from violence. In particular, the following paragraphs may apply to the child in situations of parental separation: Preamble, Appendix I.2.3, Appendix 1.3.1, Appendix 1.3.2, Appendix 1.6.

Recommendation CM/Rec(2006)19 of the Committee of Ministers on policy to support positive parenting. In particular, the following paragraphs may apply to the child in situations of parental separation: Preamble, Part 2 - Fundamental principles of policies and measures, Part 6 – Core Components of policies and measures, Part 11 – Key messages for parents and all those having responsibilities for children and their rearing.

Recommendation 1864 (2009) of the Parliamentary Assembly on “Promoting the participation by children in decisions affecting them”. In particular, the following paragraphs may apply to the child in situations of parental separation: § 5, § 6, § 7, § 8.3, § 10.1.

Recommendation 128 (2003) of the Congress of Local and Regional Authorities of the Council of Europe on the revised European Charter on “The Participation of Young People in Local and Regional Life. In particular, the following paragraphs may apply to the child in situations of parental separation: § 8, § 10.

Recommendation Rec(98)1 of the Committee of Ministers to member states on family mediation. The following paragraphs in particular may apply to children whose parents separate: Preamble, in particular § 2, 3, 5, 7; Part III on the mediation process, in particular § viii.

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. In particular, the following provisions may apply to a child whose parents separate: Preamble.

Recommendation Rec(91)9 of the Committee of Ministers to member states on urgent measures concerning the family. The following provisions in particular may apply to children whose parents separate: Preamble, Principle 1, Principle 3.

Recommendation Rec(84)4 of the Committee of Ministers to member states on parental responsibilities. In particular, the following provisions may apply to children whose parents separate: Principle 2, Principle 3, Principle 5, Principle 6, Principle 7, Principle 8, Principle 10, Principle 11.

II-23 Guidelines

Committee of Ministers' Guidelines on child-friendly justice, 2010. In particular, the following paragraphs are likely to be relevant to the child whose parents separate:

- Part III on fundamental principles, in particular :
 - Sub-part A. on the child's right to participation, in particular § 1, 2
 - Sub-part B. on the best interests of the child, in particular § 1, 2, 3, 4
 - Sub-part E. on the rule of law, in particular § 2, 3
- Part IV on child-friendly justice before, during and after court proceedings, in particular :
 - Sub-part A. on the general elements of child-friendly justice, in particular
 - on information and advice to children (1): § 1, 2, 3, 4, 5
 - on training of professionals (4): § 14, 15
 - on the multidisciplinary approach (5): § 16, 17, 18
 - Sub-part B on child-friendly justice before court proceedings, in particular § 24, 25, 26
 - Subpart D on child-friendly justice during court proceedings, in particular
 - on the child's access to the court and to judicial proceedings (1): § 34, 35, 36
 - on legal advice and representation (2): § 37, 38, 39, 40, 41
 - on the child's right to be heard and to express his or her views (3): § 44, 45, 46, 47, 48, 49
 - on the need to avoid delays in proceedings (4): § 50, 51, 52
 - on the organisation of proceedings, a child-friendly environment and language (5): § 54, 55, 56, 57
 - Subpart E on child-friendly justice after court proceedings, in particular § 75, 76, 77, 78, 79

II-4. Resolutions

Parliamentary Assembly Resolution 2207 (2018) on equality between women and men and child support. In particular, the following paragraphs may apply to children whose parents separate: § 7 (7.2, 7.2.1, 7.2.2, 7.2.3, 7.2.4, 7.2.5, 7.2.6, 7.5)

Parliamentary Assembly Resolution 2194 (2017) on transnational parental responsibility disputes. In particular, the following paragraphs may apply to a child whose parents separate: § 2, § 5 (5.1, 5.2, 5.3, 5.4, 5.5)

Parliamentary Assembly Resolution 2079 (2015) on equality and co-parenting: the role of fathers. In particular, the following paragraphs may apply to children whose parents separate: § 2, § 3, § 5 (5.5, 5.6, 5.7, 5.8, 5.9, 5.10).

Parliamentary Assembly Resolution 1714 (2010) on children who witness domestic violence. In particular, the following paragraphs are likely to be relevant to the child whose parents are separating; § 6 (6.4, 6.4.2, 6.4.5).

Parliamentary Assembly Resolution 1291 (2002) on international abduction of a child by one of the parents. In particular, the following paragraphs may apply to a child whose parents separate: § 2, § 5, § 7.

Committee of Ministers Resolution Res(78)37 on equality of spouses in civil law. In particular, the following paragraphs may apply to a child whose parents separate: § 18, § 19.

III- Standards from the European Union

III-1. Charter of Fundamental Rights

Charter of Fundamental Rights of the European Union, 2000. In particular, the following provisions may apply to children whose parents separate: Article 24

III-2. Regulations

Council Regulation (EU) 2019/1111 of 25 June 2019 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility as well as international child abduction, the so-called "Brussels IIb Regulation" (will enter into force on 1 August 2022). In particular, the following provisions may apply to a child whose parents separate: Preamble, in particular § 19, 20, Article 12, Article 13, Article 21, Article 25, Article 39, Article 68, Article 95, Article 96, Article 97.

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. In particular, the following provisions may apply to a child whose parents separate: Preamble, in particular § 19, 36; Article 4, Article 46.

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, known as the "Brussels IIa Regulation. In particular, the following provisions may apply to a child whose parents separate: Preamble, in particular § 12, 13, Article 11, Article 12, Article 15, Article 23, Article 41, Article 42.

III-3. Directives

Directive 2008/52/EC of the European Parliament and of the Council of the European Union of 21 May 2008 on certain aspects of mediation in civil and commercial matters
In particular, the following provision may apply to a child whose parents are separating: Article 7.

Directive 2004/38/EC of the European Parliament and of the Council of the European Union 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

The following provisions in particular may apply to a child whose parents separate: Article 1, Article 12(3), Article 13, Article 14.

Directive 2003/86/EC of the Council of the European Union of 22 September 2003 on the right to family reunification

In particular, the following provisions may apply to a child whose parents separate: Article 4, Article 15.3.

IV- Standards from the Hague Conference on Private International Law

Convention on the Civil Aspects of International Child Abduction, 1980. In particular, the following provisions may apply to a child whose parents are separating: Preamble, Article 1, Article 3, Article 4, Article 5, Article 11, Article 12, Article 13, Article 14, Article 15.

Reference should also be made to the Explanatory Report on the 1980 Hague Convention on International Child Abduction, Elisa PEREZ-VERA, 1982. In particular these paragraphs: § 20, § 21, § 22, § 23, § 24, § 25.

In addition, reference should be made to the Guide to Good Practice, 2020
In particular the following paragraphs of Part VI on Article 13 (1)(b): § 14, § 24, § 26

Hague Convention Protection of Children and Co-operation in Respect of Intercountry Adoption, 29 May 1993. In particular, the following paragraphs are likely to apply to the child in situations of parental separation: Article 4, Article 26, Article 27, Article 30, Article 35.

Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, 1996. In particular, the following provisions may apply to a child whose parents separate: Preamble, Article 8, Article 9, Article 10, Article 22, Article 23, Article 28.

Reference should also be made to the Explanatory Report on the HCCH Child Protection Convention, Paul LAGARDE, 1996
In particular the following paragraphs: § 37, § 52, § 65, § 117

Reference should also be made to the Practical Handbook on the Operation of the 1996 Hague Child Protection Convention, 2014. In particular these paragraphs: § 4.26, § 5.3, § 5.4, § 5.9.

Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, 2007. In particular, the following provisions may apply to a child whose parents are separating: Preamble, Article 15.1.

Convention on the Recognition and Enforcement of Decisions relating to Maintenance Obligations, 1973. In particular, the following provisions may apply to a child whose parents are separating: Article 1, Article 29.

Convention on the Law Applicable to Maintenance Obligations, 1973. The following provisions in particular may apply to a child whose parents separate: Article 1, Article 18

Washington Declaration on International Family Relocation (Hague Conference on Private International Law and International Centre for Missing and Exploited Children), 2010. In particular, the following paragraphs may apply to a child whose parents are separating: Paragraph 1, Paragraph 2, Paragraph 3, Paragraph 4.

APPENDIX C: LIST OF RELEVANT ECHR CASE LAW

A and B v. Croatia, no. 7144/15, 20 June 2019.
A.M.M. v. Romania, no. 2151/10, 14 February 2012.
A.P. and A.M. v. the Czech Republic, no. 22216/20, lodged on 27 May 2020 and communicated on 15 January 2021.
A.V. v. Slovenia, no. 878/13, 9 April 2019.
Acmanne and others v. Belgium, no. 10435/83, 10 December 1984.
Ahmut v. the Netherlands, 28 November 1996, *Reports of Judgments and Decisions* 1996-VI.
Ahrens v. Germany, no. 45071/09, 22 March 2012.
Airey v. Ireland, 9 October 1979, Series A no. 32.
Ajayi v. the United Kingdom (dec.), no. 27663/95, 22 June 1999.
Amanalachioai v. Romania, no. 4023/04, 26 May 2009.
Anayo v. Germany, no. 20578/07, 21 December 2010.
B. v. Belgium, no. 4320/11, 10 July 2012.
Babayeva v. Azerbaijan, no. 57724/11, 30 January 2020.
Bajrami v. Albania, no. 35853/04, ECHR 2006-XIV (extracts).
Bergmann v. the Czech Republic, no. 8857/08, 27 October 2011.
C. v. Finland, no. 18249/02, 9 May 2006.
Catan and Others v. the Republic of Moldova and Russia [GC], nos. 43370/04 and 2 others, ECHR 2012 (extracts).
Cengiz Kılıç v. Turkey, no. 16192/06, 6 December 2011.
Chepelev v. Russia, no. 58077/00, 26 July 2007.
Ciupercescu v. Romania (no. 3), no. 41995/14 *et al.*, 7 January 2020.
Cyprus v. Turkey [GC], no. 25781/94, ECHR 2001-IV.
Eski v. Austria, no. 21949/03, 25 January 2007.
Fjölvisdóttir and others v. Iceland, no. 71552/17, communicated 3 July 2019.
Folgerø and Others v. Norway [GC], no. 15472/02, ECHR 2007-III.
Fourkiotis v. Greece, no. 74758/11, 16 June 2016.
Gajtani v. Switzerland, no. 43730/07, 9 September 2014.
Garcia v. Switzerland (dec.), no. 10148/82, 14 March 1985.
Gas and Dubois v. France, no. 25951/07, ECHR 2012.
Garnaga v. Ukraine, no. 20390/07, 16 May 2013.
Glaser v. the United Kingdom, no. 32346/96, 19 September 2000.
Glass v. the United Kingdom, no. 61827/00, ECHR 2004-II.
Gluhaković v. Croatia, no. 21188/09, 12 April 2011.
Godelli v. Italy, no. 33783/09, 25 September 2012.
Gözüm v. Turkey, no. 4789/10, 20 January 2015.
Guillot v. France, 24 October 1996, *Reports of Judgments and Decisions* 1996-V.
Hagyó v. Hungary, no. 52624/10, 23 April 2013.
Hasan and Eylem Zengin v. Turkey, no. 1448/04, 9 October 2007.
Havelka and Others v. the Czech Republic, no. 23499/06, 21 June 2007.
Henry Kismoun v. France, no. 32265/10, 5 December 2013.
Hendriks v. the Netherlands, no. 8427/78, Report of 8 March 1982.
Hoffmann v. Austria, no. 12875/87, 23 June 1993, Series A no. 255-C;
Hokkanen v. Finland, 23 September 1994, Series A no. 299-A.
Horych v. Poland, no. 13621/08, and §131, 17 April 2012.

I.A.A. v. the United Kingdom, no. 25960/13, 31 March 2016.
I.S. v. Germany, no. 31021/08, 5 June 2014.
Iglesias Casarrubios and Cantalapiedra Iglesias v. Spain, no. 23298/12, 11 October 2016.
Ignaccolo-Zenide v. Romania, no. 31679/96, ECHR 2000-I.
Ismailova v. Russia, no. 37614/02, 29 November 2007.
Jäggi v. Switzerland, no. 58757/00, ECHR 2006-X.
Johansen v. Norway, 7 August 1996, *Reports of Judgments and Decisions 1996-III*.
Johansson v. Finland, no. 10163/02, 6 September 2007.
K. and T. v. Finland [GC], no. 25702/94, ECHR 2001-VII
K.J. v. Poland, no. 30813/14, 1 March 2016.
Kacper Nowakowski v. Poland, no. 32407/13, 10 January 2017.
Khoroshenko v. Russia [GC], no. 41418/04, 30 June 2015.
Kjeldsen, Busk Madsen and Pedersen v. Denmark, 7 December 1976, Series A no. 23.
Kroon and Others v. the Netherlands, 27 October 1994, Series A no. 297-C.
Kuppinger v. Germany, no. 62198/11, 15 January 2015.
Lautsi and Others v. Italy [GC], no. 30814/06, ECHR 2011 (extracts).
Lebois v. Bulgaria, no. 67482/14, §61, 19 October 2017.
Lyubenova v. Bulgaria, no. 13786/04, 18 October 2011.
M. and M. v. Croatia, no. 10161/13, ECHR 2015 (extracts),
M.K. v. Greece, no. 51312/16, 1 February 2018.
Mamchur v. Ukraine, no. 10383/09, 16 July 2015.
Mandet v. France, no. 30955/12, 14 January 2016.
Manuello and Nevi v. Italy, no. 107/10, 20 January 2015.
Mifsud v. Malta, no. 62257/15, 29 January 2019.
Mikulić v. Croatia, no. 53176/99, ECHR 2002-I.
Mitrova and Savik v. the former Yugoslav Republic of Macedonia, no. 42534/09, 11 February 2016.
Moog v. Germany, nos. 23280/08 and 2334/10, 6 October 2016.
Mustafa and Armağan Akın v. Turkey, no. 4694/03, 6 April 2010.
N.Ts. and Others v. Georgia, no. 71776/12, 2 February 2016.
Nazarenko v. Russia, no. 39438/13, §66, 16 July 2015.
Nekvedavičius v. Lithuania, no. 1471/05, 10 December 2013.
Neulinger and Shuruk v. Switzerland [GC], no. 41615/07, ECHR 2010.
Nunez v. Norway, no. 55597/09, 28 June 2011.
O.C.I. and others v. Romania, no. 49450/17, 21 May 2019.
Odièvre v. France [GC], no. 42326/98, ECHR 2003-III.
P.V. v. Spain, no. 35159/09, 30 November 2010.
Palau-Martinez v. France, no. 64927/01, ECHR 2003-XII.
Pisică v. the Republic of Moldova, no. 23641/17, 29 October 2019.
Plaža v. Poland, no. 18830/07, 25 January 2011.
Polyakova and Others v. Russia, no. 35090/09 *et.al*, 7 March 2017.
Raw and others v. France, no. 10131/11, 7 March 2013.
Rinau v. Lithuania, no. 10926/09, 14 January 2020.
Róžański v. Poland, no. 55339/00, 18 May 2006.
Sabou and Pircalab v. Romania, no. 46572/99, 28 September 2004.
Salgueiro da Silva Mouta v. Portugal, no. 33290/96, ECHR 1999-IX
Santos Nunes v. Portugal, no. 61173/08, 22 May 2012.
Šneersone and Kampanella v. Italy, no. 14737/09, 12 July 2011.

Söderbäck v. Sweden, 28 October 1998, *Reports of Judgments and Decisions* 1998-VII.
Sporer v. Austria, no. 35637/03, 3 February 2011.
Stjerna v. Finland, 25 November 1994, Series A no. 299-B.
Taieb dit Halimi v. France (dec.) 50614/99, 20 March 2001.
The Belgian Linguistic case (No. 2), nos. 1474/62 1677/62 1691/62 1769/63 1994/63 2126/64, 23 July 1968.
Tuquabo-Tekle and Others v. the Netherlands, no. 60665/00, 1 December 2005.
Udeh v. Switzerland, no. 12020/09, 16 April 2013.
V.A.M. v. Serbia, no. 39177/05, 13 March 2007.
V.P. v. France, no. 21825/20, communicated on 30 September 2020.
Vavříčka and Others v. the Czech Republic [GC], nos. 47621/13, 3867/14, 73094/14 et al., 08 April 2021.
Vojnity v. Hungary, no. 29617/07, 12 February 2013.
X v. Latvia [GC], no. 27853/09, ECHR 2013.
Z. v. Poland, no. 34694/06, 20 April 2010.
Zaunegger v. Germany, no. 22028/04, 3 December 2009.
Zelikha Magomadova v. Russia, no. 58724/14, 8 October 2019.

APPENDIX D: “CUSTODY” INTERPRETATION TABLE

LANGUAGE	HAGUE CONVENTION 1996, Article 3(b) b) rights of custody, including rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence, as well as rights of access including the right to take a child for a limited period of time to a place other than the child's habitual residence;	HAGUE CONVENTION 1980, Article 5(a) For the purposes of this Convention - a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;	BRUSSELS IIa, Article 2(9) the term "rights of custody" shall include rights and duties relating to the care of the person of a child, and in particular the right to determine the child's place of residence
Albanian	të drejtat e kujdestarisë (guardianship rights)	të drejtat e kujdestarisë (guardianship rights)	No translation available.
Arabic	ب- حق احضانة (the right to custody)	ب- حق احضانة (rights to custody)	No translation available.
English	Rights of custody (rights of custody)	rights of custody (rights of custody)	As above.
French	le droit de garde (custody rights)	le droit de garde (custody rights)	droit de garde (custody rights)
Spanish	No translation available.	No translation available.	derechos de custodia (rights of custody)
Italian	il diritto di affidamento (the right of custody)	diritto di affidamento (rights of custody)	diritto di affidamento (rights of custody)
Czech	práva péče o dítě (child custody rights)	právo péče o dítě (child custody rights)	právem péče o dítě (child custody)
Chinese	Could not insert the characters, but it translates as 'guardianship'	Could not insert the characters, but it translates as 'guardianship'	No translation available.
Catalan	No translation available.	dret de custòdia (right to custody)	No translation available.
Estonian	No translation available.	No translation available.	Eestkosteõigus (custody)
Latvian	aizbildnības tiesībām (custody rights)	tiesības uz aizbildnību (right of custody)	uzraudzības tiesības (supervisory rights)
Lithuanian	No translation available.	No translation available.	globos teisės (custody rights)
Hungarian	No translation available.	felügyeleti jog (right of supervision)	No translation available.

Maltese	No translation available.	No translation available.	drittijiet ta' kustodja (custody rights)
Serbian	право на старање – pravo na staranje (the right to care)	право на старање (the right to care)	No translation available.
Serbocroatian	No translation available.	право на старање (the right to care)	No translation available.
Polish	Pieczy (custody)	prawo do opieki (right to care)	prawo do opieki (right to care)
Georgian	No translation available.	მეურვეობის უფლებები (guardianship rights)	No translation available.
Slovak	No translation available.	No translation available.	opatrovnícke parvo (custody law)
Japanese	No translation available.	監護の権利」には (rights of custody)	No translation available.
Korean	No translation available.	양육권 (Custody)	No translation available.
Slovenian	No translation available.	No translation available.	pravice do varstva in vzgoje (the right to care and education...)
Bulgarian	Правото на упражняване на родителски права (the right to exercise parental responsibility)	право на упражняване на родителски права (right to exercise parental rights)	право на упражняване на родителски права (right to exercise parental rights)
Romanian	dreptul de încredințare (the right of entrustment)	dreptul privind încredințarea (right of entrustment)	încredințare (conviction...)
Croatian	No translation available.	pravo na skrb (right to care)	pravo na skrb (right to care)
Danish	No translation available.	Forældremyndighed (Custody)	Forældremyndighed (custody)
Icelandic	No translation available.	forsjárréttur (custody)	No translation available.
German	No translation available.	No translation available.	Sorgerecht (care)
Greek	No translation available.	No translation available.	δικαίωμα επιμέλειας - dikaíoma epiméleias (right of custody)
Dutch	gezagsrecht (custody rights)	gezagsrecht (custody rights)	Gezagsrecht (custody rights)
Russian	право опеки – pravo opеki (guardianship rights)	права опеки (guardianship rights)	No translation available.
Ukrainian	права опіки – prava opiky (guardianship rights)	права піклування – prava pikluvannya (custody rights)	No translation available.

Portuguese	No translation available.	No translation available.	Direito de guarda (right of custody)
Finnish	lapsen huoltajan oikeuksia (the rights of the child's guardian)	No translation available.	oikeus lapsen huoltoon (the right to custody of the child)
Swedish	No translation available.	Rätten till vårdnad (the right to custody)	Vårdnad (custody)

APPENDIX E: TABLE OF CONTRIBUTIONS RECEIVED FOR THE QUESTIONNAIRES
(CJ/ENF-ISE(2020)03A²⁷³ AND CJ/ENF-ISE(2021)2A²⁷⁴)

COUNTRY	INSTITUTION / ORGANISATION	CATEGORY	QUESTIONNAIRE
Andorra	Seu de la Justicia - Batllia	Member State	CJ/ENF-ISE(2020)03A
Austria	Federal Ministry of Labour, Family and Youth	Member State	CJ/ENF-ISE(2020)03A
Azerbaijan	State Committee on Family, Women and Children Affairs	Member State	CJ/ENF-ISE(2020)03A
Belgium	SPF Justice	Member State	CJ/ENF-ISE(2020)03A
Bulgaria	State Agency for Child Protection (SACP) and Ministry of Justice of the Republic of Bulgaria (MoJ)	Member State	CJ/ENF-ISE(2020)03A
Bulgaria	Ombudsman	Practitioner	CJ/ENF-ISE(2021)2A
Bulgaria	PULSE Foundation	Practitioner	CJ/ENF-ISE(2021)2A
Croatia	The Ministry of Labour, Pension System, Family and Social Policy	Member State	CJ/ENF-ISE(2020)03A
Croatia	Ministry of Justice and Administration	Member State	CJ/ENF-ISE(2020)03A
Cyprus	Social Welfare Services	Member State	CJ/ENF-ISE(2020)03A
Cyprus	Elias Neocleous Law Firm	Practitioner	CJ/ENF-ISE(2021)2A
Czech Republic	The Office of the Government of the Czech Republic	Member State	CJ/ENF-ISE(2020)03A
Denmark	Ministry of Social Affairs and the Interior	Member State	CJ/ENF-ISE(2020)03A
Estonia	Ministry of Social Affairs (and contributions from MoJ)	Member State	CJ/ENF-ISE(2020)03A
European Commission	Directorate-General for Justice and Consumers – Civil Justice Unit	Observer / Participant	CJ/ENF-ISE(2020)03A
Finland	Ministry of Foreign Affairs	Member State	CJ/ENF-ISE(2020)03A
France	Ministère de la Justice – Bureau de l’expertise et des questions institutionnelles (BEQI)	Member State	CJ/ENF-ISE(2020)03A
France	AMU LDPSC (NGO)	Civil Society	CJ/ENF-ISE(2020)03A
France	Service Social International - Droit d’Enfance	Observer / Participant	CJ/ENF-ISE(2020)03A
France	Droit d’Enfance (Service Social International France)	Practitioner	CJ/ENF-ISE(2021)2A
Georgia	Office of the Public Defender (Ombudsman)	Practitioner	CJ/ENF-ISE(2021)2A
Georgia	Human Rights Secretariat of the Administration of the Government /	Member State	CJ/ENF-ISE(2020)03A

²⁷³ This questionnaire was sent to Member States in Autumn 2020 and a total of 46 responses were received. 41 of the responses were from member States. 2 of the responses were from civil society organisations, and a further 3 responses were from other observers/participants.

²⁷⁴ This questionnaire was sent to practitioners in Spring 2021 and a total of 24 responses were received.

	Ministry of Justice / Ministry of Internally Displaced Persons from the Occupied Territories, Labor, Health and Social Affairs / LEPL Agency for State Care and Assistance for the (statutory) Victims of Human Trafficking		
Germany	Federal Ministry of Justice and for Consumer Protection	Member State	CJ/ENF-ISE(2020)03A
Germany	IAFL	Practitioner	CJ/ENF-ISE(2021)2A
Germany	International Social Service Germany (ISD)	Practitioner	CJ/ENF-ISE(2021)2A
Greece	Ministry of Labour and Social Affairs	Member State	CJ/ENF-ISE(2020)03A
Hungary	Ministry of Human Capacities / Ministry of Justice / National Office for the Judiciary	Member State	CJ/ENF-ISE(2020)03A
Iceland	Ministry of Social Affairs (and contributions from MoJ)	Member State	CJ/ENF-ISE(2020)03A
Italy	Department for Family Policies – Presidency of the Council of Ministers	Member State	CJ/ENF-ISE(2020)03A
Italy	Minister of Justice – Department of Justice Affairs - Directorate-General for International Affairs and Judicial Cooperation (Ufficio II)	Member State	CJ/ENF-ISE(2020)03A
Italy	Ceschini & Restognoli Law Office	Practitioner	CJ/ENF-ISE(2021)2A
Italy	Romualdo Richichi, Avvocato	Practitioner	CJ/ENF-ISE(2021)2A
Jersey	Corbett Le Quesne	Practitioner	CJ/ENF-ISE(2021)2A
Latvia	Ministry of Justice	Member State	CJ/ENF-ISE(2020)03A
Luxembourg	Ministère de l'Éducation nationale, de l'Enfance et de la Jeunesse	Member State	CJ/ENF-ISE(2020)03A
Luxembourg	Deidre Du Bois, Avocar à la Cour	Practitioner	CJ/ENF-ISE(2021)2A
Mexico	Child Protection National Authorities	Observer / Participant	CJ/ENF-ISE(2020)03A
Moldova	Ministry of Health, Labour and Social Protection	Member State	CJ/ENF-ISE(2020)03A
Monaco	Direction de l'Action et de l'Aide Sociales, Gouvernement Princier Principauté de Monaco	Member State	CJ/ENF-ISE(2020)03A
Northern Ireland (UK)	Department of Finance, Civil Law Reform Division (CLRD) (and contributions from Department of Health (Northern Ireland), Department of Justice (Northern Ireland))	Member State	CJ/ENF-ISE(2020)03A
Northern Ireland (UK)	Bar Library	Practitioner	CJ/ENF-ISE(2021)2A
Norway	The Directorate for Children, Youth and Family Affairs, Department of	Member State	CJ/ENF-ISE(2020)03A

	International Services, Division of Legal Affairs and Public Administration		
Poland	Family Policy Department in the Ministry of Family and Social Policy (Departament Polityki Rodzinnej w Ministerstwie Rodziny i Polityki Społecznej) with contributions from Department of International Cooperation and Human Rights in the Ministry of Justice (Departament Współpracy Międzynarodowej i Praw Człowieka w Ministerstwie Sprawiedliwości)	Member State	CJ/ENF-ISE(2020)03A
Portugal	Family, Children and Youth Office from Prosecutor General's Office	Member State	CJ/ENF-ISE(2020)03A
Portugal	PROVEDOR DE JUSTIÇA (Members of the Cabinet of the Portuguese Ombudsman)	Member State	CJ/ENF-ISE(2020)03A
Portugal	Judicial High Council, Conselho Superior da Magistratura and Mr António José Fialho Member of the International network of judges at the Hague conference on private international law	Member State	CJ/ENF-ISE(2020)03A
Romania	The National Authority for the Rights of the Persons with Disabilities, Children and Adoption	Member State	CJ/ENF-ISE(2020)03A
Russian Federation	Ministry of Foreign Affairs	Member State	CJ/ENF-ISE(2020)03A
Scotland (UK)	Scottish Government	Member State	CJ/ENF-ISE(2020)03A
Serbia	Ministry of Labour, Employment, Veteran and Social Affairs (and contributions from MoJ)	Member State	CJ/ENF-ISE(2020)03A
Slovak Republic	Ministry of Justice of the Slovak Republic (and contributions from Ministry of Labour, Social Affairs and Family of the Slovak Republic)	Member State	CJ/ENF-ISE(2020)03A
Slovak republic	IAFL	Practitioner	CJ/ENF-ISE(2021)2A
Slovenia	Ministry of labour, family, social affairs and equal opportunities	Member State	CJ/ENF-ISE(2020)03A
Spain	Sariego Abogados	Civil Society	CJ/ENF-ISE(2020)03A
Spain	Ministry of Justice (and punctual comments have been received from the General Council for the Judiciary and Ministry of Social Rights)	Member State	CJ/ENF-ISE(2020)03A

Spain	Alberto Pérez Cedillo Spanish lawyers & Solicitors Ltd.	Practitioner	CJ/ENF-ISE(2021)2A
Spain	IAFL	Practitioner	CJ/ENF-ISE(2021)2A
Sweden	Government Offices of Sweden	Member State	CJ/ENF-ISE(2020)03A
Sweden	Carlsson & Co Advokatbyrå	Practitioner	CJ/ENF-ISE(2021)2A
Switzerland	Office fédéral de la justice	Member State	CJ/ENF-ISE(2020)03A
Switzerland	BRS Berger Recordon & de Saugy	Practitioner	CJ/ENF-ISE(2021)2A
Switzerland	Service Social International Suisse	Practitioner	CJ/ENF-ISE(2021)2A
The Netherlands	ScheerSanders Lawyers	Practitioner	CJ/ENF-ISE(2021)2A
Turkey	Ministry of Justice	Member State	CJ/ENF-ISE(2020)03A
Ukraine	Ministry of Justice (and contributions from Ministry of Social Policy of Ukraine)	Member State	CJ/ENF-ISE(2020)03A
Ukraine	Vasil Kisil & Partners	Practitioner	CJ/ENF-ISE(2021)2A
UK (E)	Burges Salmon	Practitioner	CJ/ENF-ISE(2021)2A
UK (E&W)	Family Law and Mediation Limited	Practitioner	CJ/ENF-ISE(2021)2A
UK (E&W)	Jurisdiction England and Wales	Practitioner	CJ/ENF-ISE(2021)2A
UK	Law Society Accredited Specialist, Family Law	Practitioner	CJ/ENF-ISE(2021)2A

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