The new Family Law: realities and future perspectives (European Law Institute, Webinar, 20 November 2024)

Access to Asylum and Family Statuses Across Borders

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I. Introduction

1. Thank you very much to the European Law Institute, and to the Steering Committee and particularly to Dr Pretelli for inviting me to this event. I would also like to sincerely thank Professor Bargelli and Professor Jimenez Munoz.

2. The topic I have selected represents ongoing research for my habilitation thesis in Switzerland. In order to answer questions relating to 'access to justice' – intended as the right of access of children and families in vulnerable situations to specific remedies of protection – I have focused my research both under the aegis of private and public international law legal framework by also targeting specific jurisdictions namely Australia, Bulgaria, China, Ghana, Moldova, Morocco, Russia, South Africa, Switzerland and the UK[2]. The term protection here should refer to both asylum and civil law measures (e.g. legal representation, guardianship, foster care, kafalah)[3]. I have chosen specific jurisdictions due to previous research periods in some of these countries (China, Russia, UK) but also because of my former colleagues of the International Social Service – present in more than 120 countries – who trained me in the field of children on the move. In addition, I carried out research in relation to formal conditions 'for access to justice' affecting vulnerable children and families such as residence, domicile and statelessness; and I had the privilege to intervene in some assessment studies involving specific issues of migration such as abduction[4], age[5], recognition of marriage, transfer of asylum[6], family reunification, trafficking[7].

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[2] This author has already experienced such approach in his PhD thesis, where more than 15 jurisdictions were involved.

[3] Generally, reference can also be made to 'family law'.

[4] BUMBACA Vito, CJEU Rules on the Interplay between Brussels IIA and Dublin III, in The EAPIL Blog 2021.

[5] ROMANO, Gian Paolo. Détermination de l'âge des personnes se déclarant mineures en dehors des procédures d'asile (avec la collaboration de Vito Bumbaca, Alessandra Costa, Olivia Alyssa Anderson). 2020.

[6] BUMBACA Vito, Coordination between judicial and administrative procedures in international child abduction within migration contexts, in Ciclo di Seminari in Materia di Diritto Internazionale Privato dell'Unione Europea, 2022.

[7] BUMBACA Vito, International legal framework governing the civil aspects of child protection against child trafficking, in Unveiling Research and Best Practices to End Child Trafficking, 2024.

3. Therefore, the accent here is not only on vulnerable migration in need of protection within the European Union. Our research refers to migrants in distress in international situations, including outside Europe, in which asylum decisions and civil law remedies, as well as judgments and social services reports, may clash and result in inefficient methods – if in absence of coordination and cooperation mechanisms.

4. Because of the complexity of the topic and the time at my disposal, I will neither deal with different types of asylum nor with the specific provisions of the international legal framework. However, you will be able to find all relevant provisions in the paper that I will provide to the Steering Committee for dissemination.

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II. Practical scope

5. I would like to share here instead some general topics and findings, so to accentuate the difficulties arising from the intersection of asylum and family law, and I am certainly open to discussing all the elements touched upon with you and receiving your feedback.

A. Case Scenario n°1:

6. A migrant child whose asylum status is attached to the father moved from Greece to Switzerland all the way through Scandinavia. According to the father, at some point, while in Norway, the child was abducted by the mother who relocated to Switzerland with the child and submitted an asylum request. The mother pleaded for domestic violence. The custody proceeding and its intersection with asylum reached the Swiss supreme courts – both administrative and civil instances. The Swiss Federal Court ordered the return of the child to Greece, under the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereafter 1980 Hague Child Abduction Convention); the Swiss Administrative Court concluded for the child to remain in Switzerland with the mother by virtue of the Regulation (EU) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (hereafter Dublin III Regulation), and specifically on the basis of their "dependency relationship". The Greek authorities provided a child assessment report indicating that the child return to Greece would be safe. The Swiss social services carried out a child assessment report opting for the child to remain in Switzerland. I am not aware of the child's whereabouts today, unfortunately. But the Swiss proceedings lasted about three years[8], during which the child remained in Switzerland. Therefore some questions arise: (i) Should not the child be considered

[8] For a more detailed analysis see BUMBACA Vito, Commentaire de l'arrêt : Tribunal fédéral, IIe Cour de droit civil Arrêt du 23 mai 2018 en la cause de C. contre A., B. – 5A_121/2018, in La pratique du droit de la famille 2019, p. 282.

habitually resident in Switzerland at the time of the family law proceeding due to a grave risk of harm in Greece ? (ii) And would not it be possible to transfer asylum responsibility towards the Swiss authorities due to his dependence vis-à-vis the mother ? (iii) Have the Greek and the Swiss authorities coordinated this case ? I have tried to answer these questions in a recent edited book, which is part of this research, that will soon be published[9]. Our analyses concluded for the child to remain in Switzerland, importantly due to fundamental principles that are common to the transversal legal framework governing this case and that are enshrined in the Convention on the Rights of the Child (hereafter UN CRC 1989) – the child's best interests and the family unit[10]. The asylum procedure shall consider the child's best interests, and so it should first end and prevail over the return procedure for the purposes of the Hague Child Abduction Convention 1980[11].

B. Case Scenario n° 2:

7. A Child was born in France through surrogacy. The surrogate mother held Ukrainian origins and moved to France prior to birth where she filed for asylum. Following a dispute between the intended parents, opposite-sex couple, and the surrogate mother, the child was relocated by the surrogate mother to Ukraine right after birth. The intended and also genetic father filed a return application for alleged abduction before the courts in France and a custody application. The 1980 Hague Child Abduction Convention determines the return procedure, and the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (hereafter 1996 Hague Child Protection Convention) deals with custody determinations[12]. The Convention relating to the Status of Refugees (hereafter 1951 Geneva Refugee Convention) and its Protocol 1967 still apply for international responsibility, however the personal scope of this Convention relates to the person being outside his or her "own State"[13]. Thus, some questions shall be answered. (i) What is the "own State" of the child in question? (ii) Would his asylum request be rejected by the French authorities? (iii) If the child parental responsibility were assigned to the father under Ukrainian law (art. 16 HC-1996) – Ukrainian legislation does not apply the principle of "*mater semper certa est*" – the genetic father would be entitled for return. Conversely, under French law, the father may be granted custody – especially

[9] BUMBACA Vito, Protective coordination and adjudication for children seeking access to asylum-civil justice in cross-border family relationships, in AEPDIRI 2024.
[10] See arts. 3, 9, 18, 20.
[11] This is especially the position under UK law, see G v. G, UKSC 9, 2021.
[12] With declarations and reservations provided, notably regarding the "exception of the territories where hostilities are (were) conducted or temporarily occupied by the Russian Federation, on which it is impossible to fully guarantee the Ukrainian Party's fulfilment of its obligations under [this treaty]".
[13] HATHAWAY James, Alienage, in The Law of Refugee Status, Cambridge, 2014. For particular issues relating to statelessness for children arising through surrogacy, see "ENS Statelessness Index Survey 2023: Serbia" (<https://index.statelessness.eu/country/serbia>).

by virtue of the ECrtHR (Strasbourg Court) practice[14] – but his genetic mother too, so shared custody would possibly be assigned impacting the return procedure. Beyond the custody/return issues, would the child be entitled to move to France, in absence of custody determination in favour of his father? Would he hold the right to stay in France *tout court* after his relocation to Ukraine from the asylum viewpoint? These questions are yet lacking a uniform answer under the current and transversal legal framework to the extent of coordinated adjudication. In principle, the child born in France, would hold parent-child relationship with his genetic father, according to the Strasbourg Court, and so custody determination should not be an issue. Regardless of the place of birth, he should also be entitled to family reunification (see infra Court of Justice of the European Union, hereafter CJEU / Luxembourg Court)[15].

C. Case Scenario n° 3[16]:

8. In the mass migration flows, we should not be surprised to find that some of these fellows – human fellows – are affected by dementia or physical conditions that would qualify them as incapacitated within the framework of the Convention of 13 January 2000 on the International Protection of Adults (hereafter Hague Adult Convention 2000) and the Convention on the Rights of Persons with Disabilities (UNCRPD 2006)[17]. These two Conventions are absolutely interconnected. The adult in question would be entitled to guardianship in the Contracting State of physical presence (art. 6 of the Adult Convention) and for its recognition in case of further movements in other Contracting States – for instance from Malta to Greece or Czech Republic to Finland, to cite some Contracting States. In parallel, he or she would likewise be entitled for representation to the extent of his or her asylum request and residency permit, among other needs for representation. In the countries indicated here, Dublin III (and its Reform 2024)[18] would govern the asylum request and so the international responsibility among the Dublin 31 Member States. However, countries of origin, which would often fall outside Dublin (and its Reform 2024) shall also be considered for, inter alia, cooperation purposes, the request for civil status information and recognition of decisions dealing with administrative questions such as marital status, family acts and property acts. We should then interrogate ourselves on the more accentuated role of Embassies,

[14] Advisory Opinion 2019 on Mennesson and Labassee.
[15] CJEU, C-230/21, 2022.
[16] For more details on this topic, see also BUMBACA Vito, in BUMBACA Vito, The Hague Convention on the Protection of Adults – plea for and practice of an "adult" approach, in Yearbook of private international law 2023 ; and "Practical Handbook on the Operation of the 2000" (<https://assets.hcch.net/docs/339879fd-13de-4f74-aba7-697ee92213c1.pdf>)
[17] YEO Rebecca, Disability and the Global South, 2015, p. 534: "Asylum seekers are forbidden from working, disabled citizens are pressured to find work (while ignoring the barriers to work), and the existence of disabled asylum seekers, with cross-cutting identities, is ignored".
[18] Regulation (EU) 2024/1351 of the European Parliament and of the Council of 14 May 2024 on asylum and migration management, amending Regulations (EU) 2021/1147 and (EU) 2021/1060 and repealing Regulation (EU) Nº 604/2013.

Consulates and Civil Registrars who would need complementary expertise and training. These are important actors in the field, including in war contexts. Undocumented migrants, for instance, represent another huge issue, per se, that we aim to include in our research. In particular, the difficulties in assessing the age of asylum seekers through uniform methods in conformity with international human rights law is a proven fact, and this is especially the case in absence of age proof or birth registration. Other documents such as mandate for incapacity and medical certificates stating the incapacity of the person in question and the rights as well as obligations incumbent on the person accompanying the Adult may also prove hard to trace[19].

D. Case Scenario n° 4:

9. This refers to a preliminary ruling of the CJEU[20] concerning the intersection of domestic conflict of laws and the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification. The facts are the following ones: A marriage between a minor girl, of Palestinian origins, 15 years old and an adult, of Palestinian origins, is celebrated in Lebanon. The husband relocates to Belgium. While the wife subsequently joins him in Belgium, she is considered unaccompanied by the Belgian authorities under the meaning of the Directive (art. 2f[21] and 10(3)(a)) and a guardian is assigned. The Belgian authorities further refuse to recognise the marriage certificate by virtue of the Belgian Private International Law rules – on the reasons that it was a child marriage and so contrary to the Belgian public policy. Refugee status was later granted to her. An application to obtain visas for family reunification, submitted by her parents, was after rejected by the Belgian authorities – the marriage being valid in Lebanon, the child was not any longer part of her parents' nuclear family (art. 4.1), a conclusion that would also rely on article 9 Dublin III. The Luxembourg Court firstly recalled the objective of the Directive which is to "*provide more favourable conditions for refugees for the exercise of their right to family reunification, since their situation requires special attention on account of the reasons which obliged them to flee their country and prevent them from leading a normal family life there*" (§41). Rejecting family reunification on the basis of the marital status, for the Court, would fall against special protection, and particularly in the case of unaccompanied minors. The protection of unaccompanied minors shall apply equally regardless of the marital status which does not prevent the child from being subjected to violence and forced marriage – in addition to the fact that the marital status is often difficult to prove in the Country of marriage celebration which is also the country of origin

[19] NICHOLSON Frances, The "Essential Right" to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification, UNHCR, 2018.

[20] CJEU, C-230/21, 2022.

[21] Op. cit., § 30: "third country nationals or stateless persons below the age of eighteen, who arrive on the territory of the Member States unaccompanied by an adult responsible by law or custom, and for as long as they are not effectively taken into the care of such a person, or minors who are left unaccompanied after they entered the territory of the Member States'".

of the applicant[22]. Lastly, the Court stated that such applications shall consider the fundamental principles of best interests and family life.

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III. Milestones

10. These scenarios are just a few among the many contemplated by our research. I would also like to draw our attention to the fact that sometimes we believe that asylum seekers belong to a category that stands apart and that holds different human and family contexts. This research also tries to assess this opinion. In fact, case law and practice show that in many circumstances asylum seekers celebrate their marriage, hold assets in their country of origin but also in their country of residence – let us think about those individuals who are entitled to work, to open a bank account, to receive a salary, to open a family company – as well as they have children and exercise parental rights and obligations such as custody, maintenance and care.

11. Asylum seekers are also unaccompanied, as it was already indicated before. In many occasions, they may be placed under institutional or foster care. In the case of relocation, the measures implemented in one country should be recognised in the other country for sake of continuity. This situation is still a grey area where authorities shall coordinate together, both for the purposes of asylum and civil law protection. Stakeholders participate in important multilateral sessions to discuss, among other things, coordination at the national and regional levels. I am referring to the Permanent Bureau of Hague Conference on Private International Law which has recently developed a guide[23] applicable to unaccompanied minors and which was also the result of important training and missions with other international agencies broadly speaking such as the European Union, UNHCR and UNICEF, including in the context of the war in Ukraine[24].

12. Particularly as seen above, the 1996 Hague Convention applies to the protection and representation of children and unaccompanied minors, inter alia, seeking asylum (e.g. art. 6 HC-1996). Public measures reversely are excluded from the material scope of the Convention. And this is the point. For instance, as we have indicated above, children, including unaccompanied minors are entitled to access health and education as

[22] Ibid., §46: "Thus, the interpretation according to which Article 10(3)(a) of Directive 2003/86 does not restrict the benefit of family reunification with first-degree relatives in the direct ascending line only to unmarried unaccompanied refugee minors is also consistent with the principles of equal treatment and legal certainty, since it ensures that the right to family reunification does not depend on the administrative capabilities of the country of origin of the person concerned".

[23] "The Application of the 1996 Child Protection Convention to Unaccompanied and Separated Children" (<https://assets.hcch.net/docs/96a3875d-fb7c-44dc-99b0-844c39562851.pdf>)

[24] Reference about such coalition was made in the framework of the Executive Training on Civil Aspects of International Child Protection (ICPT/UNIGE) < https://www.unige.ch/formcont/en/courses/child-protection>).

fundamental rights. Such rights fall under the responsibility of States particularly by virtue of the UNCRC 1989 (e.g. art. 3 and 19).

13. Unaccompanied minors are very often moving through different countries of transition. National and regional authorities shall cooperate in order to ensure recognition and enforcement of provisional and urgent measures of protection[25] in parallel to the process of asylum request. The cooperation mechanisms in place between central authorities and other bodies (i.e. social services) on the basis of the 1996 Hague Convention – a private international law instrument – could definitely support inter-agency cooperation in the field of asylum and be complementary to its legal framework (i.e. Dublin III, Pact on Migration and Asylum (Reform 2024), 1951 Geneva Refugee Convention and its Protocol).

14. In addition, connecting factors governing what private international law refers to as jurisdiction and applicable law are extremely flexible in the context of displaced children. In concreto, the simple physical presence of the child in a Contracting State is sufficient to crystallise his or her access to civil law protection. Such protection, for family law purposes, comprises representation which shall be exercised in the child's best interests also vis-à-vis adoption and family reunification. Cooperation under family law (and private international law) is certainly a matter that also applies to asylum requests and fragmented families willing to reunite (and so under migration law, refugee law and public international law). In this regard, the risk for a child to reunite with family members or return to his or her "country of origin" – here the country from which the child was relocated at the beginning of his journey or from which he or she was relocated after having established residence – shall be assessed in the country of physical presence whenever a decision is taken regarding his or her asylum-civil protection and so about his or her personal and family statuses[26].

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IV. Conclusive remarks

15. In terms of methodology answering these questions, we are planning to collect testimonies within specific jurisdictions, including through international organisations

[25] Art. 11-12 but also importantly 36 of the 1996 Hague Child Protection Convention. See also BUMBACA Vito, International legal framework governing the civil aspects of child protection against child trafficking, in Unveiling Research and Best Practices to End Child Trafficking, 2024.

[26] BUMBACA Vito, CJEU on the EU-third State child abduction proceedings under article 10 of the Brussels IIA Regulation, in Conflictoflaws.net April 7/2021; BUMBACA Vito, CJEU Rules on the Interplay between Brussels IIA and Dublin III, in The EAPIL Blog 2021.

working in the field (e.g. IGOs[27], NGOs[28]). The idea is at first to collect and share data on all different contexts falling under such intersection and present them before an international audience, during a workshop. The second objective of this research is to develop some specific recommendations which will compose the main content of the habilitation thesis.

16. A recommendation envisaged in the scope of this research is to assess whether it would be possible to develop more pragmatic instruments addressing three main aspects (i) responsibility both under private and public international law – by virtue of common grounds – over child and family statuses in asylum contexts; (ii) recognition of civil status in asylum contexts[29] and (iii) administrative and judicial cooperation in the framework of international asylum-civil protection. In our view, a single Regulation at the regional level could hardly alone ensure governance, if not on the basis of a holistic approach. Lack of coordination and adjudication on asylum and civil protection holds effects towards the integration of human beings in distress such as those to which our research is destined. Common and transversal rules on protection would support continuity for the exercise of personal rights linked to family statuses across borders, albeit the difficulties in adopting such an instrument by States[30].

17. In our view, such an instrument should depart from the 'Global Compact for Migration 2018'[31] and allow for a joint commitment on behalf of the Hague Conference on Private International Law and the UN Committees on the Rights of the Child and on the Protection of Persons with Disabilities. International Projects for the approval of a common instrument between two and more organisations are not rare in the field of international commercial law[32]. We believe that international family law and migrations would need even more such coalesced work, and today more than ever.

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[27] Reference is made in particular to the work of the International Organization for Migration (IOM) with which this author cooperates in the field of the Executive Training on Civil Aspects of International Child Protection (ICPT/UNIGE) supra.

[28] Reference is made, among others, to the activities of the International Social Service on behalf of which this author has acted as permanent staff.

[29] The support of the ICCS and NGOs working in the field shall be envisaged.

[30] An example of overcoming sensitive topics towards a compromise in the child's best interests, is the ongoing work of the HCCH in the field of surrogacy (<https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy>).

[31] Global Compact for Safe, Orderly and Regular Migration (GCM), Preamble, lit. h: "The Global Compact promotes existing international legal obligations in relation to the rights of the child, and upholds the principle of the best interests of the child at all times, as a primary consideration in all situations concerning children in the context of international migration, including unaccompanied and separated children".

[32] First Meeting of the HCCH-UNIDROIT Digital Assets and Tokens Joint Project Takes Place in The Hague (<https://www.unidroit.org/first-meeting-of-the-hcch-unidroit-digital-assets-and-tokens-joint-project-takes-place-in-the-hague/>).