

CHILD PROTECTION IN FLIGHT SITUATIONS: THE HAGUE CHILD PROTECTION CONVENTION AND UNACCOMPANIED MINORS

PROTECCIÓN DE MENORES EN SITUACIONES DIFÍCILES: EL CONVENIO DE LA HAYA DE PROTECCIÓN DE LOS NIÑOS Y MENORES NO ACOMPAÑADOS

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Abstract: The Hague Child Protection Convention of 1996 is an important source of law for questions of international jurisdiction and conflict-of-laws concerning measures of child protection. Flight situations pose a significant threat to children, especially when unaccompanied, and challenge the Hague Child Protection Convention and similar tools in a very special way. This article will analyze how and to what extent the Hague Child Protection Convention offers appropriate solutions to problems even as serious as the situations of refugee children.

Keywords: Hague Convention child protection, conflict-of-laws for parental responsibility.

Resumen: El Convenio de La Haya sobre la protección de los niños de 1996 es una importante fuente de derecho para cuestiones de jurisdicción internacional y normas de conflictos relativas a las medidas de protección de los niños. Las situaciones de refugio representan una amenaza importante para los niños, especialmente cuando no están acompañados, y cuestionan la Convención de La Haya sobre la protección de los niños y otros convenios similares de una manera muy especial. Este artículo analizará cómo y en qué medida el Convenio de La Haya sobre la protección de los niños ofrece soluciones adecuadas a los problemas, incluso tan graves como las situaciones de los niños refugiados.

Palabras clave: Convenio de La Haya, protección de los niños, normas de conflicto de responsabilidad paternal.

Sumario: I. Introducción. II. Scope of application. 1. Age of assessments. 2. Unaccompanied and separated children. 3. Measures of child protection. III. International jurisdiction rules. 1. Principle of habitual residence. 2. Special jurisdiction for refugee children. 3. Further specific rules on international jurisdiction. 4. Relationship with the Brussels IIbis Regulation. IV. The rules of applicable law. V. Legal effects of changes of circumstances. 1. Border crossings. 1. The 18th birthday. VI. Conclusions.

I. Introduction

1. The funniest and at the same time most appropriate definition of the concept of children's rights one comes across while researching on the subject of child protection is probably the one the US-American educationalist Kate Douglas Wiggin formulated in the 19th century as

“the divine right to be gloriously dirty a large portion of the time”.¹

To respect and protect the little of what is left of this for refugee children, is one of the ambitions of the Hague Child Protection Convention.² The Hague Child Protection Convention was negotiated and unanimously adopted by the members of the 18th Hague Commission on International Private Law in 1996.³ Its drafting falls within a phase of general international efforts to enhance the protection of childhoods in danger.⁴ The Hague Child Protection Convention has been signed and ratified by 49 states which include both members and non-members of the Hague Conference.⁵ Thus, it has a far wider international acceptance than its predecessor, the Convention on the Protection of Minors of 1961.⁶ Up to now, however, the signatures of several states including Argentina and the US have not been followed by ratifications by these states.⁷ The latest acceding member as of 2018 is Honduras, Paraguay is said to have deposited its access documents for 2019.⁸

2. As an international treaty, the Child Protection Convention supersedes the member states' autonomous private international law.⁹ The Child Protection Convention itself is superseded by the Brussels IIbis Regulation between EU member states according to article 61 of the Brussels IIbis Regulation.¹⁰ As a consequence, the European Court of Justice is called to interpret the Convention in all areas also covered by the Brussels IIbis Regulation, in order to achieve a coherent interpretation of the Brussels IIbis Regulation.¹¹ Furthermore, questions of international jurisdiction between EU member states are ruled by the Brussels IIbis Regulation instead of the Child Protection Convention. The remaining scope of application of the Convention consists of cases concerning non EU-member states, including the United Kingdom after the Brexit. Another reason for the remaining importance of the Child Protection Convention after the entry into force of the Brussels IIbis Regulation is based on the fact that the Convention contains provisions on private international law which the Brussels IIbis Regulation does not contain.¹² While, therefore, the Convention's provisions on the international jurisdiction are superseded by the Brussels IIbis Regulation, the provisions on private international law stand alone in the area of trans-frontier child protection.

II. Scope of application

3. In article 2, the Convention limits its scope of application to minors from their date of birth until they reach the age of 18 years. With the limitation to 18 years, it overcomes one of the shortco-

¹ K. DOUGLAS WIGGIN, "Children's rights", 1892, 8.

² 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. This Convention, including related materials, is accessible on the website of the Hague Conference on Private International Law (www.hcch.net).

³ R. WAGNER/U. JANZEN, "Die Anwendung des Haager Kinderschutzübereinkommens in Deutschland", *Familie, Partnerschaft, Recht* 2011, 110 – 115.

⁴ The Hague Commission adopted a series of child related conventions, starting in 1902 with a convention on guardianship. A whole series of Conventions followed in the second half of the 20th century, to name but a few, conventions on maintenance obligations, two conventions on domestic and inter country adoption and on the civil aspects of child abduction. Furthermore, the Hague Commission had developed a first convention on the protection of minors in 1961, see fn. 6 below.

⁵ <https://www.hcch.net>.

⁶ Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants. This Convention, including related materials, is accessible on the website of the Hague Conference on Private International Law (<https://www.hcch.net>).

⁷ <https://www.hcch.net/de/instruments/conventions/status-table/?cid=70>.

⁸ <https://www.iflg.uk.com/blog/cuba-paraguay-and-philippines-all-accede-hague-conventions>.

⁹ D. SCHÄUBLE, "Die gesetzliche Vertretung Minderjähriger in der notariellen Praxis in Fällen mit Auslandsbezug", *Zeitschrift für das Notariat in Baden-Württemberg* 2016, 5 – 14.

¹⁰ 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.

¹¹ K. HILBIG-LUGANI, "KSÜ", in T. RAUSCHER, *Europäisches Zivilprozess- und Kollisionsrecht*, Volume V, 2016, Köln, Einl KSÜ Par. 38.

¹² J. PIRRUNG, "Brussels IIbis Regulation", in U. MAGNUS/P. MANKOWSKI, *European Commentaries on Private International Law*, Volume IV, Köln, 2017, Art. 61 Par. 1.

mings its predecessor of 1961 had been criticized for: The 1961 Convention of Protection of Minors had limited its scope of application to minors and had, therefore, made an independent conflict-of-laws analysis of the preliminary question of minority necessary.¹³ Questions arose as to whether children under 18, but emancipated in their country of origin by marriage, were considered minors under the 1961 Convention.¹⁴ Furthermore, the application of the 1961 Convention to children above 18 who do not obtain full capacity at the age of 18 was controversial.¹⁵ The conflict-of-laws analysis of the question of minority has been rendered obsolete under the 1996 Convention.

1. Age assessments

4. One remaining problem the 1996 Convention has not been able to render irrelevant is the practically extremely relevant problem of age assessments.¹⁶ Age assessments are necessary where a presumed minor claims to be under 18, while his physical appearance raises substantiated doubts about his or her age. A number of countries do not register child births in a coherent manner: the European Asylum Support Office (EASO) estimates the overall birth registration rate in African countries to an average of 10 %, while within the African continent the birth registration rates differ between 3 and up to 30 %.¹⁷ Therefore, a certain percentage of presumed minors carry no or no reliable documentation with them. Especially under the impression of the ongoing global migration crisis, the necessity of age assessments has challenged state authorities in the respect of various procedural key safeguards. As a reaction to these challenges and to a call by the EU-Commission and the Council in 2017,¹⁸ the EASO has reedited a Practical Guide on Age Assessment in 2018. Herein, the EASO emphasizes the best interest of the child and the benefit of the doubt as the two leading principles of all questions relating to age assessments.¹⁹

5. The best interest of the child requires the examination whether the age assessment is necessary and useful.²⁰ If an age assessment is deemed necessary, only the least intrusive method is to be applied to assess a presumed child's biological age.²¹ In general, it is recommended to exhaust non-medical assessment methods before passing to medical methods, especially those involving the use of x ray. However, the question which method is the least intrusive can prove difficult in practice and must be dealt with on a case by case basis.²² For example, a personal interview on past traumatic experiences can in individual cases be perceived more intrusive than a wrist x ray.

6. The benefit of the doubt leads the procedure of age assessment from the moment a person is found by an authority until the age of that person is duly established.²³ As a consequence, not only persons claiming to be minors, but also persons claiming to be adults may be subject to age assessment, since the latter might try to escape child protection measures.²⁴ Furthermore, an age assessment may not be applied as a routine practice, but should be duly justified based on substantiated doubts according to the stated age.²⁵ The mere absence of documentation is in itself not sufficient to justify substantiated doubts.

¹³ K. HILBIG-LUGANI (see fn. 11 above), Art. 2 Par. 2.

¹⁴ K. HILBIG-LUGANI (see fn. 11 above), Art. 2 Par. 6.

¹⁵ IBID.

¹⁶ See for further details on age assessments W. DÜRBECK, "Unbegleitete minderjährige Flüchtlinge im Familienrecht", *Zeitschrift für das Familienrecht* 2018, 553 – 564.

¹⁷ EUROPEAN ASYLUM SUPPORT OFFICE (EASO), "Practical Guide on Age Assessment", 2018, 18.

¹⁸ COM(2017) 211 of 12 April 2017.

¹⁹ EASO (see fn. 17 above), 18 s.

²⁰ IBID.

²¹ IBID.

²² IBID.

²³ IBID.

²⁴ IBID.

²⁵ IBID.

2. Unaccompanied and separated children

7. Under the influence of the ongoing global migration crisis, the 2017 Special Commission on the practical operation of the Child Protection Convention addressed the question whether the Convention should apply to unaccompanied and separated children.²⁶ Several member states, however, proposed that the situation of unaccompanied and separated children was an issue of public law rather than private international law.²⁷ Others indicated that States should apply their own national law if the latter was more favorable for the child concerned.²⁸

8. The vast majority of the member states of the Hague Child Protection Convention, however, was in favor of an application of the Child Protection Convention and took the opportunity to affirm the sufficient flexibility of the Convention was indeed flexible enough for an application to unaccompanied children and as an instrument to foster cooperation between child protection and immigration authorities. The UN Child Rights Committee and UNICEF as observers to the Special Commission also argued in favor of an application of the Hague Child Protection Convention.

3. Measures of child protection

9. Article 3 of the Convention provides for a catalogue of measures directed to the protection of the child's person or property. The catalogue names measures related to parental responsibility (lit. a), to the right of custody (lit. b), to guardianship and comparable institutions (lit. c), to the placement of children in foster families or institutional care (lit. e) and the administration, conservation or disposal of the child's property (lit. g). In accordance with article 1 paragraph 1 lit. c, the catalogue in article 3 is of exemplary character and not exhaustive.²⁹ To achieve the Convention's leading purpose, the child's best interest, measures of intervention are possible under the Convention, including measures that restrain, limit, modify or terminate the parents' rights of parental responsibility.

10. Article 4 excludes certain matters from the Convention's scope of application. Among others, all questions of descent, matters related to adoptions, measures related to criminal procedures against the child, measures related to maintenance for the child are excluded from the scope of the Hague Child Protection Convention.³⁰ Several of these areas are considered sovereign interests of the member states, others are simply governed by own specific conventions of the Hague Commission of Private International Law. Generally, the Hague Child Protection Convention does not generate a weak spot in the children's protection with regards to the excluded areas. The catalogue of excluded measures is non exhaustive. Further excluded areas are all questions of capacity and legal ability to conclude contracts, these are only covered by the Hague Child Protection Convention as preliminary questions relevant to the parental responsibility.³¹

III. International jurisdiction rules

11. The Convention's chapter II establishes a system of rules on international jurisdiction. As mentioned in the introduction, the Convention's rules on international jurisdiction are superseded by the Brussels IIbis Regulation in cases in which a child's habitual residence is established in a EU member

²⁶ SPECIAL COMMISSION ON THE PRACTICAL OPERATION OF THE 1980 HAGUE CHILD ABDUCTION CONVENTION AND THE 1996 HAGUE CHILD PROTECTION CONVENTION, "Seventh Meeting 10-17 October 2017", in *The Judges' Newsletter on International Child Protection*, Volume XXI, Winter/Spring 2018.

²⁷ IBID.

²⁸ IBID.

²⁹ K. HILBIG-LUGANI (see fn. 11 above), Art. 3 par. 2.

³⁰ See article 4 lit. a – lit. g Hague Child Protection Convention.

³¹ K. HILBIG-LUGANI (see fn. 11 above), Art. 4 Par. 1.

state.³² Therefore, the Convention's rules on international jurisdiction are limited to cases involving non EU-member states including the future post-Brexit UK.

1. Principle of habitual residence

12. Article 5 of the Convention establishes a general principle of habitual residence and abandons the principle of nationality which is the core jurisdiction rule within the Hague Minor Protection Convention of 1961.³³ The shift from nationality to habitual residence as the general base for jurisdiction is considered one of the major innovations introduced by the Hague Child Protection Convention.³⁴ The main goal behind this innovation was the drafters' objective to reflect the closest relationship of the child concerned with the state in which he or she is actually socially and legally integrated.³⁵ The principle of nationality, on the other hand, was considered a merely formal relationship and, therefore, abandoned.³⁶ Under the Hague Child Protection Convention, international jurisdiction is deemed to the authorities of one single member state under the Convention that is considered to have the closest connection with the child concerned.³⁷ Again, it can be seen that the Convention has learned from the past under its predecessor that provided for concurring international jurisdiction of various member states.³⁸

13. Habitual residence is – as it is tradition among the Hague Conventions, not positively defined. Despite the need for a autonomous definition of the term,³⁹ certain criteria for the determination of the habitual residence can be derived from the European Court of Justice's jurisprudence concerning family law related regulations which aim at protecting the best interest of the child, too.⁴⁰ Criteria developed by the European Court of Justice include the length and the circumstances and factual reasons for the stay, school enrolment, language skills, and generally the social and family bonds to the state concerned.⁴¹

14. Some specifics of children's habitual residence must be borne in mind: In general, a child's habitual residence is determined independently from its parents, with the exception of a toddler's habitual residence that is determined as an accessory to his or her parents'.⁴² An infant gains his or her habitual residence in the moment of his or her birth, no minimum period needs to be established in order to determine a child's habitual residence.⁴³

15. In flight situations, however, the determination of a habitual residence can prove difficult, due to situations in which a child crosses various borders without being able to establish stable living conditions in one place. Therefore, the general principle of habitual residence is subject to a specific exception in article 6 if the child concerned is a refugee child.

2. Special jurisdiction for refugee children

16. In the case of refugee children, the general principle of habitual residence stipulated in article 5 paragraph 1 comes to its limits: The normal jurisdiction attributed to the authorities of the State of their habitual residence is inoperative, since these children have broken their links with the State of

³² See art. 61 Brussels IIbis Regulation.

³³ K. HILBIG-LUGANI (see fn. 11 above), Einl KSÜ Par. 31.

³⁴ K. HILBIG-LUGANI (see fn. 11 above), Einl KSÜ Par. 32.

³⁵ IBID.

³⁶ IBID.

³⁷ IBID.

³⁸ K. HILBIG-LUGANI (see fn. 11 above), Einl KSÜ Par. 2.

³⁹ HCCH, "Practical Handbook on the Operation of the 1996 Hague Child Protection Convention", The Hague, 2014, Par. 13.83; SCHÄUBLE (see fn. 9 above), 9.

⁴⁰ HCCH (see fn. 39 above), Par. 13.87; D. SCHÄUBLE (see fn. 9 above), 9.

⁴¹ HCCH (see fn. 39 above), Par. 13.85; K. HILBIG-LUGANI (see fn. 11 above), Art. 5 Par. 8.

⁴² HCCH (see fn. 39 above), Par. 13.85 s.; K. HILBIG-LUGANI (see fn. 11 above), Art. 5 Par. 8.

⁴³ HCCH (see fn. 39 above), Par. 13.85.

their previous habitual residence. At the same time, their stay in the new State is of only provisional and precarious character and does not allow it to be considered that they have acquired a habitual residence there.⁴⁴ Simultaneously, these children often have a special need for protection. They may, for example, to apply for asylum or for a residence, or to be placed in institutional care. It is therefore necessary to designate a legal representative.

17. The Child Protection Convention attributes jurisdiction for refugee children to the authorities of the State in which the child is present. The original intention of the Commission had been to broaden the provisional jurisdiction based on urgency in article 11 to refugee children,⁴⁵ but article 6 as it was finally adopted establishes general jurisdiction to take measures of protection regarding the long term care of the child.⁴⁶

18. However, the jurisdiction grounded on article 6 is of temporary nature, since the lack of a habitual residence is an temporary situation, which is due to end the moment the child concerned settles in a state.⁴⁷ The stipulation is based on the premise that a refugee child is temporarily or definitively deprived of their parents. However, the urgency of the measures concerned and the question whether parents can be contacted in the specific case does not exclude the general international jurisdiction according to article 6, though it can have influence on the measure in question.

19. The concept of "presence" requires only physical presence in the territory of the Contracting State concerned, and no proof of residence of any sort.⁴⁸ The mere physical presence of the child in the territory is sufficient in order to establish the Jurisdiction of the authorities of the state.⁴⁹ By that, the Convention facilitates the determination of the internationally competent authorities, accelerates protective measures for the children concerned, which supports the Convention's ambition to facilitate measures of child protection by giving the international jurisdiction to the authorities that are in principle closest to the child.⁵⁰ Whether or not the determination of international jurisdiction through article 6 of the Hague Child Protection Convention does or does not require the establishment of the formal refugee status of the child concerned, is controversial. The lack of a definition of refugee children in the Convention itself as well as a general goal to achieve a uniform terminology speak up for referring to the definition of refugee within the Geneva Convention of 1951 on the Legal Status of Refugees.⁵¹ In the interest of facilitation and acceleration of child protection measures, however, it may seem favorable to consider the notion of a refugee child the wide and the least technical possible.⁵² Ultimately, the question is of no practical importance due to article 6 paragraph 2 that refers to paragraph 1 with regards to all children whose habitual residence cannot be determined. Therefore, at least through paragraph 2, the rule established in paragraph 1 would apply to a child whether his or her status as a refugee under the Geneva Convention can be established or not.

3. Further specific rules on international jurisdiction

20. In case of wrongful removal or retention of the child, the authorities of the state in which the child was habitually resident immediately before the removal or retention keep their jurisdiction until the child has acquired a habitual residence in another State, and the person or institution having

⁴⁴ P. LAGARDE, "Explanatory Rapport", Par. 44.

⁴⁵ P. LAGARDE (see fn. 44 above), Par. 45.

⁴⁶ HCCH (see fn. 39 above), Par. 13.58.

⁴⁷ E. PATAUT/E. GALANT, "Brussels Ibis Regulation", Art. 13 Par. 1 s., in U. MAGNUS/P. MANKOWSKI, *European Commentaries on Private International Law*, Volume IV, Köln, 2017.

⁴⁸ HCCH (see fn. 39 above), Par. 13.88.

⁴⁹ HCCH (see fn. 39 above), Par. 13.88.

⁵⁰ K. HILBIG-LUGANI (see fn. 11 above) Art. 6 Par. 2.

⁵¹ K. HILBIG-LUGANI (see fn. 11 above) Art. 6 Par. 8; K. MARKWARDT, "EGBGB" in *Beck'scher Online Groß-Kommentar BGB*, Ed. 1, 2015, Art. 6 Par. 5.

⁵² See also HCCH (see fn. 39 above), Par. 13.59.

rights of custody has acquiesced or at least a year has expired (article 7). This rule is another important divergence from the basic principle of habitual residence in the Hague Child Protection Convention for cases of illegitimate abduction, a rule of international jurisdiction that complements the Hague Child Abduction Convention. Article 7 does not amend or substitute the mechanism established by the 1980 Convention for dealing with situations of international child abduction, but supplements and strengthens it by avoiding that the abducting person can establish a new jurisdiction for a possible new rights of custody decision in a new state.

21. Another constellation in which the Child Protection Convention diverges from the principle of habitual residence is the urgency jurisdiction established by article 11. Jurisdiction is deemed to the authorities in the state of the child's presence. The jurisdiction lapses when the authorities whose jurisdiction is established on the basis of article 5 – 10 take the measures required by the situation.

4. Relationship with the Brussels IIbis Regulation

22. As mentioned earlier, the Convention's rules on jurisdiction are displaced by the Brussels IIbis Regulation if a child's habitual residence is established in a EU member state. As far as the basic rules on international jurisdiction are concerned, a certain harmony between the rules of the Hague Child Protection Convention and the Brussels IIbis Regulation can be observed: Article 5 and 6 have equivalents in the Brussels IIbis Regulation,⁵³ so that in principle, the same rules on jurisdiction apply between EU member states and non EU member states.⁵⁴

23. However, some divergences concern the questions of transfer of jurisdiction (article 8 and 9 Hague Child Protection Convention) and above all, the question of *perpetuatio fori*, which is affirmed in article 8 paragraph 1 Brussels IIbis and denied in article 5 paragraph 2 Hague Convention.⁵⁵

IV. The rules of applicable law

24. As mentioned in the introduction, the Hague Convention is superseded by the Brussels IIbis Regulation rules on international jurisdiction. Since the Brussels IIbis Regulation does not contain rules on the applicable law, the Hague Convention is an alone-standing set of rules in the field of conflict-of-laws as applied to measures related to parental authority.

25. Chapter III of the Hague Convention establishes a general *lex fori*-principle, according to which every authority taking a measure of protection applies its own internal law (article 15). The applicable law is thereby linked to the international jurisdiction of an authority taking measures within the scope of the Hague Convention. In principle, the applicable law is thereby governed by the principles of habitual residence and presence established by Chapter II and discussed above.⁵⁶

26. A second rule governs the applicable law in cases of attribution or extinction of parental responsibility by operation of law. If no measure is taken by an authority because parental responsibility is affected by operation of law without interference of an authority, the applicable law is, again, determined by the child's habitual residence.

27. Thereby, the Convention in principle again refers to the habitual residence as the closest connection between a member state and the concerned child, thus unifying the law applicable to parental

⁵³ Article 5 and 6 have parallel rules in article 8 and 13 paragraph 2 Brussels IIbis Regulation.

⁵⁴ E. PATAUT/E. GALANT (see fn. 47 above), Art. 13 Par. 7 s.

⁵⁵ For further details see Part IV below.

⁵⁶ See Part II above.

responsibility and measures of protection.⁵⁷ On the other hand, necessary exceptions to the principle of habitual residence, for instance in cases concerning refugee children, are taken into account.

28. The unified conflict of law rule of the Convention is complemented by article 12 paragraph 1 of the Geneva Convention of 1951 on the Legal Status of Refugees according to which the personal status of a refugee shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence. This parallel between the Hague Child Protection Convention and the Geneva Convention of 1951 on the Legal Status of Refugees, respectively, render a clarification of a child's refugee status unnecessary. That is an advantage in comparison to the conflict of laws rule concerning adults, where non-refugee migrants are mostly governed by the law of their nationality: According to the prevailing view in the doctrine, a statute change occurs in the moment a refugee is acknowledged a refugee status according to the Geneva Convention⁵⁸.

29. One specific of flights situations that has already been discussed in depth⁵⁹ is the difficulty to determine a child's habitual residence. As we have seen, this difficulty is overcome by the Hague Child Protection Convention by facilitating the requirement of habitual residence to a mere presence of the child that has to be established in one of the Hague Convention member states. Furthermore, flight situations can be characterized by various border crossings in a short period of time. Consequently, even as a presence or residence of the concerned child has been established, the question arises as to whether and to which extent later border crossings cause changes of statute.

V. Legal effects of changes of circumstances

1. Border crossings

30. The Hague Child Protection Convention contains various rules dealing with the phenomenon of changes of residence or presence of a child. As the core principle governing changes of residence, article 5 paragraph 2 excludes *perpetuatio fori*. Consequently, if a child changes his or her residence while judicial proceedings are ongoing, the proceedings undertaken by the member state of the former residence are discontinued due to a lack of international jurisdiction. This principle is a significant divergence from the Brussels IIbis Regulation, that foresees a continuing jurisdiction for three months following the change of residence in article 9 paragraph 2. By this principle of *perpetuatio fori*, the Brussels IIbis Regulation aims at a prolongation of the child protection after a change of residence. The reason behind the Convention's decision against a *perpetuatio fori* principle is to render the child's protection as effective as possible by vesting international jurisdiction in the authorities which are geographically the closest to the child. However, the legislative history of the Hague Child Protection Convention shows that the decision against a general *perpetuatio fori*-principle was also a political compromise between the negotiating member states.⁶⁰

31. One exception to article 5 paragraph 2 is formulated for cases of child abduction. According to article 7, the authorities of the state in which the child concerned was residing before the abduction, remain internationally competent for a period of 3 months. This partial return to the principle of *perpetuatio fori* has been included in the Hague Child Protection Convention in order to harmonize its rules of international jurisdiction with the Hague Child Abduction Convention. The latter aims at perpetuating the international jurisdiction of the authorities of the former residence of the child in order to stabilize the authority over the child concerned.⁶¹

⁵⁷ In comparison with its predecessor that referred to the nationality of the child.

⁵⁸ G. SCHULZE, "EGBGB", in *Nomos Kommentar BGB*, 2016, Anh II Art. 5 Par. 28; J. VON HEIN, "EGBGB", in *Münchener Kommentar BGB*, 2018, Anh II zu Art. 5 EGBGB Rn. 75.

⁵⁹ See Part II 3 above.

⁶⁰ P. LAGARDE (see fn. 44 above), Par.42.

⁶¹ P. LAGARDE (see fn. 44 above), Par.46.

32. Article 5 paragraph 2 is complemented by article 14 which contains a rule on continuity. Accordingly, a judicial decision taken before the change of residence survives until it is replaced by a decision taken in the new state of residence. A certain legal security is thereby provided for all cases in which a judicial decision has been taken. However, the rule in article 14 remains silent as to the question from what stage onwards a decision is protected by the survival ruled in article 14. The requirements a decision has to fulfill in order to survive in accordance with article 14 is controversial. The majority of the doctrine considers a survival limited to those decisions that have yet become *res judicata* as exceedingly strict.⁶² However, a first instance ruling that is still subject to at least another ruling on the facts might be a too early stage for a survival of the decision. In general, a last judicial ruling that includes a fact finding might be considered a reasonable requirement for the survival of a judicial decision under article 14.

33. Another rule dealing with cross-border cases, though not necessarily with border crossings, is the rule of the Hague Child Protection Convention on recognition of measures taken in other member states in article 23. According to article 23 paragraph 1, measures taken in a member state are recognized in all other member states by operation of law and to their full extent.

2. The 18th birthday

34. The moment a minor completes his or her 18th birthday, the Hague Child Protection Convention is no longer applicable. In absence of any written rule on the conflict-of-laws, an authority taking into consideration a child protection measure will no longer apply the Hague Child Protection Convention, but their own private international law in order to establish international jurisdiction or the applicable law. According to the common conflict-of-laws-rule, questions relating to the personal status including the legal capacity of a person are governed by the law of nationality.⁶³ In the case of a minor who recently completed his 18th year, the rules governing his capacity will in general be determined by his nationality. Two consequences arise: First, again, no weak spot, neither in the protection nor in the capacity of a person to conclude contracts, is to be feared, since the whole range of questions related to the personal status is governed by the law of nationality. Second, the age of 18 proves to be a date of paramount importance in the question which conflict-of-laws rules apply to a person.

VI. Conclusions

35. In comparison to its predecessor, the Child Protection Convention does determine the international jurisdiction in a very straightforward manner: Competence is vested in the authorities of the habitual residence. Where there is no habitual residence, the mere presence is enough. The former competition between the authorities of the child's residence and the authorities of his or her nationality, as it was under the Minor Protection Convention, is abolished.

36. The applicable law is the authority's own domestic law. Consequently, measures of protection are significantly facilitated and accelerated. If there is no decision as to the competent authority necessary, the applicable law is the law of the habitual residence. By that, the Convention unifies the conflict-of-laws rules that were foreseen by its predecessor and makes the habitual residence its core connecting factor. In the special case of refugee children, and of unaccompanied minors more generally, it takes their breach with their country of origin seriously. It could also be regarded as a modern instrument to foster the integration of unaccompanied minors since they are subject to their new home's law, already. The jurisdiction rule of the mere presence gives effect to that intention at a very early stage.

⁶² K. HILBIG-LUGANI (see fn. 11 above), Art. 5 Par. 14; K. MARKWARDT (see fn. 51 above), Art. 5 Par. 13.

⁶³ See N. GONZÁLEZ MÉNDEZ DE VIGO, "Vormundschaft für unbegleitete minderjährige Ausländer/ innen/ Flüchtlinge - Grundlagen und Grundsätze", in *Themengutachten DJuF*, 2015, Par. 3, and D. SCHÄUBLE (see fn. 9 above), 14, for the German perspective.

37. The unified conflict-of-laws rule of the Convention is complemented by article 12 paragraph 1 of the Geneva Convention on the Status of Refugees according to which the personal status of a refugee shall be governed by the law of the country of his domicile or, if he or she has no domicile, by the law of the country of his or her residence. This parallel between the Hague and the Geneva Convention render a clarification of a child's refugee status unnecessary. That might prove advantageous in comparison to the conflict-of-laws rule concerning adults, where non-refugee migrants are often governed by the law of their nationality. Again, the age of 18 is a cross-roads in the protection of a person under the Hague Convention, which makes a thorough age assessment even more important.

38. However, the Convention remains silent on a number of questions linked to child protection. Remaining problems are the questions of the demarcation of parental responsibility which is governed by the Convention and the personal status of children which is explicitly excluded. An example for demarcation problems is the emancipation that affects the personal status and, at the same time, extinguishes the parental responsibility.⁶⁴

39. Furthermore, due to the prevailing of the Brussels IIbis Regulation in the area of international jurisdiction, the impact of the Hague Child Protection Convention is practically limited to determining international jurisdiction in cases in which the children concerned are not present within the borders of the EU. The impact outside the geographical region of Europe, however, is limited by the growing, yet still limited, number of member states.⁶⁵ In the best interest of legal clarity with regards to the international jurisdiction in cases requiring child protection measures, further ratifications of the Hague Child Protection Convention can only be seen as desirable.⁶⁶

⁶⁴ See P. LAGARDE (see fn. 44 above), Par. 101 for further details.

⁶⁵ K. HILBIG-LUGANI (see fn. 11 above), Einl KSÜ Par. 5.

⁶⁶ This is even more desirable since there are no written rules on international jurisdiction and the applicable law for cases involving child protection measures apart from the Hague Child Protection Convention. With regards to the unwritten rule in german conflict-of-laws see D. SCHÄUBLE (see fn. 9 above), 7.