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Continuity of Parental Responsibility in Child Abduction Cases: Lesson Learned from the Case of *Z. v. Croatia*

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Abstract: The new ECtHR decision in the case of *Z. v. Croatia* suggests that the rule of parental responsibility acquired *ex lege* is not always easy to implement in child abduction cases. The case primarily raised the question of determining whether the removal or retention of the child is wrongful in situations when the unmarried left-behind father does not have the *ex lege* right to parental responsibility under the law of the country of habitual residence, but he has acquired it under the law of the country in which he and the child had their previous habitual residence. In addition, the case of *Z. v. Croatia* raises the issue of *renvoi*, the habitual residence of children whose lifestyle involves frequent moving with their parents, as well as the issue of the need for thorough justification of the court decision. The identified difficulties showed the need to clearly elaborate and determine the interrelationship between Article 3 of the Child Abduction Convention and Article 16(3) of the Child Protection Convention, as well as the necessity to evaluate domestic legislative solutions and the practice of the national authorities that have led to the determination of violation in the present case.

Keywords: child abduction; parental responsibility acquired *ex lege*; habitual residence; *renvoi*; *Z. v. Croatia*; Child Abduction Convention; Child Protection Convention



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1. Introduction

The provision of Article 3 of the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter: Child Abduction Convention) (HCCH 1980), which regulates a wrongful removal or retention of a child, is the key provision of this instrument.¹ The obligation to return the child exists only if the removal or retention of a child can be considered wrongful under the Child Abduction Convention. This provision governs the relations protected by the Child Abduction Convention itself, and at the same time, establishes the conditions under which a unilateral change in the *status quo* may be considered wrongful. A wrongful removal or retention of a child depends on two facts: the existence of the right to parental responsibility under the law of the state of a child's habitual residence, and the actual exercise of that right prior to the removal or retention of a child (Pérez-Vera 1982, para 64). In this way, the Child Abduction Convention protects family relationships that have already been protected by virtue of the manifest right to parental responsibility acquired in the country of the child's habitual residence (Pérez-Vera 1982, para 65). The removal or retention of the child by one parent who has joint parental responsibility without the consent of the other parent is also unlawful, regardless of whether it is grounded in the law or by court order. Wrongfulness stems from the fact that this type of unilateral action violates the protected rights of the other parent, who is

¹ "(1) The removal or the retention of a child is to be considered wrongful where—(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. (2) The rights of custody mentioned in sub-paragraph (a) above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."

prevented from exercising those rights normally (Beaumont and McEleavy 1999, p. 4). Joint parental responsibility does not always arise *ex lege*. There are national legal systems that do not automatically recognise the joint parental responsibility of fathers when the parents are not married.² This type of national legislation does not contradict the fundamental right to family life. It was clearly stated by the Court of Justice of the European Union (hereinafter: CJEU) in the child abduction case *McB*.³ The European Court of Human Rights (hereinafter: ECtHR) did not determine such national legislation as being generally contrary to the right to family life and to the prohibition of discrimination. Nevertheless, it gave its opinion on domestic legislative solutions where the mother's consent is a prerequisite for the father to acquire the right to parental responsibility, and established discrimination in this respect.⁴

The law applicable to parental responsibility is generally governed by 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 (hereinafter: Child Protection Convention) (HCCH 1996), which also contains, in Article 16, the rule on the law applicable to parental responsibility, which takes into account a change in the child's habitual residence.⁵

The facts of the recent case of *Z. v. Croatia*⁶ show the inevitable need to take into account the rules of both Hague Conventions. The case concerns the proceedings for the return of children under the Child Abduction Convention, in which the domestic courts refused to order the return of the applicant's four children to Germany after their mother had retained them in Croatia. The parents—Ms X and Mr Z, both Croatian nationals—had lived as an unmarried couple since 2007. They had four children, all born in Croatia. In the period between 2011 and 2018, the family moved frequently and lived in Greece, Slovakia, Hungary, Sweden, and France, and, as of 2018, again in Croatia. In 2018, Ms X and Mr Z ended their relationship. In October 2018, the mother gave the father written consent to bring the children from Croatia, where they were living at the time, to Germany, and to take care of them there, fully and independently. In December 2018, the father moved with the children to Germany, where he enrolled them in a private school and kindergarten. In July 2019, the mother revoked her consent, and in August of the same year, she came to Germany and took the children to Croatia. She refused to return the children to Germany after the summer holidays. The national courts in both instances refused to return the children, holding that prior to the abduction, the children had their habitual residence in Germany and that German law was applicable for assessing whether the retention of the children in Croatia is wrongful. According to German law, the retention of the children in Croatia by their mother did not represent a breach of the father's right to parental responsibility because he did not have such a right.⁷ The national court did not take into

² UK, some of the USA states, New Zealand, France, the Netherlands. (Schuz 2013, p. 151).

³ CJEU, Case C-400/10 PPU *McB*, 2010, EU:C:2010:582.

⁴ E.g., ECtHR, *Paparrigopoulos v. Greece*, Application No 61657/16, 30.6.2022; *Zaunegger v. Germany*, Application No 22028/04, 3.12.2009; For more information, see: (Hanke 2011; Koukoulis 2022).

⁵ "(1) The attribution or extinction of parental responsibility by operation of law, without the intervention of a judicial or administrative authority, is governed by the law of the State of the habitual residence of the child. (2) The attribution or extinction of parental responsibility by an agreement or a unilateral act, without intervention of a judicial or administrative authority, is governed by the law of the State of the child's habitual residence at the time when the agreement or unilateral act takes effect. (3) Parental responsibility which exists under the law of the State of the child's habitual residence subsists after a change of that habitual residence to another State. (4) If the child's habitual residence changes, the attribution of parental responsibility by operation of law to a person who does not already have such responsibility is governed by the law of the State of the new habitual residence."

⁶ ECtHR, *Z. v. Croatia*, Application No. 21347/21, 1.9. 2022. The ECtHR already conducted several cases against Croatia, in which a violation was established due to the improper implementation of the Child Abduction Convention—*Karadžić v. Croatia*, Application No. 35030/04, 15.12.2005; *Adžić v. Croatia*, Application No. 22643/14, 12.3.2015; *Vujica v. Croatia*, Application No. 56163/12, 8.10.2015; *Adžić (2) v. Croatia*, Application No. 19601/16, 2.5.2019. For the analysis of national legislation and court practice on child abduction, see: (Tomljenović and Kunda 2010; Župan and Ledić 2013; Hoško 2015; Župan and Hoško 2015; Župan et al. 2019, 2021).

⁷ According to Article 1626a of the German Civil Code, the mothers of children born out of wedlock have sole custody and fathers have no right unless both parents agree on joint custody or the court imposes it.

account the father's argument that he had acquired parental responsibility automatically under Croatian law and that he could not have lost this right by moving with the children to Germany.⁸ Prompted by this case, the aim of this paper is to expose and discuss how the Child Abduction Convention and the Child Protection Convention interact in view of the continuity of parental responsibility and to suggest ways of resolving the difficulties that occur in this regard. The discussion will be framed in legal sources, the broad literature, and case laws concerning parental responsibility and custody rights.

2. Concept and Matter of Continuity of Parental Responsibility in Child Abduction Cases

2.1. Semi-Autonomous Nature of Parental Responsibility

Before discussing the presented case law, it is necessary to consider the concept of the right to custody—i.e., parental responsibility—contained in the Child Abduction Convention. The “right to custody”, as provided in the Child Abduction Convention, is not so common in contemporary family law.⁹ Most countries have replaced it in their legislations with the concept of parental rights and responsibilities (Lowe 1997). The Child Abduction Convention has not followed this trend as, within its framework, the “right to custody” has an autonomous meaning.¹⁰ This concept is independent of any legislative construction of the Contracting States. In order to determine the substance of parental responsibility, the law of the state in which the child has habitual residence must be consulted; only then can the court of the requested state determine whether the right in question falls under the concept “the right to custody” in the Child Abduction Convention and whether there has been a violation of that right (Pérez-Vera 1982, para 39). In this sense, the right to custody under the Child Abduction Convention is semi-autonomous (Beaumont and McEleavy 1999, p. 74). The Child Abduction Convention defines the “right to custody” as the right that includes the custody of the child as a person, and in particular the right to determine the child's place of residence.¹¹ This definition should be interpreted in accordance with the objectives of the convention (HCCH 1993).

An autonomous definition from the Child Abduction Convention and the concept of the right to parental responsibility in the contracting states may differ, and as such, this may cause confusion. Schuz proposes a two-step approach to resolve these difficulties. The first step is to recognise the rights that the parent or guardian has over the child under the law of the country in which the child has habitual residence. The second step is to characterise those rights according to the autonomous definition from the convention; i.e., to determine whether or not those domestic rights can be considered the “right to custody” within the meaning of the convention.¹²

When deciding on the request for the return of the child, the Croatian courts technically followed the recommended approach. This proved insufficient in this case, as the ECtHR blamed the domestic courts for the lack of sound reasoning in their decisions. In what follows, this article will further examine the possible failures in the application

Bürgerliches Gesetzbuch in der Fassung der Bekanntmachung vom 2. Januar 2002 (BGBl. I S. 42, 2909; 2003 I S. 738), das zuletzt durch Artikel 1 des Gesetzes vom 14. März 2023 (BGBl. 2023 I Nr. 72) geändert worden ist.

⁸ The Family Act of 2003 (Obiteljski zakon, Official Gazette no 163/03) was in force at the time the children were born. Under Article 99(1), both parents of a child (regardless of whether the child was born in or out of wedlock) acquired parental responsibility jointly by operation of law. The current Family Act (Obiteljski zakon, Official Gazette nos 103/15, 98/19, 47/20, 49/23) kept the same regulation of joint parental responsibility in Article 104.

⁹ In this paper, the term “parental responsibility” is used generally, while the term “custody” is used only when it explicitly refers to Article 3 of the Child Abduction Convention. See also: (Scherpe 2009).

¹⁰ The Overall Conclusion of the Special Commission of October 1989 on the Operation of the Hague Convention on the Civil Aspects of International Child Abduction, 29 ILM, 1990, para 9; (Freeman 2000).

¹¹ Child Abduction Convention, Article 5(a)f; (Harrison et al. 2020).

¹² Schuz's proposal was supported in practice: *Re V-B* (Minors: Child Abduction: Custody Rights), 1999, 2 FLR 192, 196B; *Hunter v. Murrow*, 2005, EWCA Civ 976; *Fairfax v. Ireton*, 2009, NZFLR 433, NZCA 100; *Re D* (A Child) (Abduction: Foreign Custody Rights), 2006, UKHL 51; *Abbott v. Abbott*, 2010, 130 S Ct 1983. (Schuz 2013, p. 147).

of the relevant provisions of the Child Abduction Convention and the Child Protection Convention in more detail.

2.2. *Renvoi*

This scenario leads to the first general question of private international law relevant to the application of Article 3 of the Child Abduction Convention; i.e., is the applicable law determined by the convention law of the state concerned in its entirety (entailing also its rules of private international law), or is it merely a reference to substantive law? The question is well-known in the doctrine as *renvoi*. In international treaties containing the uniform rules concerning conflicts of laws, *renvoi* is usually expressly excluded. Unlike other Hague conventions on applicable law (since 1955), the drafter of the Child Abduction Convention chose to break with this tradition and not to address the issue. This approach was generally understood as a decision *pro renvoi*. The Explanatory Report confirms that the fact that the traditional approach of the HCCH to avoid *renvoi* and to refer to “internal” law was abolished can only mean that the word “law” is to be understood in its broadest sense, including also the rules concerning conflict of laws of the relevant legal system. Despite initiatives to clarify that the reference to the “law of habitual residence” refers to the domestic law of that state as the designated law, as applicable by its conflict of laws rules, the HCCH held that it was “unnecessary and became implicit anyway once the text neither directly nor indirectly excluded the rules in question” (Pérez-Vera 1982, para 66).

The landmark writings on the Child Abduction Convention confirm this understanding (Sonntag 2017, p. 1541; Schuz 2013, p. 146). Beaumont and McElevy argue that the standard form clause of earlier HCCH conventions restricting the applicable law to the domestic law was intentionally omitted. The Child Abduction Convention thus leaves room for *renvoi* in order to allow for a broader range of custody rights to be considered (Beaumont and McElevy 1999, p. 46). The fact that the return of the child to the place of habitual residence does not automatically trigger the application of the substantive law of that state to the proceedings has been reiterated by the doctrine (Wolfe 2000, p. 302).

Some authors still believe that the drafters should have been clearer on this issue. For example, Beevers and Perez Milla emphasise that Article 3 should have been worded more precisely to explicitly allow *in favorem renvoi*, but only if it achieves the desired result (Beevers and Milla 2007, p. 226). This approach could be supported by the intention of the drafters of the convention to bring as many cases as possible under the scope of Article 3 (Pérez-Vera 1982, para 67). Schuz advocates for this approach: wherever custody rights have been violated, either under domestic law or under the choice of law rules of the state of habitual residence, the removal or retention will be wrongful (Schuz 2013, p. 170). Driven by the objectives of the convention, these authors propose a layered application of *renvoi*. The abducting court should first consider the domestic law of the child’s habitual residence. If the applicant (the left-behind parent) does not invoke the convention under those rules, the conflict of laws rules of the relevant state should be invoked (Beevers and Milla 2007).

In light of some older national case laws on *renvoi* in the context of child abduction, this approach seems reasonable. In the 2004 *Re JB*¹³ decision on the abduction of a child from Spain to the United Kingdom (UK), the UK court’s application of *renvoi* led to results that were unfavourable from the perspective of the drafters of the convention. Namely, although the father had custody under Spanish substantive law, the application of Spanish private international law referred to the law of the nationality of the child—that is, English substantive law—which deprived the father of custody rights. This case illustrates the danger of sticking to the letter of the law, which may lead to a result that the convention aimed to prevent. Although the father had secured his parental rights under Spanish law, he did not foresee that he would also have to do so under English law. The decision was in favour of the abducting parent, who gained an advantage by removing the child to

¹³ *Re JB* (Child Abduction: Rights of Custody: Spain), 2003, EWHC 2130 (Fan), 20041 1 FLR 796.

another jurisdiction. These results are outdated in all States Parties to the Child Protection Convention, as they all apply the connecting factor of the child's habitual residence.

It is worth noting that the available national law is not consistent, even within the same jurisdiction. Subsequent court decisions in the UK,¹⁴ as well as the practice in New Zealand¹⁵ and the Croatian case we examine in this paper, refer to internal law. *Renvoi* has not been addressed by either of the rulings adopted by the national courts or ECtHR in the case of *Z. v. Croatia*.

The Child Abduction Convention has opted for *renvoi*. However, the approach to *renvoi* in child abduction should be policy-oriented. A mechanical application of *renvoi* may violate fundamental rights, which fall under the ambit of public policy. When ruling on Article 3 of the Child Abduction Convention, one must bear in mind the intention of the drafters to include as many cases as possible within the scope of the convention. The right to respect for family life under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR), which also includes the legitimate expectations of parents regarding the right to the continuity of the once acquired parental responsibility settlement, should be taken into account. Only such an approach can guarantee the best interest of the child. This approach takes advantage of the *renvoi* doctrine while avoiding its disadvantages in a way that promotes the objectives of the convention (Schuz 2013, p. 170; See 2012). In the Contracting States of the Child Protection Convention, the conflict of laws rule is the same as that of the Child Abduction Convention: it focuses on a child's habitual residence. Moreover, Article 16(3) of the Child Protection Convention effectively monitors the *conflict mobile* in the event of the connecting factor not being established as it guarantees that parental responsibility as it exists under the law of the state of the child's habitual residence subsists after that habitual residence is transferred to another state. However, the application of the conflict of laws rules of the Child Protection Convention broadens the scope of the rule and makes it possible to fully implement the policy advocated by both instruments.

For the sake of all States Parties to the Child Abduction Convention that are not States Parties to the Child Protection Convention, the HCCH should clarify whether *renvoi* should be treated as an alternative referral rule (where the left-behind parent does not have custody rights under the domestic substantive law, the choice of law rules of the state of habitual residence are taken into consideration) or whether the legitimate policy objectives should be achieved by other means.

2.3. Habitual Residence

Without establishing the child's habitual residence at the time of the alleged wrongful removal or retention, it is not possible to establish whether or not the act of removal or retention was wrongful (Kruger 2011, p. 21). The Child Abduction Convention provides that the law of the state of the child's habitual residence is the only applicable law under which the wrongfulness of the abduction can be determined. The connecting factor of habitual residence is a well-established HCCH concept,¹⁶ which was primarily considered as a factual concept,¹⁷ and in this respect, it was distinguished from residence. It is considered appropriate for practice because it is important that the competent authorities of the place where the child is actually located are responsible for their physical well-being and can decide on their financial needs (De Winter 1969, p. 470). Habitual residence as a connecting factor meets the requirements of a modern and mobile society, which cannot be addressed according to residence and citizenship (Beaumont and McElevay 1999, p. 89). It

¹⁴ *Hunter v. Murrow*, 2005, EWCA Civ 976, 12005 2 FLR 1119.

¹⁵ New Zealand Court of Appeal in *Fairfax v. Ireton*, 2009, NZCA 100, 12009 3 NZLR 289.

¹⁶ The concept was first introduced in the 1902 Guardianship Convention and it has since then been part of all Hague conventions dealing with family matters.

¹⁷ Although in early documents, including the Explanatory Report, this concept is considered exclusively factual, this is a terminological mistake. The determination of habitual residence presupposes the application of legal standards to the fact of a specific case. (Kunda 2019; Beaumont and Holliday 2021).

indicates a person's actual, real (closest) connection to a legal order, provides the possibility that several different family relationships are subject to the same applicable law, and promotes greater harmony between the rules of jurisdiction and the applicable law when both are based on habitual residence (Dutta 2017, p. 559). It is considered logical to prescribe the habitual residence of a child as a connecting factor to determine the wrongfulness of abduction. This is supported by the importance of child protection and the very nature of the Child Abduction Convention; i.e., its limited scope of application (Pérez-Vera 1982, para 66; Beaumont and McEleavy 1999, p. 88). The nature of this concept causes difficulties in abduction cases because it may benefit the abducting parent, who are able to remain undetected by giving the child sufficient time to adjust to the new environment. Therefore, it is not uncommon for the interpretation of the concept of habitual residence to arise as a difficulty in proceedings under the convention, nor for it to be interpreted differently by the courts of different states, and even by the courts of the same state (Schuz 2013, p. 175).

The case of *Z. v. Croatia* raises the question of whether the children actually had their habitual residence in Croatia before they moved to Germany and acquired it there. This question is significant from the point of view of establishing parental responsibility on the basis of Croatian national law. The Croatian Government argued before the ECtHR that the children did not have their habitual residence in Croatia before moving to Germany. The Government argued that before moving to Germany, the family had lived in Croatia, Greece, Slovakia, Sweden, and France, and then again in Croatia. The children were born between 2008 and 2015, and some of them had only resided in Croatia for a few months and had not attended school or kindergarten there.¹⁸ On the other hand, the father claimed that the children had habitually resided in Croatia before moving to Germany. He emphasised that Croatia was the country with which the children had the closest connection: they had been born in Croatia and had Croatian citizenship, just like their parents. After the family's numerous temporary stays abroad, they had always returned to Croatia. The fact that they did not attend school or kindergarten was related to their parents' specific lifestyle. The older children took correspondence courses and were home-schooled (*Ibid*, para 74). The applicant also referred to the arguments raised by the children's mother during the return proceedings concerning their integration into a social and family environment in Croatia (*Ibid*, para 22). Finally, the ECtHR decided that, in accordance with the principle of subsidiarity, it was not appropriate to examine the issue of habitual residence in the proceedings as it was not examined by the domestic courts in the return proceedings. Given the specific circumstance of family life and the significance of the matter in establishing the continuity of parental responsibility, it is the failure of the national courts to not have further examined the issue of the children's habitual residence. In this sense, it was necessary for the courts to establish all elements of the children's habitual residence in Croatia, especially the fact of their actual physical presence and the parents' intention to stay (Kunda 2019, p. 301), in line with the rich practice of the CJEU.¹⁹

2.4. Parental Responsibility Arising Ex Lege

The sources of the right to parental responsibility are those on which the child return request can be based under the respective legal system. The Child Abduction Convention takes into account the most significant sources, such as parental responsibility arising *ex lege*, the right to parental responsibility established by a judicial or administrative decision, and the right to parental responsibility established by an agreement with legal effect. This list is not exhaustive (Schuz 2013, p. 146). The wording of Article 3 contains the phrase:

¹⁸ *Z. v. Croatia*, para 77.

¹⁹ C-523/07 *A*, 2009, EU:C:2009:225; C-512/17, *HR*, 2018, EU:C:2018:513; C-499/15 PPU, *W. and V. vs. X*, 2017, EU:C:2017:118; C-393/18 PPU, *UD vs. XB*, 2018, EU:C:2018:835; C-111/17 PPU, *OL vs. PQ*, 2017, EU:C:2017:436; C-85/18 PPU, *CV vs. DU*, EU:C:2018:220; C-372/22 *CM*, 2023, EU:C:2023:364; C-572/21 *CC*, 2022, EU:C:2022:562; C-644/20 *W. J.*, 2022, EU:C:2022:371; C-603/20 PPU *MCP*, 2021, EU:C:2021:231; C-501/20 *M P A*, 2022, EU:C:2022:619; C-759/18, *OF*, 2019, EU:C:2019:816; C-530/18 *EP*, 2019, EU:C:2019:583; C-468/18 *R*, 2019, EU:C:2019:666.

“may arise in particular”, which emphasises the fact that there may be other types of arrangements that are not provided for in this provision. It is clear that these sources of the right to parental responsibility cover a wide area of law, but the fact that the list is not exhaustive renders the rule subject to flexible interpretation and applicable to a large number of factual situations (Eekelaar 1982, p. 320).

The Child Abduction Convention primarily provides for the law as a source of parental responsibility. It thus confirms one of the main characteristics of the child return system; namely, the protection of the right to parental responsibility even before any decision has been made on that matter. This is especially important in cases where the child has been removed or retained prior to the decision on parental responsibility (Beaumont and McElevy 1999, p. 48). The Explanatory Report states that at the time the convention was drafted, the parent from whom the child was removed had no other option to regain the child than to resort to force or other actions that are harmful to the child. By including the cases with no decision on parental responsibility within the scope of the application of the convention, a significant step was taken toward resolving real problems that had previously been outside of the scope of the traditional private international law mechanisms (Pérez-Vera 1982, para 68). At present, the Child Abduction Convention provides that the removal of a child by a parent who has joint parental responsibility without the consent of the other parent is equally wrongful. Wrongfulness stems from the fact that the protected right of the left-behind parent, who is prevented from exercising that right normally, is violated by such a procedure. This confirms the legal nature of the convention, which is not intended to determine the merits of parental responsibility or the issue of the change of the right to joint parental responsibility due to subsequent changes to the facts. The aim of the convention is to prevent the decision on parental responsibility from being affected by factual changes caused by the unilateral action of one of the parents (Beaumont and McElevy 1999, p. 49; Taylor and Freeman 2023, p. 4.; Bryant 2020, p. 182).

The purpose of the Child Abduction Convention is to protect all ways in which parental responsibility can be exercised. In terms of Article 3 of the Child Abduction Convention, the right to parental responsibility may be conferred on the person who requests it, independently or jointly with another person. It is difficult to imagine any other arrangement considering that joint parental responsibility, based on the principle of gender equality, is part of the internal law of most modern countries (Pérez-Vera 1982, para 71). Joint parental responsibility does not always arise *ex lege*. This is confirmed by national legislation, which does not automatically recognise the system of joint parental responsibility in relation to the father if the parents are not married. Some of these laws provide legal arrangements under which the unmarried father has no right to parental responsibility unless he has obtained it through a court order or some other method recognised by the state, such as the mother’s consent or registration. In such a system, if the mother or another person takes the child before the father has made the necessary arrangements to obtain parental responsibility, such removal cannot be considered wrongful. This also applies to cases in which the father *de facto* takes care of the child either independently or jointly with the mother (Schuz 2013, p. 151; See also: Beevers 2006; Jiménez Blanco 2012; Župan and Drventić 2023, p. 20). A child abduction case from a state with such legal regulation was brought before the Court of Justice. In the *McB* case, the CJEU ruled on the application of Article 7 on the right to respect for family life of the Charter in relation to the existence and realisation of the right to parental responsibility. The facts of the case considered the mother and the father of three children who were not married. Under Irish law, where the children were habitual residents, the father was not entitled to the right of parental responsibility without a court order or consent. By the force of the law, the mother is the sole bearer of parental responsibility over a child born out of wedlock. Due to the disrupted family relationship, the mother took the children to England, and the father submitted a request for the return of the children back to Ireland. The English court rejected the father’s request, explaining that the removal of the children was not wrongful. Following the father’s appeal, the Supreme Court of Ireland referred a request for a preliminary ruling to the

CJEU regarding the possible application of Article 7 of the Charter when determining the existence of the right to care in order to establish the wrongfulness of the child abduction. The CJEU replied that Member States are not prevented from prescribing, in their national law, that the unmarried father must first obtain a court decision granting him the right to parental responsibility in order to acquire the right to parental care, which would mean that removing the child from the country of habitual residence is wrongful.²⁰ The Court did not find such a national solution to be in violation of the Charter.

Cases with a similar scenario are not unknown to the Croatian courts. Recent research (Drventić 2022) of national judicial practice has recorded cases questioning the right to parental responsibility of an unmarried father as an applicant through direct judicial communication,²¹ administrative cooperation,²² or independent research into the law of the state of habitual residence.²³ This had led to the conclusion that when domestic authorities receive a request for the return of a child by the unmarried applicant father, they will always inquire in some way about the content of the foreign law on parental responsibility of the requesting state. However, all of these cases considered the facts in which the family was established in the state of habitual residence before the abduction. The case of *Z. v. Croatia* indicated that greater attention is required in those child abduction cases where the family moves from Croatia (or any other country which provides for joint parental responsibility of unmarried parents) to another state that may not automatically recognise the right to joint parental responsibility.

2.5. Applicable Law Provisions in the Hague Child Protection Convention

In Article 16, the Child Protection Convention governs the law as applicable to parental responsibility. The general rule provides that the law of the state in which a child is a habitual resident is applicable to the assignment or termination of parental responsibility.²⁴ The significant provisions for this research are those that consider a change in the habitual residence of a child contained in Article 16(3) and (4). The Lagarde Report brought to our attention that these provisions were the results of two divided opinions, neither of which took into account the totality of the elements of the problems (Lagarde 1998, para 105). The first opinion was grounded in variability. It held that for each change in the state of habitual residence, there is a necessary corresponding change to the applicable law to the assignment or termination of parental responsibility through the operation of the law. The opinion relied on the need for simplicity and security. The second opinion advocated for the continuity of protection; it argued that parental responsibility conferred through the operation of the law of the state of the child's habitual residence should subsist despite the change in the child's habitual residence. The main advantage of this opinion is the continuity of protection, especially in situations where the law of the state of the new habitual residence does not assign parental responsibility through the operation of the law. The opinion was grounded on the hypothesis that continuity would allow the holder of parental responsibility to continue caring for a child in the new state of habitual residence and to represent them in ordinary day-to-day transactions (*Ibid*, para 106). Finally, the drafters decided to embrace the second solution referring to continuity of parental responsibility. The actual provisions provide that parental responsibility existing under the law of the state of the child's habitual residence continues, notwithstanding the change of the child's habitual residence to another state.²⁵ Nevertheless, where the law of the state of the child's new habitual residence automatically confers parental responsibility on a person who does not already have it, it is the latter law that prevails (*Ibid*, Article 16(4); HCCH 2014, p. 96; Detrick 1996). In other words, a change in habitual residence cannot

²⁰ *McB*, para 64.

²¹ Municipal Civil Court in Zagreb (Općinski građanski sud u Zagrebu), 131 R1 Ob-1746/20-8, 21.10.2020.

²² Municipal Civil Court in Zagreb (Općinski građanski sud u Zagrebu) 146-R1 Ob-2395/2019-4, 11.12.2019.

²³ Municipal Civil Court in Zagreb (Općinski građanski sud u Zagrebu), 130 R1 Ob-937/2019-22, 18.11.2019.

²⁴ Child Protection Convention, Article 16(1) and (2).

²⁵ Child Protection Convention, Article 16(3).

terminate parental responsibility, but it can confer it, which effectively means that the Child Protection Convention gives preference to a substantive rule that imposes parental responsibility whenever possible (Lowe 2010; Župan 2012, p. 213). Applying these rules to the circumstances of the case of *Z. v. Croatia*, the following can be concluded: Assuming that the children's previous habitual residence was in Croatia, the unmarried couple had joint parental responsibility under Croatian law. When the father moved with the children to Germany, whose national legislation assigns parental responsibility only to the unmarried mother, the German law should remain, without any effect on the rights of the father, who would retain parental responsibility as conferred on him by the first law (Lagarde 1998, para 107).

2.6. *The Impact of the Applicable Law Provision on the Child Abduction Proceedings*

Despite the rather clear application of Article 16(3) to the circumstances of the case, there is still the question of the interrelation of the applicable law provisions of the Child Protection Convention and the provisions of the Child Abduction Convention governing the wrongful removal of children. The relationship between these two conventions is thus complex (DeHart 2000). When it comes to cases where both Conventions can be applied, as in the present case, the Child Protection Convention does not change or replace the mechanism established by the Child Abduction Convention. On the contrary, it complements and strengthens the Child Abduction Convention in certain aspects (Duncan 2010). This means that a number of its provisions can be used to complement the mechanism of the Child Abduction Convention when it is applied to a specific case. Article 50 provides that the Child Protection Convention "shall not affect" the application of the Child Abduction Convention; further, Article 50 clarifies that: "Nothing, however, precludes provisions of this Convention from being invoked for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organising access rights." The applicable law provisions on parental responsibility in the Child Protection Convention are thus relevant to the application of the Child Abduction Convention and, in particular, to establishing whether the applicant has the right to parental responsibility within the meaning of Article 3 of the Child Abduction Convention (Lowe 2010, p. 7).

3. Overview of the Case of *Z. v. Croatia*

3.1. *Child Abduction Proceedings*

In October 2019, the father instituted the proceedings before the Municipal Civil Court in Zagreb for the return of his children to Germany in accordance with the Child Abduction Convention and the Brussels IIbis Regulation.²⁶ Before the court, the father stated that the mother had wrongfully retained the children in Croatia, while the mother claimed that the applicant had agreed on taking the children back to Croatia permanently. During the administrative procedure between two Central Authorities, the officers corresponded via e-mail. In the course of that correspondence, an official from the German Central Authority referred to the request of the Croatian Central Authority for the delivery of the relevant provision of German law regarding parental care. In the letter, the officer stressed that German law is not applicable in this case as the children were born in Croatia, where they previously lived with the parents. The German Central Authority pointed out on two occasions that the parents had joint parental responsibility with respect to the children in Croatia under Croatian law. The German Central Authority grounded its opinion in Article 16(3) of the Child Protection Convention. It is not clear whether the judge of the Municipal Civil Court in Zagreb was aware of this correspondence at the time. However, at the court hearings, the applicant's lawyer provided the court with a copy of the correspondence between the two Central Authorities. In the court proceedings, a judge of the Municipal Civil Court in Zagreb, who was appointed contact judge for the purposes

²⁶ 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, OJ L 338, 23.12.2003, pp. 1–29.

of the International Hague Network of Judges and the European Judicial Network, asked the German counterpart for information regarding the parental responsibility of fathers of children born out of wedlock under German law. In its response, the German court referred the judge to Article 1626a of the German Civil Code, which states that mothers of children born out of wedlock have sole custody and that fathers have no right unless both parents agreed on joint custody or a court imposed it.²⁷ In its decision of 15 November 2019, the Municipal Civil Court in Zagreb dismissed the father's request for the return of the children. The court held that prior to the abduction, the children had their habitual residence in Germany, and that the German law was applicable for assessing whether the retention of the children in Croatia constituted a breach of the applicant's right to parental responsibility. The court referred to the provision of the German Civil Code and concluded that the retention of the children in Croatia by their mother did not represent a breach of the father's right to parental responsibility because he has not such right.²⁸

The applicant appealed. He argued that he had acquired parental responsibility automatically under Croatian law and that he could not have lost this right by moving with the children to Germany. He considered that this court's decision is contrary to Article 16(3) of the Child Protection Convention. The County Court of Zagreb dismissed the appeal and upheld the first-instance decision. In doing so, the appellate court referred only to the German Civil Code, agreeing, in this way, with the court of the first instance that the retention was not wrongful. The County Court did not refer at all to the applicant's argument regarding the application of the Child Protection Convention.²⁹

Following this, the father lodged a constitutional complaint before the Constitutional Court of the Republic of Croatia, claiming that the decisions of the civil courts had breached his right to fair proceedings and the right to respect for his family life. He again stressed that the civil courts misapplied substantive law by applying German law and not Article 16(3) of the Child Protection Convention. The Constitutional Court held that there had been no breach of his constitutional rights. It merely noted that the applicant had invoked Article 16(3) of the Child Protection Convention, without further elaboration. In addition, the Constitutional Court referred to Article 7 of the same Convention, which defines wrongfulness in removal or retention, without explaining why that article was relevant at all. Finally, it concluded that the reasons given by the Municipal Civil Court in Zagreb and the County Court of Zagreb were relevant and sufficient and did not disclose any arbitrariness with regard to the father.³⁰

3.2. ECHR Assessment

The ECtHR found that there were no justified reasons for the domestic courts to interfere with the father's family life and established a violation of Article 8 on the right to respect for private and family life in the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR).³¹ The ECtHR considered that insufficient reasoning in a ruling dismissing or accepting objections to the return of a child under the Child Abduction Convention was contrary to the requirement of Article 8 of the ECHR. The ECtHR found that that the appellate court did not address the issues stressed by the father that were relevant to establishing the wrongful retention of the children. The nature and importance of those arguments required a specific and express reply.³² In regard to the decision of the Constitutional Court, the ECtHR found that the Constitutional Court had only referred to Article 7 of the Child Protection Convention, but did not explain how this article was relevant for dismissing the complaint (*Ibid*, para 90). Taking these

²⁷ Bürgerliches Gesetzbuch.

²⁸ Municipal Civil Court of Zagreb (Općinski građanski sud u Zagrebu), 145-R1-Ob-2080/19-19, 15.11.2019.

²⁹ County Court of Zagreb (Županijski sud u Zagrebu), 10 Gž Ob-36/20-2, 15.1.2020.

³⁰ Constitutional Court of the Republic of Croatia (Ustavni sud Republike Hrvatske), U-III-4062/2020, 13.2.2021.

³¹ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5.

³² *Z. v. Croatia*, para 89.

circumstances into account, in addition to their previously established practice,³³ the ECtHR found that the reasons stated by the domestic courts were neither relevant nor sufficient to justify the interference with the applicant's right to respect for his family life.³⁴

4. Conclusions

In the case of *Z. v. Croatia*, the ECtHR brought another case against Croatia, which has already had a history of inadequate implementation of the Child Abduction Convention. In this case, the reasoning from Strasbourg bypasses a universally significant and essentially relevant issue for the application of Article 8 of the ECHR and the Child Abduction Convention—that of the continuity of parental care. On the contrary, the ECtHR took an easier path and focused only on the aspects of the insufficient application of the Child Abduction Convention with regard to the insufficiently reasoned decision of the national courts.

This paper looks at the notion of parental responsibility in child abduction proceedings from multiple angles. The right to custody under the Child Abduction Convention is semi-autonomous. It is roughly defined by Article 3. In order to determine the content of parental responsibility, the law of the state in which the child had habitual residence before the abduction must be consulted. Only then can the court of the requested state determine whether the right in question falls under the concept of “the right to custody” in the Child Abduction Convention and whether there has been a violation of that right. There are different domestic legislation approaches to the notion of parental responsibility. In the context of this research, the most significant aspect is with respect to domestic substantive laws that do not attribute parental responsibility to fathers *ex lege*. However, the entire exercise of the application of Article 3 described above should be governed by the objectives of the convention.

Another plea for teleological interpretation refers to the matter of *renvoi* in the course of child abduction proceedings. The matter has not been addressed by any of the courts involved in many instances of the dispute in *Z v. Croatia*. When ruling on Article 3 of the Child Abduction Convention, the court must bear in mind the intention of the drafters to include as many cases as possible within the scope of the convention. Courts should also take into account the right to respect for family life under the state's fundamental rights, which also includes the legitimate expectations of parents regarding the right to the continuity of the once acquired parental responsibility settlement. Only such an approach can guarantee the best interest of the child.

It is sustained here that the Child Abduction Convention opts for *renvoi*. Thus, the applicable law determined by Article 3 is the law of the state concerned in its entirety, entailing also its rules of private international law. Such an approach speaks for a combined application of both Hague conventions, of 1980 and 1996, in handling child abduction proceedings. When it comes to cases where both conventions can apply, as in the present case, the Child Protection Convention does not change or replace the mechanism established by the Child Abduction Convention. The demarcation clauses sustain that the Child Protection Convention complements and strengthens the Child Abduction Convention in certain aspects.

In Article 16, the Child Protection Convention governs the law applicable to parental responsibility. The general rule provides that the law of the state in which a child is a habitual resident is applicable to the assignment or termination of parental responsibility. The significant provisions for this research are those that consider a change in the child's habitual residence and are contained in Article 16(3) and (4). They effectively monitor the *conflict mobile* in the event that the connecting factor is not established as it guarantees that parental responsibility as it exists under the law of the state of the child's habitual

³³ ECtHR already sanctioned insufficient reasoning in several child abduction cases: *X. v. Latvia*, Application No. 27853/09, 26.11.2013, para 106 and 107; *Blaga v. Romania*, Application No. 54443/10, 1.7.2014, para 70.

³⁴ *Z. v. Croatia*, para 91.

residence subsists after that habitual residence is transferred to another state. However, the application of the conflict of laws rules of the Child Protection Convention broadens the scope of the rule and makes it possible to fully implement the policy advocated by both instruments. Based on the considerations in this research, it follows that the provision on the continuity of parental responsibility should be applied and taken into account in cases of international child abduction when determining the wrongfulness of child removal or retention.

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