INTERNATIONAL REMOVALS IN CONTEXTS OF VIOLENCE BETWEEN EUROPEAN ASYLUM LAW AND THE BEST INTERESTS OF THE CHILD

THE CJEU CASE A. V. B., OF 2 AUGUST 2021

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I. Introduction

The relationship between private international law and international refugee law is growing significantly.[1] An example of this is the unprecedented decision of judg-

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[1] See V. VAN DEN EECKHOUT, Private international law questions that arise in the relation between migration law (in the broad sense of the word) and family law: subjection of PIL to policies of migration law, Background paper, PILAGG-Presentation, 24 January 2013, http://ssrn.com/abstract=2203729 [accessed 2 April 2022]; A. FIORINI, The Protection of the Best Interests of Migrant Children – Private International Law Perspectives, in G. BIAGIONI & F. IPPOLITO (eds), Migrant Children in the XXI Century. Selected Issues of

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ment 2 August 2021, A. v. B. of the CJEU,[2] which raises the interconnection of two legal instruments of European Union law which have ostensibly different subjects and objectives. The preliminary rulings in that case concern the interpretation of the provisions on international child abduction and the transfer imposed by Regulation (EU) No 604/2013 of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection filed in one of the Member States by a third-country national or a stateless person[3] (Regulation No 604/2013 or Dublin III).

Most of the rules and mechanisms addressing the relationship of migrants with the State derive from "public law", such as asylum or immigration laws. However, in the area of international private situations, in addition to the mechanisms and systems of private law, public law rules inevitably contribute to the regulation and solution of problems in this area, thereby showing the artificiality of the so-called "private-public divide".[4] These and other aspects blur the traditional division between the public and private spheres, as is the case with the rules of private international law involved in the regulation of asylum (Articles 12 to 16 of the 1951 Geneva Convention Relating to the Status of Refugees).[5] This is also true in the case of certain provisions aimed at protecting refugee and internationally displaced children which need to be coordinated with those on international jurisdiction of Article 13.2 of Council Regulation 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[6] (Regulation No 2201/2003).

This is the context of the case under consideration. With the aim of protecting a minor witnessing gender based domestic violence, a mother transferred her child from Sweden to Finland, in compliance with a decision issued pursuant to Regulation No 604/2013. The removal of the child leads the father to request his immediate return to the country of habitual residence (Sweden) on grounds of another EU instrument: Regulation No 2201/2003. The questions referred to the CJEU by the Finnish court conern the main instruments on international child

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Public and Private International Law, Series "La ricerca del diritto", Editoriale Scientifica, 2016, p. 379-418, https://ssrn.com/abstract=2862361 on 1.3.2022.

[2] ECLI:EU:C:2021:640

[3] OJ L 180, 29.6.2013. This system was designed to respond to the phenomenon of *asylum shopping* (searching for the most advantageous Member State), with the aim of avoiding the abuse of these procedures through the simultaneous or successive filing of several applications by the same person in different Member States. It is also intended to prevent the phenomenon known as 'refugees in orbit', whereby Member States claim not to be responsible for analysing asylum applications.

[4] M. REQUEJO ISIDRO, La protección del menor no acompañado solicitante de asilo: entre estado competente y estado responsable, *Cuadernos de Derecho Transnacional*, 2017/2, vol. 9, p. 482-505.

[5] Done at Geneva on 28 July 1951. Also the Protocol Relating to the Status of Refugees, done at New York on 31 January 1967.

[6] OJ L 338, 23.12.2003.

abduction, such as Regulation No 2201/2003 and the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction[7] (hereinafter referred to as 1980 Hague Convention), as well as the Dublin III Regulation.

Given the limited scope of the analysis, we will focus in these pages on international transfer imposed by the application of European asylum law, taking into account the provisions on international child abduction. However, we note that it is difficult to carry out an adequate examination of the legislation bearing upon the case under consideration without taking into account gender transversality. The applicant's request for asylum was motivated by the fact of being a victim of gender based domestic violence and a well-founded fear of returning to her country of nationality, Iran, because of the risk of attacks in the name of honour by her husband's family.

The international architecture of women's human rights, such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),[8] imposes a binding obligation to adopt a gender perspective whenever this is needed in order to prevent or eradicate a discrimination. Not to comply eith the Convention would mean being in breach of international law on the matter. We will therefore focus in the following pages on the incorporation of gender mainstreaming as an analytical tool presented at the Fourth World Conference on Women in Beijing in 1995.[9]

We will also bear in mind Articles 60 and 61 of the 2011 Council of Europe Convention on preventing and combating violence against women and domestic violence (known as the Istanbul Convention),[10] which protect foreign victims who are persecuted for gender-based reasons and enshrine the principle of non-refoulement. In the case of children who are victims of structural violence, even as eyewitnesses, we must be guided by Article 31 of the Istanbul Convention. If our examination of the regulations linked to the case shows up a lack of alignment between them, that negatively affects the child transferred and affected by gender based domestic violence, we must look at ways of resolving such conflicts. We will assess whether in Case C 262/21 PPU this combination of regulations has been taken into account.

[7] Done on October 25, 1980, https://www.hcch.net/es/instruments/conventions/specialised-sections/child-abduction.

[8] Adopted by the United Nations and opened for signature and ratification or accession by the General Assembly in its Resolution 34/180 of 18 December 1979.

[9] Done at Beijing, 4-15 September 1995, A/CONF.177/20/Rev.1. See https://www.un.org/womenwatch/daw/beijing/platform/.

[10] Done at Istanbul, 11 May 2011. See https://www.coe.int/en/web/istanbul-convention/home.

II. Presentation of the Case and its Decision

A. The Family Situation

The main dispute concerns a married couple of Iranian nationals who, after a period of legal residence in Finland, moved to live in Sweden. On 5 September 2019, while they were in the latter country, their child was born.

Some time later there were episodes of violence by the father towards the mother, in the presence of the child, who was only a few months old, a fact that presented a real danger to his development and health, in addition to the possibility of being illicitly transferred to Iran by the father. In compliance with the European Parliament resolution of 11 November 2019 on protective measures for the minor,[11] the Swedish authorities have taken over guardianship and foster care of the child, who was housed with his mother in a home for women in difficulty. The father was not considered a safe person for the child to be with, leading to his initially being allowed access to the child only by means of photos and video recordings. Subsequently, visits were arranged in the presence of a social worker, limited to very brief contacts in view of the young age of the child.

As a result of the violence suffered and the initiation of the divorce, the mother filed an asylum application for herself and her son in Sweden in August 2020. This request was motivated by a well-founded fear of being threatened and attacked in the name of honour by the father's family if she were to return to Iran.[12]

On 27 August 2020, Finland, her former country of residence, confirmed that it was reponsible for the examination of the international protection of the mother and the child in accordance with Article 12, paragaph 3, of Regulation No 604/2013. This competence criterion based on the expiration date of the residence permit granted to the mother by Finland (27 December 2021), a longer period than that granted by the Kingdom of Sweden (16 September 2020), together

[11] European Parliament resolution of 26 November 2019 on children's rights on the occasion of the 30th anniversary of the UN Convention on the Rights of the Child (2019/2876(RSP).

[12] In a similar vein, the decision of the Croatian Constitutional Court U-III-557/2019 (610) of 11 September 2019 accepted a complaint by a rejected asylum-seeking woman from Iraq. In support of her request, the applicant had initially put forward only warfare in her home country, but at a later stage she explained that she was a victim of gender based domestic violence and that, if returned to Iraq, she risked further ill-treatment or death at the hands of her former husband or her brother, one of whom would necessarily be considered her guardian. Taking into consideration the circumstances of the case as a whole, including her high degree of traumatisation and vulnerability, the Constitutional Court accepted that the applicant had been too ashamed and too afraid to immediately rely on the issue of domestic violence in her initial asylum interview, because it had been conducted by two men. In the new proceedings, the Constitutional Court instructed the authorities to allow the applicant to prove her personal situation and individualised risk in line with up-to-date facts on the situation of women victims of domestic violence in Iraq and their ability to relocate elsewhere within the country, cited in AA.VV., *Handbook on European law relating to asylum, borders and immigration*, 2020, p. 295, in https://fra.europa.eu/en/publication/2020/handbook-european-law-relating-asylum-borders-and-immigration-edition-2020.

with the corresponding assessment of the best interests of the child (Article 6(3) of Regulation No 604/2013), was decisive in the transfer decision. As there was no opposition from the applicant or from the Swedish authorities, as foreseen by the Dublin text, the change of country took place in November 2020.

For his part, the father filed a claim to the Appeal Court of Helsinki (Finland) in December 2020 for the immediate return of his son to Sweden under Regulation No 2201/2003 and the 1980 Hague Convention. Further to dismissal of the claim and the subsequent appeal to the Helsinki Supreme Court, it was decided to stay the proceeding and to refer five questions to the CJEU for a preliminary ruling.

B. The Legal Questions Referred to the CJEU

The CJEU decision of 2 August 2021 refers primarily to the scope of application *ratione materiae* of Regulation No 2201/2003 in terms of analysing the constituent elements of wrongful removal or retention, in the light of the decision taken under Regulation No 604/2013 on the transfer of the minor and his mother to the country in charge of the asylum examination. We will now set out several observations regarding the five questions referred to the CJEU for a preliminary ruling.

First of all, the transfer decision must not be taken in isolation but must be assessed in the context of the procedure of which it is part, since it cannot be dissociated from the application for international protection which is its immediate origin. The purpose of the asylum request is to guarantee the minor a permanent status that protects him from the danger to which he may be exposed. Consequently, this request constitutes a measure of protection of the minor, falling under "civil matters" in accordance with Article 1 of Regulation No 2201/2003, regardless of the provisions of Recital 10 of that text.

Secondly, the assessment of the legality or otherwise of the transfer of the child on the basis of the definition provided by Article 2(11) of Regulation No 2201/2003 requires that, in compliance with an order issued by a national authority on the basis of the Dublin III Regulation, it is not deemed to be "unlawful". If the transfer is lawful, the child cannot be returned. The importance of this aspect leads us to deal with it in more detail in section IV of this paper.

Thirdly, given the statement that it is not a question of wrongful removal or retention of the child, it is superfluous to answer the remaining questions, which were raised conditionally. In any case, if it were a question of international abduction of the child and the return to the State of residence were ordered, the mother could object by invoking Articles 13(1)(b) or 20 of the 1980 Hague Convention. Despite being able to demonstrate a serious risk to the child if he were to be returned in view of the domestic violence witnessed, the authorities of the country of habitual residence could still order return by ensuring adequate arragnements to prevent the foreseeble risks, under the terms of Article 11(4) of Regulation No 2201/2003.[13] Unfortunately, the CJEU did not resolve these disputes and missed

[13] I. PRETELLI, Three Patterns, One Law: Plea for a Reinterpretation of The Hague Child Abduction Convention To Protect Children from Exposure to Sexism, Misogyny and Violence Against Women, in M. PFEIFFER, J. BRODEC, P. BRÍZA and M. ZAVADILOVÁ (eds),

the opportunity to ascertain what the safe return of the child would look like in contexts of gender-based violence.[14]

Finally, during the hearing the High Court confirmed the existence of the court decision that definitively granted the mother sole custody of the common child. This led to the closure of the debate before the Finnish court concerning the return of the child to Sweden.

III. The Dublin III System and the Perspective of Children in Situations of Gender Violence

A. Mother's and Child's Asylum Claim Based on Gender Grounds

Member States are constantly confronted with the emerging challenges of asylum law and gender, as women and girls, who are often victims of multiple forms of discrimination and gender-based violence, represent a high percentage of requests for international protection. However, gender-based persecution is not recognized independently, unlike the other five forms of persecution listed in the 1951 Geneva Convention.

In the face of this extremely complex reality, Article 60(1) of the Istanbul Convention contributes to filling one of the major gaps in international law on migration and the protection of the rights of migrant victims by determining that "gender-based violence against women may be recognised as a form of persecution as defined by article 1.A (2) of the Geneva convention and as a form of serious harm giving rise to international protection".

The special difficulties faced by foreign women and their children who are victims of violence against women has led the Council of Europe, in drawing up Sustainable Development Goal 5 of the Gender Equality Strategy 2018-2023, to

Liber Amicorum Monika Pauknerová, Praha, 2021, p. 363-393, at p. 387 illustrates that the rule, elaborated in an attempt to make mutual trust (and perhaps an assumed "abstract interest of the child") prevalent to the best interests of the child in danger, is particularly ill-suited in cases of gender-based domestic violence because, on the one hand, it does not ensure any deterrence – it is unlikely for a mother not to violate statutory rights of the father if the child is in real danger – and, on the other, because it does not respect basic rights of the child, as the right to life, health and a sound development. As observeed by the author, *ibidem*, the Recast of Regulation 2201/2003, namely Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction and the recognition and enforcement of judgements in matrimonial matters and in parental responsibility issues, and on international child abduction, OJ L 178 of 2.7.2019, has introduced changes with the aim of making it possible for both Courts to ensure that the best interests of the child are pursued throughout the procedure.

[14] On the subject, see C. RUIZ SUTIL, Implementation of the Istanbul Convention in the recast Brussels II bis Regulation and its impact on international child abduction, *Cuadernos de derecho transnacional*, 2018/2, vol. 10, p. 615-641.

conceive a Draft Recommendation dedicated to the protection of the human rights of migrant, refugee and asylum-seeking women and girls.[15]

As for the children of these victims of gender violence, the recommendations and decisions issued by the Committee on the Elimination of Discrimination against Women (CEDAW) stress that the extent of this violence is such as to have far-reaching effects on these minors, impacting their overall development and jeopardising their best interests. Likewise, the European Parliament resolution of 6 October 2021 on the impact of intimate partner violence and custody rights on women and children[16] notes that children may suffer what is called 'witnessed violence', an essential factor in the determination of any measure of parental responsibility,[17] including those falling within asylum claims[18]. Further, the ECHR holds that victims of domestic violence, together with their minor children, belong to the group of "vulnerable individuals" and are entitled to international protection by States.[19]

If we focus on the gender-based asylum claim in Case C 262/21 PPU, we find that it also includes the claim for the child on the grounds of overexposure to gender-based violence. Under Article 7(3) of Directive 2013/32/UE,[20] it is possible to file a request for the child through a single adult representing him or her, who may be a parent or another relative.[21] In this sense, Article 20(3) of Regulation No 604/2013 provides that the status of the minor accompanying the applicant and meeting the definition of family member shall be indissociable, provided that it is in the best interests of the child.[22] Likewise, it follows from recitals 13, 15 and 16 of the aforementioned Dublin III text that the best interests of the child must be a primary consideration in joint asylum processing, as this aims to guarantee a permanent status children, that avoids the danger they may face if returned to the

[15] GEC-MIG (2021) 3 rev 2 20. See https://www.coe.int/fr/web/genderequality/migrant-and-refugee-women-and-girls.

[16] P9_TA(2021)0406. See recitals I and N of the resolution.

[17] C. RUIZ SUTIL, La movilidad intra-europea de las mujeres extranjeras irregulares víctimas de la violencia intrafamiliar: carencia de igualdad de género en la normativa de la Unión Europea, *La Ley Unión Europea*, 2020/83, p. 8.

[18] Paragraphs 29 and 31 of the conclusions of Mr. Pilamäe in Case C-262/21 PPU state that the asylum application falls within the scope of Regulation No 2201/2003. And that the concept of "civil matters" must be understood as an autonomous term of Union law covering all claims, measures or decisions in matters of "parental resposibility", including those aimed at protecting the child, as clarified by the Judgment of the CJEU in Case Gogova v Iliev (C-215/15), para 26, EU:C:2015:710.

[19] Opuz v. Turkey, Application no. 33401/02, Council of Europe: European Court of Human Rights, 9 June 2009, para. 160, available at: https://www.refworld.org/cases, ECHR,4a2f84392.html [accessed 17 April 2022].

[20] Directive of the Parliament and of the Council of 26 June 2013 on common procedures for granting or withdrawing international protection (OJ L 180, 29.6.2013).

[21] Judgment of the CJEU of 4 October 2018, Ahmedbekova (C-652/16), paras 53 to 55, EU:C:2018:801.

[22] See judgment of the CJEU of 23 January 2019, M. A. and others (C-661/17), paras 87 to 90, EU:C:2019:53.

country where they may suffer persecution. Thus, the competence of the Member State responsible for the asylum application assessment will cover the joint request of the mother and child, which has been motivated by domestic violence.

Therefore, despite the fact that the child's perspective in situations of gender-based violence is not expressly incorporated in Regulation No 604/2013, we must allow greater flexibility in assessing the requirements for asylum requests in these situations. For instance, we could cease to require the father's consent when initiating the procedure for international protection for the child when it is motivated by gender issues. Moreover, if it is a young child, as in the present Case C 221/PPU, this component becomes more relevant in the context of gender violence, requiring greater care and the efforts needed to ensure the emotional stability of the child. We must pay sufficient attention to situations of vulnerability related to these traumatic experiences.

B. Hierarchical Criteria in the Search for the State Responsible for Asylum – The Incorporation of Gender-Based/Domestic Violence

In the intra-European space, the Dublin Regulation[23] has become a mechanism for monitoring, early warning and crisis management in connection with asylum applications. Its functions are basically to monitor the status of requests for international protection in the Member States and to establish a framework for structured and orderly action to identify problems arising from migratory pressure.

To this end, Articles 7 *et seq*. of the Dublin text establish several graduated criteria that determine the country responsible for examining the asylum request. Without leaving it to the will or preferences of the persons concerned, priority is given hierarchically to: the family unit (Articles 8 to 11); possession of residence documents and visas (Article 12); irregular entry or residence (Article 13); entry with visa exemption (Article 14), and application at airports or transit zones (Article 15). As a subsidiary function, a closing clause is included in favour of the State where the application was submitted (Article 3(2)).[24]

However, the Dublin system has proved to be unworkable and ineffective,[25] as it mainly favours the objectives of European integration and minimizes the rights of applicants. In fact, the hierarchy of criteria for assigning the State respon-

[23] This Regulation originated in the 1997 Dublin Convention (OJ C 254 19.8.1997), which was replaced by Regulation (EC) No 343/2003 of the Council of the European Union, or Dublin II, as amended by the Dublin III Regulation.

[24] The judgment of the CJEU of 6 June 2013, in Case C-648/11, ECLI:EU:C:2013:367, establishes an exception in this sense, altering the logic of the asylum system. Thus, when a minor who has no family applies for asylum in several States, the Member State responsible for examining the application is the one where the minor has lodged his or her asylum application. On this issue, see M. REQUEJO ISIDRO (note 4), p. 491.

[25] Currently, due to the massive influx of forced migrants and the imbalances within the EU arising from the current asylum system, which places a burden on frontline Member States, there is a legislative proposal for reform to replace the current Dublin text with a new regulation on asylum and migration management. See https://www.consilium.europa.eu/en/policies/eu-migration-policy/eu-asylum-reform/ [accessed 20 April 2022].

sible is reported as being misapplied.[26] And the rules on the transfer of responsibility laid down by the Dublin III Regulation undermine the efficiency of asylum procedures.

If we look at the cases of asylum requests filed by victims of gender violence, as opposed to what happens with unaccompanied minors,[27] we can see that there is no criterion for establishing which State is responsible in such scenarios. An example of this is Case C 262/21 PPU, where the gender perspective has not been sufficiently included in the answers given to the preliminary ruling questions. This invisibility has been detected by the European Parliament's Committee on Women's Rights and Gender Equality,[28] which has called on the Committee on Civil Liberties, Justice and Home Affairs to incorporate its suggestions based on the specific needs of women and girls throughout the complex asylum procedure.

The growing number of asylum requests in the EU based on discrimination and violence against women raises the question whether the current criteria for assigning responsibility of the Member State are inadequate to address this problem. If they were to be corrected, we suggest including, for example, the place where the victim resides, leaving it to the wishes of the victim to decide. This would avoid re-victimization and the need to recount the situation experienced before other judicial or administrative officers, with a consequent saving of human and economic resources.

At present, one way of altering the hierarchy of criteria for transmission of competence to the State responsible for examining asylum applications is via assessment of the best interests of the minor (Article 6(3) of Regulation No 604/2013). Also, for the European asylum framework, as established by CJEU doctrine,[29] we should keep in mind Article 24(2) of the Charter of Fundamental Rights of the European Union and take account of the circumstances of the specific case, in particular the age of the minor, her physical and emotional development and the intensity of his emotional relationship with his parents. In the absence of *gender mainstreaming* being incorporated into Regulation No 604/2013 – *i.e.* an obligation established at international and European level to ensure the application of the best interests of the child and his or her special vulnerability in situations of gender or domestic violence –, we must assess the corrective factors in paragraphs (b) and (c) of Article 6(3) of the Dublin text. The victimization experience of minors in contexts of gender-based violence has a very special impact on the

[26] See Report on the implementation of the Dublin III Regulation (2019/2206(INI)), 2.12.2020. Committee on Civil Liberties, Justice and Home Affairs. Rapporteur: Fabienne Keller, https://www.europarl.europa.eu/doceo/document/A-9-2020-0245_EN.html [accessed 2 April 2022].

[27] M. REQUEJO ISIDRO (note 4), p. 489-492.

[28] See (2019/2206(INI)).

[29] This follows from Article 8 and Recital 13, in addition to Article 6(3)(c), of the Dublin Regulation, which list certain elements to be taken into account when determining the best interests of the child: safety and security considerations, especially where there is a risk of the child becoming a victim of trafficking in human beings.

treatment provided by international protection, in addition to trying to overcome the problems caused by transfer to another State under the Dublin III system.[30]

We believe that ultimately, in determining which Member State is competent for the asylum request, it will be necessary to apply the gender approach to the criteria for assigning the country responsible, in order to provide adequate protection in accordance with the particular needs of people suffering from the scourge of domestic violence.

IV. International Child Abduction and European Asylum Law

A. Redefining the Wrongfulness of International Child Abduction in the Face of Dublin III Mandatory Transfers

One of the keys to understanding the answers given to the preliminary questions in Case C 262/21 PPU is determining the lawfulness of the transfer of the child. To do so, it is necessary to refer to the meaning of the term "wrongful removal" adopted in the 1980 Hague Convention and in Regulation No 2201/2003. Defining this concept does not depend exclusively on the purely material and objective finding that the child has been removed or retained outside the place of his or her habitual residence, without the consent of the holder or co-holder of the parental responsibility. In order to describe the case as "unlawful", it is also necessary to know that the infringement of the right of custody is due to an act attributable to the parent responsible for the child's removal, an act aimed at obtaining pratical or legal advantages to the detriment of the other parent. An examination of the CJEU judgments on the interpretation of Regulation No 2201/2003 leads to an identical concept of wrongful removal or retention.[31]

Case C 262/21 PPU concludes that the removal of the child is not the result of an act attributable to the parent responsible for the removal, but is the consequence of the effect of a specific regulation, Regulation No 604/2013, the application of which is imposed both on the Member States and on applicants for international protection. Therefore it cannot in itself constitute an infringement of the right of custody within the meaning of Article 2, point 11, of Regulation No 2201/2003. To arrive at this answer, we can use the analogy of the concept of *force majeure* in contracts. The unlawfulness of the removal of the child may derive from a factual situation that can be described as an "irresistible and external event", beyond the mother's will and beyond her control. The transfer obligation in

[30] The ECHR and CJEU have pronounced on this issue. *See* Mª.C. CHÉLIZ INGLÉS, El traslado de solicitantes de asilo a Estados miembros con condiciones menos favorables, in D. MARÍN CONSARNAU (coord.), *Retos en inmigración , asilo y ciudadanía. Perspectiva Unión Europea, internacional, nacional y comparada*, Marcial Pons, Madrid, 2021, p. 319-328.

[31] See, inter alia, Judgment of the CJEU of 8 June 2017, OL (C-111/17 PPU), para 63, EU:C:2017:436.

the context of a decision arising from the application of the Dublin III Regulation results in the parent and her child having to travel to the State responsible for the asylum examination. These circumstances have nothing to do with the mother's intention to leave Sweden.

The abusive parent's counter-argument is that the mother has violated his right to custody, as he never gave his consent to the child's removal to Finland. Furthermore, the father insists that the mother used the asylum procedure for purposes other than those for which it was intended. However, this reasoning becomes weak in the absence of proof of such a subjective or intentional element. In fact, if the mother failed to comply with the provisions of the enforceable decision to transfer to the state responsible for asylum seekers in order for her behavior not to be considered unlawful, she would compromise the achievement of the objectives of Regulation No 2201/2003, in addition to the consequences of such disobedience.

The conclusion would be different if, on the pretext of a request for international protection filed on her behalf and on behalf of the child, the mother had sought to create a *de facto* situation in order to deprive the father of his custody rights.[32] This would be the case if the mother had fled with her child because of gender violence, seeking a safe haven and distance from her abuser, a controversial issue that is receiving the attention of the Hague Conference on Private International Law.[33] In this respect, Article 13(1) (b) is certainly available, however, the extent to which the exception therein can be relied upon is controversial. Differrently from the past, there is an emerging trend which considers that the exception should be used as a ground for refusing return in cases of gender biases leading to violence against women in domestic contexts.[34]

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[32] See Judgment of the CJEU of 18 December 2014, McCarthy and Others (C-202/13, para 54, EU:C:2014:2450). In this connection, the Court has stated that proof of abuse requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the EU rules, the purpose of those rules has not been achieved, and, second, a subjective element consisting in the intention to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining it (judgments in Hungary v Slovakia, C-364/10, EU:C:2012:630, para 58 and the case-law cited, and O. and B., EU:C:2014:135, para 58).

[33] See the Good Practice Guide. Part IV. Art. 13.1) b of the 1980 Hague Convention, at https://www.hcch.net/es/publications-and-studies/details4/?pid=7059. On such guidance guiding and 'soft law' see, inter alia, G. MORENO CORDERO, El interés superior del menor y su retorno seguro en sustracciones intracomunitarias fundadas en la violencia de género: el grave riesgo en la guía de buenas prácticas, in A. Ortega Giménez (dir.) I. Lorente Martínez y L. S. Heredia Sánchez (coords.), *Europa en un mundo cambiante: Estrategia Europa 2020 y sus retos sociales*, Cizur Menor, 2021, p. 119-134. N. RUBAJA, La nueva "Guía de Buenas Prácticas" para la aplicación del art. 13.1.b) – "excepción de grave riesgo" - del Convenio de La Haya sobre los aspectos civiles de la sustracción internacional de menores, *Práctica de las relaciones de familia y sucesorias a un lustro del Código Civil y Comercial Libro homenaje a la memoria de Nora Lloveras*, Santa Fe, 2020.

[34] I. PRETELLI, (note 13); M. REQUEJO ISIDRO, "Child Abduction and Domestic Violence in the EU, *Anuario Español de Derecho Internacional Privado*, 2006/6, p. 179-194; N. BROWNE, Relevance and Fairness: Protecting the Rights of Domestic Violence Victims and Left-Behind Fathers under the Hague Convention on International Child

As a consequence of the rise in the number of forced migrations in the EU, it becomes necessary to redefine the concept of wrongfulness in international child abduction in contexts of requests for international protection, as the CJEU did in the decision of 2 August 2021.

In summary, we consider that mutual trust among the EU Member States and a common asylum culture should lead to the traditional concepts of private international law being brought into line with these new migratory realities.

A. The Principle of Consistency in the Interlocking Application of the International Child Abduction and Asylum Instruments

The formulation of the principle of the consistency of the provisions of European Union law is regarded as the legislative embodiment of a principle that could be deduced from the case law and doctrine on European private international law, as stated by Professor SÁNCHEZ LORENZO.[35] This principle essentially addresses the need for consistency among the rules and legal concepts contained in the different provisions of European law, both in their formulation and in their interpretation. The author makes clear that it is not a normative principle as such, but rather that coherence meets the need for a systematic interpretation of the different rules of private international law, so as to ensure the unity and maximum effectiveness of the entire legal system.

Coherence between the rules of private international law and those of substantive law, such as those on asylum, is not easy to achieve, given the increasing complexity of EU Regulations. While conflict rules and international jurisdiction share certain common objectives, these are more distant in the case of the substantive rules of public law, as is true of asylum law, because of the dimension of legal certainty that surrounds it.[36]

If we look more closely at the coherence principle in the European instruments applicable in the C 262/21 PPU case, we are faced with a difficult task. On the one hand, the drafting of Regulations No 2201/2003 and No 604/2013 (Dublín III) unfolded in the context of negotiations and particular tensions arose at different times.[37] On the other hand, and, above all, the two texts are different in nature. We also find that, unlike Regulation No 2201/2003, the Dublin Regulation makes mention of the coherence principle, in its Recital 10. This principle functions as a guide in the interpretation and application of the EU asylum *acquis* with the aim of

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Abduction, *Duke L. J*., 2011, p. 1193-1238; T. KRUGER and L. VAN WYNSBERGHE, Vulnerability, domestic violence and child abduction, in C. Corso and P. Wautelet (dirs.), *L'accès aux droits de la personne et de la famille en Europe*, Brussels, 2022, p. 47-58.

[35] On this subject see S. A. SÁNCHEZ LORENZO, Principio de coherencia en el Derecho internacional privado europeo, *REDI,* 2018/2, vol. 70, p. 17-47

[36] A. SOLANES CORELLA, Protección y principio de *non-refoulement* en la Unión Europea, *SCIO. Revista de Filosofía*, 2020/19, p. 27-62.

[37] J. BASEDOW, EU-Kollisionsrecht und Haager Konferenz: ein schwieriges Verhältnis, *IPRax*, 2017/2, vol. 37, p. 194-200, is right when he points out that it is the very nature of the rules to present themselves in an uncoordinated manner.

ensuring equal treatment for all applicants for, and beneficiaries of, international protection.[38]

From our point of view, the principle of coherence becomes the cornerstone when dealing with the answers to the questions referred to the CJEU for a preliminary ruling in Case C 262/21 PPU. In a European cross-border context, the dispersal of regulatory sources on international child abduction,[39] in combination with international refugee law,[40] results in a highly complex system, since the answers provided operate in very different universes. Incorporating the coherence principle thus requires a case-by-case analysis of the in order to ascertain the values and objectives pursued by the various provisions of European law that contain a relevant concept or solution. As can be seen from the solutions provided in the aforementioned CJEU decision in case C 262/21 PPU, we note that the consistency principle has functioned as a hinge between the interrelated legal instruments, despite the fact that it is not referred to in the interpretation of Article 2, point 11, of Regulation No 2201/2003 in relation to the transfer of the child and her mother to another Member State in accordance with the requirements of Regulation No 604/2013.

From a more substantive perspective, if we look at conceptual coherence,[41] the interpretative work to arrive at more harmonious interpretations of the legal concepts used in different European legal instruments is endeavouring. Despite the inevitable language problems[42] and the differing legal traditions underlying each concept,[43] the European legislator has been accepting conceptual consistency in the task of approximating the meanings of the terms included in the EU instruments.[44]

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[38] See Recital 29 of the Dublín III Regulation and the desirability of ensuring consistency in the texts of European asylum law.

[39] In addition to the 1980 Hague Convention, one should take into account Council Regulation (EU) 2019/1111 of 25 June 2019 (note 13), which replaces Regulation No 2201/2003 as of August 2022.

[40] The analysis of this issue in mmigration law is undertaken by P. JIMÉNEZ BLANCO, Movilidad transfronteriza de personas, vida familiar y Derecho internacional privado, *Revista Electrónica de Estudios Internacionales*, 2018/35, p. 1-49, DOI: 10.17103/reei.35.06.

[41] Concept devised by A.L. CALVO CARAVACA, El derecho internacional privado de la Unión Europea. Valores y principios regulativos, *Revista Jurídica del Notariado*, 2020/110, p. 11-40.

[42] As highlighted by T. RAUSCHER, Von prosaischen Synonymen und anderen Schäden: zum Umgang mit der Rechtssprache im EuZPR/EuIPR, *IPRax*, 2011/1, vol. 32, p. 40-48.

[43] There are concepts that may sound the same, but which reflect very disparate ideas, as graphically demonstrated by I. ISAILOVIC, Same Sex but Not the Same: Same-Sex Marriage in the United States and France and the Universalist Narrative, *AJCL*, 2018, 66/2, p. 267-315.

[44] It should be noted that, according to Recital 10 of Regulation No 2201/2003, it can be understood that decisions relating to the right to asylum are excluded from the concept of civil matters covered by this text. The CJEU, for its part, has already stated that civil measures refer to all those concerning the protection of minors, including those subject to public law, as is the case in the Judgment of the CJEU of 21 October 2015, Gogova v

As we assess the particular circumstances of Case 262/21 PPU, it is of interest to see how the consistency principle works in terms of the concept of transfer as adopted by any given authority under Regulation No 604/2013. Although the same term is used, the meaning assigned to transfer may differ from one authority to the next, given that it originates in a different logic and serves a different function in each text,[45] and should be interpreted in the light of the regulatory purposes in which it is embedded.

Under the Brussels II bis Regulation system, a wrongful removal or a wrongful retention is one that occurs in breach of a custody right actually exercised, separately or jointly, or that would have been exercised in the absence of such a transfer. By contrast, the transfer decision taken under the Dublin III Regulation occurs when the allocation criteria of the Member State responsible for the examination of an asylum request are inspected. In the light of these elements, the Advocate General[46] considers that in Case C-262/21 PPU the transfer decision must not be taken in isolation, but should rather be assessed in the context of the entire procedure of which it is part. It is therefore concluded that the transfer of the parent to a Member State other than that of his or her habitual residence is not unlawful where it is required by a decision arising from the application of the Dublin Regulation.

Ultimately, the challenge remains of resolving possible discrepancies in the implementation of various international instruments concerning minors who witness domestic violence. To avoid the independent and unilateral application of each regulation, a balanced approach is needed in the conceptual interpretation of the terms used and, above all, we should draw on to the aforementioned principle of coherence and conceptual consistency. To this should be added that, when the issue involves domestic violence, the provisions of the Istanbul Convention, which insists on the application of the axis of coherence as a fundamental pillar for providing a comprehensive response to violence against women and their children, are fundamental. With the specific aim of making the human rights of victims a priority, the European Parliament Report of 23 February 2022 on the protection of the rights of the child in civil, adminsitrative and family law proceedings,[47] holds that despite not being expressly mentioned, consistency should be sought in criminal, civil and administrative proceedings affecting a family and children, particularly in cases of gender based domestic violence.

Iliev (C-215/15, ECLI:EU:C:2015:710. In any case, this interpretative question will be solved with the entry into force in August 2022 of Regulation No 2019/111, since its Recital 4 indicates that this regulation will apply to those measures of parental responsibility over the child, including those regarded by national law as measures of public law, such as those derived from international protection.

[45] J.D. LÜTTRINGHAUS, "Übergreifende Begrifflichkeiten im europäischen Zivilverfahrens- und Kollisionsrecht: Grund und Grenzen der rechtsaktsübergreifenden Auslegung, dargestellt am Beispiel vertraglicher und außervertraglicher Schuldverhältnisse", *RabelsZ*, 2013/1, vol. 77, p. 31-68.

[46] See Opinion of Advocate General Priit Pikamäe, delivered on 14 July 2021, ECLI:EU:C:2021:592.

[47] 2021/2060(INI).

V. Conclusions

The hectic legislative activity of the EU in the field of international family law, together with the legislative inflation, characteristic of the European Asylum System, has led to unforeseen situations. These circumstances have led to solve Case C 262/21 PPU, by means of an integrated view of the various EU instruments, which ultimately lays the foundations for interrelated responses.

The solutions put forward in this case suggest that it is necessary to merge instruments that concern the law of asylum and others that use techniques of private international law intended for dealing with cases of international child abduction. Beyond the difficulties mentioned above, we have tried to keep in mind the principle of coherence with a view to achieving better interaction of removal provisions in the different European instruments relating to the unlawfulness of international child abduction.

In addition, we have stressed the need to implement gender mainstreaming in asylum requests involving children and mothers who are victims of gender violence. Case C 221/PPU offers both an example of how gender biases against women, and the violence that ensues, influence asylum requests and represent the background of illegal transfers of children from one State to another. In these pages we advocate the confluence of the perspective of children and gender mainstreaming in private international law issues especially and necessarily in connection with asylum law. This gender methodology makes it possible to identify, question and assess discrimination, inequality and exclusion of women, as well as to eradicate the various forms of persecution based on violence against women and affecting their children. Despite the difficulties arising from the confusion among international instruments relating to the transnational issues mentioned above, the central interest of the child in contexts of domestic violence must be identified in order to guide the actions of the authorities involved.

Ultimately, future strategies derived from the implementation of international and European law and the domestic law of each State should be even more ambitious in order to eradicate domestic and gender-based violence, a scourge that is widespread throughout the EU and that affects women and children in particular.