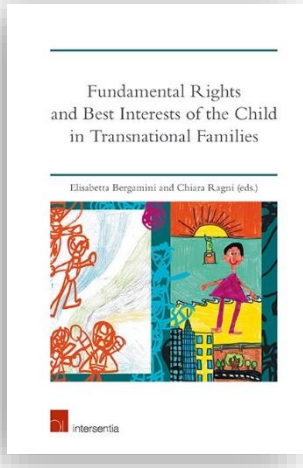

Fundamental Rights and Best Interests of the Child in Transnational Families
ISBN 978-1-78068-665-3

Elisabetta Bergamini and Chiara Ragni (eds.)

Published in September 2019 by Intersentia
www.intersentia.co.uk

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CROSS-BORDER RECOGNITION OF ADOPTION

Rethinking Private International Law from a Human Rights Perspective

Chiara Ragni

1. LACK OF HARMONISATION OF FAMILY LAW IN EUROPE AND ITS IMPACT ON RECOGNITION OF FOREIGN ADOPTIONS

The practice of adoption was largely viewed as a strictly national procedure for a long time, and as such, it was regulated by domestic rules. The international dimensions of this phenomenon have emerged as a relatively recent occurrence. These include both the movement of children across international borders for adoption and the possibility of obtaining the recognition of *status filiation* is duly acquired abroad through adoption. As we will see, notwithstanding their cross-border implications, these matters are only partly covered by international rules. Questions regarding issues such as the criteria that prospective parents should meet to be eligible for adoption or the legal effects of adoption are still mostly regulated by domestic legislation; States remain in fact reluctant to refrain from exercising their exclusive jurisdiction in family matters.

Even in the EU context, notwithstanding the entry into force of an increasing number of rules defining key aspects of jurisdiction, applicable law and recognition and the enforcement of judgments in the fields of divorce,

maintenance obligations, parental responsibility, among others,[1] substantive aspects of family law are still regulated by national legislation. The failure to pass uniform rules on family issues demonstrates the cautious attitude of States in this regard.

For example, the limited number of ratifications alleged to the 1967 European Convention on the Adoption of Children, and even fewer to the revised version of the treaty, which was adopted in 2008 to account for legal and social developments in the European framework,[2] can be read as proof of the aforementioned reluctance of States to cede their exclusive jurisdiction in family matters. This approach is due to the continuing influence on family law of moral, religious or political beliefs, which often vary across States.

Against this background, cross-border recognition of the parental status arising from foreign adoptions has encountered obstacles. In some cases, orders duly entered into in one country may be considered contrary to the public policy of another country (such as in the case of adoptions pronounced in favour of same-sex couples). In others such orders may be recognised with different – and generally more limited – effects than those produced in the country of origin (as in the case of single adoption). Furthermore, they could be deemed as not valid under the law, according to the conflict-of-law rules of the concerned State (such as in the case of *kafalah*, the alternative care option in Islamic law for children deprived of a family environment).

At the international level, the only legal instrument that addresses the matters under consideration is the Hague Convention of 29 May 1993, which

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1 On the harmonisation of EU private international law in family matters, see K. Boele-Woelki, *Perspectives for the Unification and Harmonisation of Family Law in Europe*, Intersentia, Cambridge 2003.

2 It is worth recalling, even if the topic will be addressed in section 3, that the 2008 European Convention on the Adoption of Children (Revised – Strasbourg, 27.11.2008) was elaborated also in order to take into account developments that occurred in the European context with regard to adoption. It particularly highlights the need to acquire the consent of the father to the adoption, even in the case of children born out of wedlock (Council of Europe Treaty Series – No. 202. Explanatory Report, CETS 202, Adoption of Children (Revised Convention), §27 ff.), and it also stresses the importance of considering the opinion of the child when he or she is considered by law as having sufficient understanding. This reflects the emphasis placed at both the international and EU levels on the importance of giving the child an opportunity to be heard in proceedings affecting him or her unless such hearing is inappropriate. Finally, considering the legal and social developments in most CoE Member States with regard to the regulation of family matters, the Convention envisages the possibility of opening adoption to 'same sex couples who are married to each other or who have entered into a registered partnership together'. It also leaves States 'free to extend the scope of [the] Convention to different sex couples and same sex couples who are living together in a stable relationship'. For more details on the Convention and, more broadly, on the regulation of adoption in Europe see C. Fenton-Glynn, *Children's Rights in Intercountry Adoption: A European Perspective*, Intersentia, Cambridge 2014.

provides for the automatic recognition of intercountry adoption orders.[3] However, notwithstanding its relevance, this treaty only covers situations when the parents and the child are resident in two different Member States. Outside its scope, recognition of foreign adoptions is subject to domestic rules, with no legal guarantee that the situation lawfully acquired in one country and its legal consequences will be recognised in another.

This matter has been broadly addressed by national courts. It has also been the object of some relevant cases brought before the European Court of Human Rights (ECtHR), which was called upon to pronounce on whether the lack of recognition of a foreign adoption violated family rights under Article 8 of the European Convention on Human Rights (ECHR), as well as minors' rights. As stated by the 1989 UN Convention,[4] and, accordingly, by the EU Charter of Fundamental Rights,[5] the child's best interests should in fact be a primary consideration in all decisions affecting minors.[6]

Assuming, also in the light of the analysis of the jurisprudence of the ECtHR, that the recognition of *status filii* (as well as the individual status of the child) should be considered a means to protect family rights and pursue the best interests of the child, the aims of this chapter are as follows: i) to frame the rules aimed at regulating the recognition of foreign adoptions in the European context; ii) to identify (also in the light of existing practice) possible gaps in EU, international and national legislations regarding these matters; and iii) to assess how conflict-of-law rules on the recognition of *status filii* duly acquired abroad should be reshaped in light of human rights standards and social developments in family relationships. The underlying idea is that a line of continuity between the legal situation created in the State of origin and the domestic legal order should be guaranteed as a matter of principle, even if limited exceptions should be available to fulfil the best interests of the child in any particular case.

2. THE INTERNATIONAL LEGAL FRAMEWORK: THE 1993 HAGUE CONVENTION AND ITS LIMITS

Beginning in the 1960s, the growth in international adoptions with the increasing number of orphan children made States aware of the need to cooperate and

3 The Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption (29.05.1993). Other Conventions that are relevant in this area (such as the aforementioned CoE European Convention on the Adoption of Children) limit themselves to providing some general standards that parties should comply with to safeguard the child's best interests; however, they do not address recognition issues, nor do they include conflict-of-laws rules.

4 Convention on the Rights of the Child (New York, 20.11.1989), Article 3.

5 Charter of Fundamental Rights of the European Union (Nice, 2000), Article 24.

6 On the child's best interests principle and its relevance with regard to transnational families, see M. Distefano in this volume.

embrace a multilateral approach to the phenomenon; their first aim was to define common shared standards to protect children against abduction, human trafficking or any other form of abuse. To that end, the Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption was finally concluded at the 17th session of the Hague Conference on Private International Law. The treaty, which only applies in cases where the adoptive parents and the child reside in different Member States, aims at establishing 'safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognised in international law'. It provides procedural standards for courts, administrative authorities and private intermediaries to guarantee that the best interests of the child principle is the guiding standard in all decisions regarding the adoption of minors, as is also stated by the aforementioned 1989 New York Convention.

Based on the premise that the best interests of minors are served by growing up with their own parents or at least maintaining his or her cultural, linguistic, religious and ethnic identity, as appropriate, the 1993 Hague Convention considers that adoption should be pronounced only in cases where it is the only means of ensuring 'a permanent family to a child for whom a suitable family cannot found in his or her State of origin'.[7] The underlying idea is therefore that intercountry adoption should be considered a last resort and that it only serves the purpose of providing a family to abandoned children.

In line with its stated objective, the Convention does not apply to simple adoption and only covers adoptions that create a permanent parent-child relationship.[8] Single adoption might therefore be a viable option under the treaty,[9] provided that it is likely to produce the same legal consequence of creating a parentage link or where it can be converted into an adoption having such an effect in the receiving State.[10] With regard to other conditions that an order should fulfil to benefit from the Convention's regime, Chapter V lists some procedural safeguards aimed at ensuring the protection of children's rights against any possible abuse.

Like other treaties and legal instruments adopted in the field of private international law, to ensure internal consistency and the protection of national fundamental principles, Article 24 provides that 'the recognition of an adoption

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7 See 1993 Hague Convention, Preamble, which reproduces the idea expressed in Article 21, sub-paragraph (b) of the United Nations Convention on the Rights of the Child.

8 See Article 2 of the 1993 Hague Convention.

9 Notwithstanding references to adoptive parents, the possibility that intercountry adoption may also be pronounced in favour of a single person is clearly envisaged by Article 2 of the Convention.

10 This hypothesis is regulated by Article 27, which permits the receiving State to convert simple adoption into a full adoption, provided that the law allows it and the consents that are necessary for the purpose of such an adoption have been given. On this point, see P. H. Pfund, 'Intercountry Adoption: The 1993 Hague Convention: Its Purpose, Implementation, and Promise', (1994) *Family Law Quarterly*, 53–88.

may be refused in a Contracting State only if the adoption is manifestly contrary to its public policy, taking into account the best interests of the child'. As is further clarified in the Explanatory Report, the specification that the safeguarding of national interests and values should necessarily be balanced against the protection of the best interests of the child means that the mere existence of large-scale differences among domestic legislation with regard to the regulation of minors' adoption is not a sufficient ground to refuse the recognition of foreign decisions.[11] In addition, to affirm the continuity of parental bonds and thereby avoid limping situations, the Convention provides a preventive mechanism of coordination between the child's State of origin and the State of destination.[12]

However, this mechanism does not preclude the possibility that adoption is refused to same-sex couples or to unmarried persons in accordance with domestic rules. According to Article 5, the eligibility requirements are in fact subject to national legislation and the recognition of foreign decisions might be denied on the grounds of their alleged contravention of the fundamental principles of the requested State.[13]

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11 According to the Explanatory Report annexed to the 1993 Hague Convention: 'neither Article 24 nor any other articles of the Convention provides for the exception of the unknown institution as a ground to refuse recognition of the adoption granted in a Contracting State, … Thus, the solution is the same and the fact that the recognizing State does not have the institution of adoption, or a particular form of adoption, cannot be used as a ground to deny recognition to foreign adoptions' (para. 428).

12 See R. Baratta, 'La reconnaissance internationale des situations juridiques personelles et familiales', (2010) *Collected Courses of the Hague Academy of International Law*, 348, 271, at 343, where the author indicates that the Convention should therefore be capable of avoiding *a priori* the creation of limping adoptions in concerned States.

13 In Italy, see for example, Law No. 476 of 31.10.1998, which authorises the ratification and implementation of the 1993 Hague Convention, as amended by Law No. 149 of 28.03.2001, which provides that only married couples are entitled to intercountry adoption and foreign decisions should comply with fundamental principles of Italian law in family matters. According to this rule, the well-established jurisprudence of the Italian Supreme Court (*Corte di Cassazione*) decided that adoptions pronounced abroad in favour of single persons only produce in Italy the limited effects of the so called adoption in particular cases as envisaged by Article 44 of the Italian Law on adoption: 'This approach rests on the adoption in particular cases being conceived as not capable of interrupting the relationship between the child and his/her family of origin and giving rise to parental links between the former and the family of the adoptive parent'. On this issue, see C. E. Tuo, 'The Italian Regime of Recognition of Intercountry Adoptions of Children in Light of the ECHR: What about Singles?' (2015) *Cuadernos de Derecho Transnacional* 7, 357–68. On the specific issue of the recognition of foreign adoptions under the 1993 Hague Convention also see L. Carpaneto, 'Recognition of Protection Measures affecting Migrant Children' in F. Ippolito and G. Biagioni (eds.), *Migrant Children: Challenges for Public and Private International Law*, 419–53, n 25. However, the best interests of the child principle should also take precedence over fundamental principles of domestic legislation, due to it being, according to some scholars, a limit that prevails over the public policy exception. See F. Mosconi and C. Campiglio, *Diritto internazionale privato e processuale*, II, Torino 2014, p. 229.

Nonetheless, the safeguarding of national public concerns encounters a limitation in the need to protect the best interests of the child, which should take precedence over any other consideration.

Since the term 'family' is not defined under the Convention, which only makes reference to spouses or persons habitually resident in a State party, the possibility that intercountry adoption is pronounced in favour of same-sex married parents is not *per se* ruled out. The reasons why this scenario was left uncovered are in fact traceable to historical conditions. When the Convention was being drafted from 1988 to 1993, no country allowed same-sex couples to adopt. The question was still being debated even in States such as Denmark or the Netherlands, which pioneered same-sex partnerships or marriages. Against this background, negotiators abstained from specifically addressing the matter, thus leaving States free to decide for themselves whether the intended parent is qualified to adopt according to Article 5, if all the other conditions required by the treaty are fulfilled. In the light of the Convention, what instead is more questionable is the eligibility of *de facto* couples unless the decision concerns only one of the partners and/or is likely to produce the effects of a full adoption.

Beyond the discretion that States still enjoy regarding the interpretation of the concept of family under the Convention, a further and more important limit of the treaty concerns its scope of application. As anticipated above, Article 2 postulates that for the international discipline to be applied, the intended parents and the adoptive child must be resident in different Member States. Although all the EU Member States are parties to the 1993 Hague Convention, outside the European context, about half of the world's countries have never ratified the treaty. In such cases as well as in all the situations not covered by the Convention, the recognition of adoptions pronounced abroad is still entirely subject to domestic legislation unless bilateral agreements exist. Thus, foreign adoptions of children may not be recognised or may be given limited effects in the State where the parents reside, in cases when they do not meet domestic – both substantive and procedural – requirements[14] which, as well as conceptions of public policy, often vary from one country to another.

Under traditional methods of private international law, the recognition of legal parentage established abroad through adoption may prove to be hard given the lack of international or uniform conflict-of-law rules. The application of traditional methods could therefore result in the spread of limping situations.

[14] Even countries where the 1993 Hague Convention is in force might require additional conditions not provided by the treaty for the recognition of intercountry adoptions. See in this regard the report '20 Years of the 1993 Hague Convention Assessing the Impact of the Convention on Laws and Practices Relating to Intercountry Adoption and the Protection of Children', Preliminary Document No 3 of May 2015, drawn up by the Permanent Bureau for the attention of the Special Commission of June 2015 on the practical operation of the Hague Convention of 29.05.1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption.

This means that a status, though validly acquired under one State's system of private international law, is not recognised as valid under that of another. Such situations are not only undesirable but might also breach the family rights of the people involved.[15]

However, the margin of discretion that States enjoy in regulating family matters remains subject to the limits deriving from human rights law. In this regard, a distinction should be traced between purely internal situations, which fall within the scope of domestic legislation, and cross-border relationships, including both intercountry adoption and situations whereby a State is required to recognise status acquired abroad in accordance with the national legislation of a different country. While, as concerns the former, States are free to decide how to regulate the right to adopt, with regard to the latter, national values concerning for example the protection of traditional family must be balanced against the need to protect the social reality of situations already existing abroad.

This issue was brought before the ECtHR, where the refusal by national authorities to recognise foreign adoption orders was actually challenged on the ground of its incompatibility with the right to family life.

3. THE RIGHT TO THE CONTINUITY OF FAMILY STATUS: SOCIAL REALITY AND LEGITIMATE EXPECTATIONS v. LEGAL RELATIONSHIPS

Notwithstanding their falling within the domain of domestic law, family relationships are also protected under international law by human rights treaties. For example, the 1989 New York Convention, which is focused on minors, emphasises both the importance of the child growing up in a family environment and the role played to that end by intercountry adoption (Article 21(b)). It also places upon party States an obligation to protect family life from any kind of unlawful or arbitrary interference (Article 16). The right of individuals to have their family life protected is also enshrined at the international level in many human rights legal instruments, starting with the 1948 UN Declaration for Human Rights (Articles 12 and 29(2))[16] as well as the International Covenant on Civil and Political Rights (Article 23). In the European context, the same rights are protected by Article 8(1) of the ECHR and by Article 7 of the EU Charter of Fundamental Rights.

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15 On the impact of human rights considerations on the functioning of PIL mechanisms, see R. Baratta, 'Recognition of Foreign Personal and Family Status: A Rights Based Perspective' (2016) *Rivista di diritto internazionale privato e processuale*, 413.

16 The Declaration was proclaimed by the United Nations General Assembly in in General Assembly Resolution No 217 Paris on 10.12.1948 (UN Doc. A/RES/217 – III). Although the Declaration is not able to produce legally binding effects, its adoption made a fundamental contribution to the promotion of human rights and the adoption of treaties that are modelled on it.

The question is whether these norms also imply an obligation for States to recognise family *status* acquired abroad or, more specifically, if they also enshrine a right to adopt children.

While the right to adopt is not included, as such, among those guaranteed by the ECHR,[17] the relationship between the adoptive parents and the adoptee child is nonetheless considered to be a family tie for the purposes of Article 8.[18] Accordingly, as it was stated for the first time in *Hussin v. Belgium*, the refusal to give effect to a family relation or a *status* legally acquired abroad in principle amounts to an interference with protected rights.[19] Although the judges dismissed the application in the aforementioned case on the ground that the justification given by the State for validating the refusal appeared to be well-founded under the conflict-of-law rules governing the competence to declare a foreign order enforceable, the reasoning of the Court regarding the obligations of State parties in matters of recognition of a family *status* obtained abroad are of utmost importance for tracing the subsequent development of its jurisprudence on the matter.

Some years later, in *Wagner v. Luxembourg*, the Court had to pronounce on whether the failure of Luxembourg authorities to recognise a full adoption order issued by a Peruvian court in favour of a single person as valid in domestic law, which had been justified on the grounds of its allegedly being against public policy, had violated Article 8 of ECHR.[20]

After explaining that *de facto* 'family life' existed between the adoptive mother and the child even in the absence of a legal tie resulting from the enforcement of the foreign order, the judges considered that the refusal to recognise the Peruvian decision amounted to an interference with the right to family life of both the adoptive mother and the child. In assessing whether the interference was in breach of the rights protected by the Convention, the Court followed a consolidated approach. It first verified whether the cumulative conditions provided by Article 8(2) were fulfilled. According to the norm, for a domestic

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17 In this regard the ECtHR has already explained that this right cannot be inferred from the Convention, in which Article 8 only protects existing relationships. Therefore, States enjoy a broad margin of the discretion concerning the regulation of the requirements for adoption: ECtHR, *Frettè v. France*, No. 36515/97, 26.02.2002, ECHR 2002-I, §29.

18 'It must be pointed out that the adoption orders conferred on the applicants the same rights and obligations in respect of their adopted children as those of a father or mother in respect of a child born in lawful wedlock, while at the same time ending any rights and obligations existing between the adopted children and their biological father or mother or any other person or body': ECtHR, *Pini and Others v. Romania*, Nos. 78028/01 and 78030/01, 22.09.2004, §§140–142, ECHR 2004-V; the same concept was reiterated in more recent cases. See for example *Frettè v. France*, §32 and in the same vein *EB v. France*, in which the Court insisted that 'the provisions of Article 8 do not guarantee either the right to found a family or the right to adopt' [GC] *E.B. v. France*, No. 43546/02, 22.01.2008, §41.

19 ECtHR, *Hussin v. Belgium*, No. 70807/01, 06.05.2004.

20 ECtHR, *Wagner and J.W.M.L. v. Luxembourg, No*. 76240/01, 28.06.2007, ECHR 2007-VII.

restrictive measure to be considered legitimate under the Convention, national authorities should demonstrate that the limitation on the relevant rights was in accordance with the law (or prescribed by the law) as well as necessary in a democratic society and proportionate to the pursuit of specific legitimate aims set out by the treaty. Insofar as family relations are concerned, these include both safeguards for public health and morals and the protection of the fundamental rights of other persons. In *Wagner v. Luxembourg*, the Court first noted that the measure had been taken by French authorities in accordance with the law, namely with Article 367 of the Civil Code. The Article limited full adoption to married couples based on traditional notions of child-raising by a mother and father. However, most European states permit adoption by unmarried persons without any restriction, so that it was hardly proved that the denial of full adoption effects to the Peruvian order was also strictly necessary in a democratic society.

The Court further indicated that in cases involving children, their best interests – including the right to have the most favourable status recognised as well as the protection of their emotional and affective ties – should prevail over all other considerations. It then noted that in allowing the Luxembourg conflict-of-law rules to take precedence over the social reality of the situation, domestic authorities had precluded the adoptive child and her mother from being afforded legal protections granted by the law and from living their daily lives in the absence of insurmountable obstacles. Accordingly, the Court concluded that in the specific case at issue, the Luxembourg courts 'could not reasonably disregard the legal status validly created abroad and corresponding to a family life within the meaning of Article 8 of the Convention'.[21] It then reiterated its view of the Convention as follows:

> a living instrument and must be interpreted in the light of present-day conditions' … the Court considers that the reasons put forward by the national authorities – namely, the strict application, in accordance with the Luxembourg rules on the conflict of laws, of Article 367 of the Civil Code, which permits adoption only by married couples – are not 'sufficient' for the purposes of paragraph 2 of Article 8.[22]

Reference was therefore made to factual elements such as 'de facto family ties', 'day-by-day life' and 'social reality' that should take precedence over the strict application of legal rules in cases when this leads to an unjustified restriction of human rights, particularly when minors' interests are concerned.[23]

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21 *Wagner v. Luxembourg*, §133.

22 Ibid., §135.

23 The same approach was taken some years later with regard to the recognition of family ties deriving from recourse to surrogacy. In *Paradiso Campanelli v. Italy*, for example, the Court stated that 'la référence à l'ordre public ne saurait toutefois passer pour une carte blanche

The same approach was taken some years later in *Negrepontis-Giannissis v. Greece*, in which the Court considered the compatibility with Article 8 ECHR of the refusal of the Greek authorities to recognise an adoption order made in 1984 by a court in the American state of Michigan in favour of the uncle of a Greek citizen.[24] As the adoptive father was an orthodox bishop, and as such prohibited under Greek canon law from carrying out secular acts, including adoption, the recognition was refused on public policy considerations, which according to the Greek Supreme Court should be understood in Greece as embodying the aforementioned canon rules.

In finding a violation of Article 8, the ECtHR held that the refusal did not answer to a pressing social need. Even in a case when there should have been a legitimate aim worthy of protection, the measure taken by the Greek Supreme Court was disproportionate, as it completely denied the 'social reality' of a relationship that had existed for more than 20 years and which should have been properly considered.

Notwithstanding the differences between the two cases, the decisions of the ECtHR in *Wagner* and *Negrepontis* appear to point to the same conclusion. By making reference to factual elements or situations, the Court clarifies that Article 8 requires that domestic legislation provide a possibility of recognition of a legal parent-child relationships established abroad regardless of their validity under private international law.[25] Such an obligation depends on two main circumstances. The first and most important one is that the situation has been effectively created and actually exists within the legal order of a given country,[26] and has been developed and consolidated during a significant period of time, and the relationship has all the characteristics to be considered as a family tie for the purposes of Article 8.

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justifiant toute mesure, car l'obligation de prendre en compte l'intérêt supérieur de l'enfant incombe à l'État indépendamment de la nature du lien parental, génétique ou autre' ECtHR [GC], *Paradiso and Campanelli v. Italy*, No. 25358/12, 24.01.2017, §80.

24 ECtHR, *Negrepontis-Giannisis v. Greece*, No. 56759/08, 03.05.2011. For a comment, see P. Franzina, 'Some Remarks on the Relevance of Article 8 of the ECHR to the Recognition of Family Status Judicially Created Abroad', (2011) *Diritti umani e diritto internazionale* 5, 609–16.

25 In the same vein, see the recent Advisory Opinion, delivered upon the request of the French Court of Cassation, regarding the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother. ECtHR [GC], Advisory Opinion, No. P16-2018-001, 10.04.2019.

26 In this context, it has been correctly pointed out that 'for this condition to be met, both formal and substantial standards may have to be looked at. In *Wagner* and in *Negrepontis-Giannisis* the ECtHR referred to the fact that the foreign judgments at issue had *validly* created a family relationship in the country of origin and to the fact that each of these relationships had since become a *social reality*': P. Franzina, above n. 24, p. 612. It should be noted however that in *Pini* v. *Romania*, the ECtHR also envisaged the possibility that family life might arise from a 'lawful and genuine adoption order', despite the absence of any affective ties between the adopters (based in Italy) and the adoptees (residing in Romania). Ibid., §148.

Secondly, the recognition of the status should correspond with a legitimate expectation of the people concerned. According to the jurisprudence of the ECtHR, the concept of 'legitimate expectation' includes both that the status was validly acquired abroad without recourse to fraud and that the parties could expect to have their relationship recognised in light of the practice followed in similar cases. This last element clearly emerges from *Wagner*, in which the ECtHR noted that the adoptive mother acted in good faith (in reliance on a previously established practice of Luxembourg courts whereby Peruvian judgments pronouncing full adoption in favour of unmarried women were recognised by operation of law) and had a legitimate expectation of recognition.[27] According to some scholars, legitimacy also depends 'upon the intensity of the links the situation has with the foreign legal system under which the status was acquired'.[28]

The above suggested reading of the jurisprudence of the ECtHR finds support in the reasoning made *a contrario* in cases regarding surrogacy agreements, with particular reference to the recent decision rendered by the Grand Chamber in *Paradiso and Campanelli v. Italy*. The refusal to recognise the relationship between the intended parents and the child was mainly justified on the grounds of the illegality of the couple's conduct, whereby they circumvented Italian legislation which expressly prohibits surrogacy, and had recourse to this practice in Russia. The Italian government moreover alleged that the relation with the child did not possess the characteristics of stability and continuity necessary for it to qualify as a family tie. The Court agreed with the reasons invoked by the State: on the one hand, it rejected the argument made by the parties that a family tie effectively existed between the intended parents and the baby;[29] on the other, with regard to the alleged violation of the right to private life, which entails both the expectation of the intended parents and the right of the child to have his or her status recognised, the Court considered the measure taken by the Italian government as legitimate and proportionate under Article 8(2) of the Convention.[30]

The idea that seems to emerge is that no valid or legitimate expectation of the parties existed in this case that was likely to be perturbed and that might have justified a different conclusion. In a previous stage of the case, notwithstanding that it found that the measure taken by the Italian government violated Article 8

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27 *Wagner v. Luxembourg*, §130. For a more in-depth analysis of the last point see *infra*, section 4.

28 P. Kinsch, 'Recognition in the Forum of a Status Acquired Abroad – Private International Law Rules and European Human Rights Law' in K. Boele-Woelki et al. (eds.), *Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr*, Eleven International Publishing, The Hague 2010, p. 259–75, specifcally p. 273.

29 In order to reach this conclusion, the Court took into consideration 'the absence of any biological tie between the child and the intended parents, the short duration of the relationship with the child and the uncertainty of the ties from a legal perspective': [GC], *Paradiso and Campanelli*, §157.

30 [GC] *Paradiso and Campanelli v. Italy*, §199–211.

of the Convention, the Chamber noted that because the child had 'undoubtedly developed emotional ties with the foster family with whom he was placed' after being removed from the applicants, the 'finding of a violation in the applicants' case cannot therefore be understood as obliging the State to return the child to them'.[31] In other words, and coherently with the suggested reading, the legitimate expectations to be safeguarded in the case were those of the foster family who took care of the baby and had developed an affective bond with him.

4. RECONCILING HUMAN RIGHTS AND PRIVATE INTERNATIONAL LAW

Notwithstanding that States enjoy a broad margin of appreciation concerning the determination of the requirements that adoptive parents should meet to be eligible for adoption, the above analysis of the jurisprudence of the ECtHR reveals that when it comes to the recognition of a situation that already exists, domestic rules will attract close scrutiny by the Court.

In a situation that is dependent on foreign judgments or that was legally created abroad, the review of the Court on the legitimacy of the State's denial to give it effect will therefore necessary imply a scrutiny of domestic conflict-of-law rules.

The question of the impact of human rights on private international law is not a new one; for many years, both domestic courts and doctrine have explored viable solutions to reconcile these two areas of law.[32] States enjoy broad discretion in the regulation of private international law, particularly in the field of family law, as noted above. The exercise of such discretion cannot override the limits imposed by human rights standards and obligations. A compromise between the two areas must therefore be achieved in situations susceptible to a potential conflict between them.[33]

Such a compromise should be reached by starting from the assumption that private international law and human rights rules somehow pursue similar goals. Ensuring the cross-border continuity of a person's rights and status is one of

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31 ECtHR, Second Section, No. 25358/12, *Paradiso and Campanelli v. Italy*, 27.01.2015, §88.

32 See, inter alia, L. R. Kiestra, *The Impact of the European Convention on Human Rights on Private International Law*, Springer, The Hague 2014; J. J. Fawcett, M. N. Shúilleabháin, and S. Shahm, *Human Rights and Private International Law*, OUP, Oxford 2016; and in this volume, P. Franzina, 'The Place of Human Rights in the Private International Law of the Union in Family Matters'.

33 In this vein, see P. Kinsch, 'The impact of Human Rights on the Application of Foreign Law and on the Recognition of Foreign Judgments – A Survey of the Cases Decided by European Human Rights Institutions' in T. Einhorn and K. Siehr (eds.), *Intercontinental Cooperation Through Private International Law–Essays in Memory of Peter E. Nygh*, TMC Asser Press, The Hague 2004, p. 197, pp. 202–05; J. J Fawcett et. al., above n. 32, p. 49.

the purposes of conflict-of-law rules, which – as suggested in this book – aim at creating bridges between legal orders and serve as a means of safeguarding family rights under Article 8.[34] The jurisprudence of the ECtHR should not be read as if it points to the 'indiscriminate displacement of conflict of laws rules';[35] rather, the idea that emerges is that a strictly formalistic approach to the question of the recognition of family *status* acquired abroad should be set aside in cases when it results in the complete frustration of legitimate expectations of the persons concerned, with a special regard to situations in which a child's interests are at stake. A right balance of all the concerned interests cannot be struck but on a case-by-case basis.

An analysis of the jurisprudence of the ECtHR moreover suggests that private international law might also synergistically contribute to human rights protection. For example, in *Harroudi v. France*, the Court was called upon to pronounce on the question of whether a French choice-of-law rule giving effect to a prohibition on adoption of the child under the national law was compatible with Article 8.[36] Specifically, the applicant complained of the refusal of domestic courts to grant her a full adoption of an Algerian child that she had taken into her legal care three years previously by way of the Islamic institution of *kafalah*.[37] The refusal was justified on the grounds of the provisions of the French Civil Code, which prohibit full adoption of children in cases where such is not provided by their national law.

On the premise that French law provides the means to alleviate the effects of that prohibition, the Court concluded that 'the respondent State, which seeks to encourage the integration of children of foreign origin without cutting them off immediately from the rules of their country of origin, has shown respect for cultural pluralism and has struck a fair balance between the public interest and that of the applicant'. In other words, the choice-of-law rule under question was regarded as a means of protecting cultural rights while simultaneously providing the child with the possibility of enjoying similar protections to those accorded by the law to adoptive children.[38]

Even if they do not specifically address adoption, it is worth mentioning that in other cases the Court considered that human rights law and conflict-of-law

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34 In this vein, see Fawcett et al., above n. 32.

35 P. Kinsch, above n. 28, p. 266.

36 ECtHR, *Harroudj v. France*, No. 43631/09, 04.10.2012.

37 On matters regarding the recognition of *kafalah* in European Countries, see A. Lang in this volume.

38 The decision was criticised on the grounds of the deference that the Court 'accords to legal formalism and to the use of rigid juridical 'nationality' as a connecting factor in regulating a child's personal status': J. J. Fawcett et al., above n. 31, p. 775. More generally, on the balance between the need for safeguarding cultural interests and the need to grant a secure parent-child relationship, see E. Bartholet, 'International Adoption: Thoughts on the Human Rights Issues', (2007) *Buffalo Human Rights Law Review* 13, 180, 191–92.

rules can work together towards the same purpose. For example, in most cases regarding child abduction, the return of the child, which is the main object of the 1980 Convention on the Civil Aspects of Child Abduction, was considered as being the means of ensuring the maintenance of family ties with both parents, as well as (more broadly) of responding to the general public interest of protecting the best interests of children, by discouraging future kidnapping.[39]

Also in the case of adoption, the jurisprudence of the ECtHR clearly indicates that human rights law and private international law can support each other in the pursuit of common objectives. Fundamental rights are at the heart of all international rules dealing with international adoption, which are aimed at ensuring that this practice shall never be used as a means of perpetrating human trafficking, abduction, or other forms of exploitation. Accordingly, starting from the 1993 Hague Convention on Intercountry Adoption, international rules require that the recognition of adoption orders is subject to a procedure that ensures minors' protection against all possible forms of abuse with a view to granting children the possibility of growing up in a wholesome family environment. Moreover, as indicated in the 2008 European Convention on the Adoption of Children, international rules also insist on the importance of perceiving adoption as a last resort for resolving cases whereby there are no alternative options for providing a child with a family. In accordance with the goals pursued, international rules also recognise the need to seek the opinion of the child of a sufficient age and maturity,[40] as well as the necessity that the adoption order is pronounced by a competent entrusted authority acting in compliance of fundamental procedural safeguards.

The promotion of minors' best interests, which is a shared goal of both human rights and private international law, not only requires that they be granted protection against abuses, but also the right to have their family ties recognised and protected by the State. This does not necessarily postulate an obligation to recognise all of the legal effects of adoption orders. Rather, it points to a duty to ensure that the child is not deprived of family situations or relationships duly

39 On this issue see in this volume, R. Lamont.

40 The 1967 Convention did not take a strong position on the child's consent to an adoption (see Articles 5 and 9(9)(f)). The right of the child to be heard is rather protected by all international treaties concerning children's rights: see Article 12 of the 1989 New York Convention; Article 3(b) of the European Convention on the Exercise of Children's Rights (1996, ETS No. 160); Article 4(d) of the 1993 Hague Convention on Inter-Country Adoption; Article 13 of the 1980 Convention on the Civil Aspects of International Child Abduction; Article 23 of the Convention of 19.10.1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children. Within the EU context, also see Article 24(1) of the Charter of Fundamental Rights of the EU (2012/C 326/02) and Article 11(2) of the Regulation (EC) 2201/2003 (see, in this volume, L. Carpaneto).

established abroad that contribute to the development of his/her personality. The refusal to recognise an existing parent-child link arising from a foreign adoption should be pronounced only after a careful assessment of the situation. Furthermore, the impact of restrictive national measures on the right of children to have their identity guaranteed must be assessed, in addition to the legitimate expectation that the social reality of their emotional bonds is safeguarded. As was recently pointed out by the ECtHR in its Advisory Opinion of 10 April 2019: 'Article 8 of the Convention does not impose a general obligation on States to recognise *ab initio* a parent-child relationship … What the child's best interests – which must be assessed primarily *in concreto* rather than *in abstracto* – require is for recognition of that relationship, legally established abroad, to be possible at the latest when it has become a practical reality. It is in principle not for the Court but first and foremost for the national authorities to assess whether and when, in the concrete circumstances of the case, the said relationship has become a practical reality' (*ivi*, para. 52).[41]

A human rights-based attitude to private international law should therefore necessarily imply rethinking traditional methods based on strict applications of conflict-of-law rules in favour of a more flexible approach to the recognition of *status* acquired abroad.[42] As suggested by the relevant literature, to settle possible normative conflicts, private international law 'should be shaped and understood as a means to pursue the fundamental rights of the individuals concerned'.[43] Positive obligations descending from human rights treaties and Article 8 ECHR do not in fact entail a general duty for the State to remove all obstacles to recognition, but rather an obligation to 'forge its PIL provisions so as to make them *result-oriented*'.[44] This means that domestic legislation should be able to ensure that, far from being the results of an automatic and rigid application of internal rules, decisions on recognition should be the results of a careful assessment of all the interests involved.

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41 Above n. 25.

42 It has been correctly suggested in this regard that, according to this approach, public policy could be for example conceived – and applied – as a means of providing private international law with the inherent flexibility to ensure the protection of human rights: F. Salerno, 'Il vincolo al rispetto dei diritti dell'uomo nel sistema delle fonti del diritto internazionale privato', (2014) *Diritti umani e diritto internazionale*, 549.

43 In this context, see R. Baratta, above n. 15, p. 426 ff.

44 Ibid.; for an assessment of possible solutions, see P. Lagarde, 'La reconnaissance, mode d'emploi' in *Vers de noveaux équilibres entre ordre juridiques, Liber Amicorum Héléne Guaudemet-Tallon*, Paris, Dalloz 2008, p. 481; I. Thoma, 'The ECHR and the *Ordre Public* Exception in Private International Law', (2011) *Netherlands International Privaatrecht (NIPR)*, 13; P. Kinsch, above n. 27, 273 ff.