THE IMPACT OF THE TEMPORARY PROTECTION STATUS ON DETERMINING JURISDICTION FOR THE PROTECTION OF UKRAINIAN CHILDREN UNDER THE 1996 HAGUE CONVENTION DURING THE RUSSIAN-UKRAINIAN WAR

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Abstract: *On 4 March 2022, the Council of the EU activated the 2001 Temporary Protection Directive, establishing a temporary protection regime for those fleeing Ukraine. The composition of Ukrainian immigrants is characterized by the domination of women and children. The article's objective is to analyze the grounds of jurisdiction provided by the 1996 Hague Convention[1], which are applicable to Ukrainian children enjoying temporary protection status in the EU. Authors distinguish situations when either the 1996 Hague Convention or the Brussels IIbis Regulation[2] is applied, the significance of the child's territorial presence in the hosting state, the loss of the previous and the acquisition of a new habitual residence of a child from the point of view the jurisdictional rules of the 1996 Hague Convention. The article relies on explanatory reports and commentaries, as well as relevant doctrinal works on the interpretation of the provisions of the 1996 Hague Convention, the Brussels IIbis Regulation, documents regulating the issue of temporary protection and the status of refugees in the EU. Additionally, the case law of the Supreme Court of Ukraine and the CJEU is analysed to indicate practical peculiarities of taking protective measures directed to the protection of the person or property of the child.*

Keywords: *child protection, internationally displaced children, temporary protection status, jurisdiction, Hague Children's Conventions, case law*

INTRODUCTION

The system of international legal rules on children's rights had already been established by the end of the 20th century. Traditionally, international family-law disputes concerning children are analyzed taking into account not only several Conventions, known as the "Hague Children's Conventions",[3] but also the European Court of Human Rights (ECHR) case law and the obligations assumed by each state through participation in international human rights agreements. The fruitful working relationship between the Council of Eu-

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[1] Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. In: *The Hague Conference on Private International Law* [online]. 19. 10. 1996 [2024-06-02]. Available at: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=70>.

[2] Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast). OJ EU, 2.7.2019, L 178/1 EN, pp. 1–115.

[3] «Hague Children's Conventions» include three current conventions adopted by the Hague Conference on PIL: Convention on the Civil Aspects of International Child Abduction of 1980; Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children of 1996; Convention on the International Recovery of Child Support and Other Forms of Family Maintenance of 2007.

rope, the ECHR and the Hague Conference on Private International Law (the Hague Conference on PIL) regarding the Court's interpretation of the Hague Children's Conventions has already been deeply examined – particularly in the works of former judge Nina Vajić, judge Torunn E. Kvisberg and professor Peter McEleavy.[4]

Phenomena of migration and refugees – both adults and children have determined the need to research the joint interaction of child rights, private international law, and migration law. In 2017 the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs presented the study "Children in the Move: A Private International Law Perspective". The study was dedicated to the potential and challenges of private international law in the current migratory context, and it highlighted that the child's best interests are a primary consideration under international and European Union law. The scope of this commitment is not limited to European Union citizens, but should apply to all children, whatever their citizenship (including stateless children) and residence status. Migrant children should, as a matter of principle, not be treated differently than other children.[5] One more peculiarity of the recent studies in the scope of child law (international) and migration law is the change of the research focus – not so much the interests of the state, as the interests of the migrant (child) as an individual. As it is noted in the study "Private International Law in a Context of Increasing International Mobility: Challenges and Potential", "…states often focus on ideas of burden-sharing and fraud prevention. They manage international migration from a very distant and even statistical perspective (flows of people and figures), while consideration of migrants and their family members' interests requires a more concrete approach".[6]

Children are one of the population groups most affected by the Russian war in Ukraine. The Russian invasion of Ukraine has driven many children from their homes and resulted in the largest influx of refugees in the European Union since World War II. Many Ukrainian children were and continue to be on the move. Some travel with their parents or one of them, others become separated from their parents, family members or relatives along the route or in the hosting state. So, children permanently residing in Ukraine may enter European Union countries either accompanied by different adult persons or alone. Due to martial law restrictions in Ukraine, mainly mothers, grandmothers (or great-

[4] VAJIĆ, N. *The Interaction between the European Court of Human Rights and the Hague Child Abduction Convention.* In: *pravos.unios.hr* [online]. [2024-06-02]. Available at: <https://www.pravos.unios.hr/wp-content/uploads/2023/12/vajic-the-interaction-between-the-european-court-of-human-rights-and-the-hague.pdf>; McELEAVY, P. The European Court of Human Rights and the Hague Child Abduction Convention: Prioritising Return or Reflection? *Netherlands International Law Review.* 2015, Vol. 62, pp. 365–405. In: *DOI* [online]. [2024-06-02]. Available at: <DOI 10.1007/s40802-015-0040-z>; KVISBERG, T. E. Child Abduction Cases in the European Court of Human Rights – Changing Views on the Child's Best Interests. *Oslo Law Review.* 2019, Vol. 6, No. 2, pp. 90–106. In: *Scandinavian University Press* [online]. [2024-06-02]. Available at: <https://doi.org/10.18261/issn.2387-3299-2019-02-02>.

[5] Children On the Move: A Private International Law Perspective Legal Affairs: Study, Directorate General for Internal Policies of the Union Policy Department for Citizens' Rights and Constitutional Affairs. PE 583.158, June 2017. In: *European Parliament* [online]. [2024-06-02]. Available at: <https://www.europarl.europa.eu/RegData/etudes/STUD/2017/583158/IPOL_STU(2017)583158_EN.pdf>.

[6] Private International Law in a Context of Increasing International Mobility: Challenges and Potential: Study, Directorate General for Internal Policies Policy Department for Citizen's Rights and Constitutional Affairs. PE 583.158., June 2017. In: *European Parliament* [online]. [2024-06-02]. Available at: <https://www.europarl.europa.eu/RegData/etudes/STUD/2017/583157/IPOL_STU(2017)583157_EN.pdf>.

grandmothers), grandfathers (or great-grandfathers), adult sisters, aunts, and stepmothers accompany children. In some of these cases, mothers and fathers of children have to remain in Ukraine or are captured, injured, or dead. In other cases, children have been children orphans or deprived of parental care already before February 24th They are accompanied by persons bearing responsibility for them as parent-educators, foster parents, caregivers in foster homes, or staff members of the administration of institutions for these children.

It's important to note that the Hague Conference on PIL and the Council of EU have already adopted legal instruments which may be applied particularly for unaccompanied or separated children fleeing from Ukraine and seeking protection in the states of the EU. Thus, the Hague Conference on PIL has published in 2023 the document which deals with the application of the 1996 Hague Convention in cross-border situations involving children who are unaccompanied or separated.[7] The Regulation No. 604/2013 of the European Parliament and of the Council lays down the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person ('the Member State responsible') and contains the legal definition of the term "unaccompanied child."[8]

Taking into account the above, it's possible to indicate several possible Ukrainian child protection scenarios in the EU states during the Russian war in Ukraine:

1) The child is displaced from Ukraine with both parents;
2) The child is displaced from Ukraine with only one parent (the other parent is in Ukraine);
3) An unaccompanied and separated child is displaced from Ukraine (it is about the child without parental care who is not cared for by an adult who, by law is responsible for doing so);
4) The child is displaced from Ukraine accompanied by an adult (other than a parent) who is responsible by law to provide care to the child and /or to represent the child.

The unprecedented flaw in the migration of children from Ukraine was recognized by the European Commission in its official communication, treating this fact as a legal challenge facing EU member states.[9] On March 4, 2022, the Council of the EU, by its Implementation Decision (EU) 2022/382, established the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of the Directive 2001/55/EC. This

[7] The application of the 1996 Child Protection to Unaccompanied and Separated Children, published by the Hague Conference on Private International Law, Permanent Bureau, 2023. In: *The Hague Conference on Private International Law* [online]. [2024-06-02]. Available at: <https://assets.hcch.net/docs/96a3875d-fb7c-44dc-99b0-844c39562851.pdf>.

[8] Regulation (EU) No 604/2013 of the Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast). OJ EU, 29. 6. 2013, L 180/31 EN.

[9] Communication from the Commission on Operational guidelines for the implementation of Council implementing Decision 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection 2022/C 126 I/01 C/2022/1806. OJ C 126I, 21. 3 .2022, pp. 1–16.

Council Implementation Decision had the effect of introducing a temporary protection mechanism.[10] As a result, Ukrainian children have the temporary protection status under the Council Directive 2001/55/EC on Minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (the Temporary Protection Directive 2001/55/EC).[11]

Russia's military aggression against Ukraine raises questions about the situation of children who are displaced from Ukraine in the European Union and got there the status of temporary protection. It is urgent to ensure that these children are protected against the risk of violence, exploitation, illegal adoption, abduction, sale, or child trafficking. For this reason, it is essential to use the instruments that protect the rights of these children. There are instruments in European and international law to ensure the protection of children, with special provisions for the protection of and assistance to children temporarily or permanently relocated from their native country, deprived of their family environment, including in emergency situations, such as war.

In this article, the authors carry out a comprehensive study of the grounds of jurisdiction to take measures directed to the protection of the person and property of children who are displaced from Ukraine during wartime and enjoy temporary protection status in the EU. The preliminary question is about the proper international legal instrument for the cross-border protection of these children: Should the Brussels IIbis Regulation or the 1996 Hague Convention be applied? Then, the significance of the Ukrainian child's territorial presence in the hosting state, the loss of the previous, and the acquisition of a new habitual residence of a child from the point of view of the jurisdictional rules of the 1996 Hague Convention are considered. The authors also lay down the overview of the scenarios when national courts of the EU states apply Art. 5, 6, 11, or 12 of the 1996 Hague Convention in the case concerning the protection measures for the Ukrainian child. In addition, the current practice of the Supreme Court of Ukraine on the issues of jurisdiction concerning Ukrainian children under temporary protection in the EU states is analysed.

I. THE 1996 HAGUE CONVENTION OR THE BRUSSELS IIBIS?

I.1. Retrospective on the unification of jurisdictional rules in family law disputes concerning children

The current rules regarding jurisdiction in cross-border child cases are characterized by the coexistence of the Hague Child's Conventions, European law, and national law. The 1996 Hague Convention, known as the Hague Convention on cross-border child protec-

[10] Council Implementing Decision (EU) 2022/382 of 4 March 2022 on establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection. OJ L 71, 4.3.2022, pp. 1–6.

[11] Council Directive 2001/55/EC on Minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof. OJ L 212, 7. 8. 2001, pp. 12–23.

tion, was accessed by Ukraine on the basis of the Law of Ukraine from 14. 9. 2006[12] and entered into force for Ukraine on 1.02.2008.

In the states of the EU the 1996 Hague Convention is partly complemented and partly superseded by the so-called Brussels IIbis Regulation (2019/1111), which succeeded the Regulation (EC) No 2201/2003.

Having adopted its own legal acts on the issues of international family law and civil litigation, the EU continues to cooperate actively with the Hague Conference on PIL. The importance of such cooperation is emphasized in the EU Development Programs. For example, under the Hague Programme, "the Commission and the Council are urged to ensure coherence between the EU and the international legal order and continue to engage in closer relations and cooperation with international organisations such as The Hague Conference on Private International Law and the Council of Europe" (п. 3.4.5.).[13] The Stockholm Programme addresses the issue of cooperation between the EU and the Hague Conference on PIL in the context of the EU's interaction with third countries in the field of judicial cooperation in civil matters. Particularly, it is noted that "the Union should use its membership of the Hague Conference to actively promote the widest possible accession to the most relevant Conventions and to offer as much assistance as possible to other States with a view to the proper implementation of the instruments. The European Council invites the Council, the Commission and the Member States to encourage all partner countries to accede to those Conventions which are of particular interest to the Union" (3.5.).[14] These provisions of the Stockholm Programme are developed in the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, from 27.06.2014. Article 24 of the Agreement promotes that judicial cooperation in civil matters, as declared by the Agreement, should be carried out "on the basis of the applicable multilateral legal instruments, especially the Conventions of the Hague Conference on Private International Law in the field of international Legal Cooperation and Litigation as well as the Protection of Children."[15]

Many Hague Conventions have become the basis for the EU Regulations. In relation to the Brussels IIbis Regulation, this thesis is repeatedly emphasized both in the legal doctrine and in CJEU judgments. The prominent European researchers of Child Law (International) Peter McEleavy and Anatol Dutta note that "… during the negotiation of Council Regulation 2001/2003 the Hague Convention was simply a rival text, albeit one which the Commission was content to use as a platform on which to build a more advanced and rigorous Community regime for the free movement of judgments and intra-EU cases of child

[12] Закон України від 14.09.2006 Про приєднання України до Конвенції про юрисдикцію, право, що застосовується, визнання, виконання та співробітництво щодо батьківської відповідальності та заходів захисту дітей [Law of Ukraine from 14. 9. 2006 On the Accession of Ukraine to the Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children]. In: *Bulletin of Verkhovna Rada of Ukraine, 2006, № 43.*

[13] The Hague Programme: Strengthening freedom, security and justice in the European Union (2005/C 53/01). OJ of the EU, C 53/1.

[14] The Stockholm Programme. – An open and secure Europe serving and protecting citizens. OJ of the EU, C 115.

[15] Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, from 27. 6. 2014. OJ L 161, 29. 5. 2014, pp. 3–2137.

abduction"[16] and that "many of the rules of the Brussels IIbis Regulation draw inspiration from those of the 1996 Hague Children Convention since the later was drafted at the same time as the Convention of 1998, which later became the Brussels II Regulation".[17] The CJEU has underlined that for the interpretation of the Brussels IIbis Regulation, one might resort to the 1996 Hague Convention and its *travaux préparatoires*; the provisions of the Regulation and the provisions of the conventions corresponding to it should, as far as possible, be interpreted in the same way in order to avoid different results depending on whether the case concerns another Member State or a third state.[18]

I.2. Relation between the 1996 Hague Convention and the Brussels IIbis Regulation

Because the 1996 Hague Convention and the Brussels IIbis Regulation have similar subject scopes of application, it's necessary to bear in mind the issue of relations between these two instruments. We agree with the opinion that a conflict between an EC Regulation and an International Convention is different from a conflict between two Conventions.[19] The conflict between multilateral conventions adopted by international organizations is a conflict between two sources of the same type of law and is usually regulated by the International Law of Treaties, according to the rules of the Vienna Convention on the Law of Treaties of 23.05.1969 (Article 30 "Application of successive treaties relating to the same subject matter"). On the other hand, it isn't easy to regulate relations between multilateral international conventions as sources of international law and the EU Regulations as sources of Community law (EU law) using *lex posterior* and *lex specialis*. From this point of view, it is valuable that all versions of the Brussels IIbis Regulation have a Chapter devoted to the relations with other instruments and the special Article "in order to enable the harmonious application of both texts"[20] of the Brussels IIbis Regulation and the 1996 Hague Convention. It is Art. 97 in the current version of the Brussels IIbis Regulation governing this issue.

The basic rule provided in par. 1 of the Art. 97 is the following: the Brussels IIbis Regulation shall apply where the child concerned has his or her habitual residence in the territory of a Member State, subject to certain exception in Art. 97 para 2. This primary rule is also pronounced in the recital (25) of the Preamble of the Brussels IIb Regulation: "Where the habitual residence of a child cannot be established, and jurisdiction cannot be determined on the basis of a choice of court agreement, the courts of the Member State

[16] McELEAVY, P. Luxembourg, Brussels and Now the Hague: Congestion in the Promotion of Free Movement in Parental Responsibility Matters. *ICLQ*. 2010, Vol. 59, pp. 505–519.

[17] DUTTA, A. Child Law (International). In: Jürgen Basedow – Klaus J. Hopt – Reinhard Zimmermann – Andreas Stier (eds.). *The Max Planck Encyclopedia of European Private Law. Volume I*. Oxford: Oxford University Press, 2012, p. 177.

[18] Judgment of the CJEU, C-435/06, 27 November 2007, E.C.R. [2007], I-10141. In: *EUR-Lex* [online]. [2024-06-02]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62006CJ0435>.

[19] BEILFUSS, C. G. EC Legislation in Matters of Parental Responsibility and Third States. – International Civil Litigation in Europe and Relations and Relations with Third States. In: Arnaud Nuyts - Nadine Watte (eds.). *International Civil Litigation in Europe and Relations with Third States*. Bruxelles: Bruylant, 2005, pp. 424–425.

[20] MAGNUS, U., MANKOWSKI, P. *European Commentaries on Private International Law. Brussels IIbis Regulation*. Köln: SELP, 2012, p. 111.

where the child is present should have jurisdiction. This presence rule should also apply to refugee children and children internationally displaced because of disturbances occurring in their Member State of habitual residence". However, further the Regulation lays down special exception in the case of children who had their habitual residence before the displacement in a third State: "in light of this Regulation in conjunction with Article 52(2) of the 1996 Hague Convention, this jurisdiction rule should only apply to children who had their habitual residence in a Member State before the displacement. Where the habitual residence of the child before the displacement was in a third State, the jurisdiction rule of the 1996 Hague Convention on refugee children and internationally displaced children should apply".

Summarizing the above, we may draw the conclusion that, under the general rule, the Brussels IIbis Regulation prevails over international conventions, including the 1996 Hague Convention. Still, it is only in relations between EU Member States. The 1996 Hague Convention continues to apply in relations between EU Member States and third countries, particularly Ukraine. Therefore, our further research will focus on the challenges and peculiarities of the 1996 Hague Convention application by the national courts of the EU states and Ukraine throughout the period of the full-scale war, which is currently ongoing.

II. GENERAL RULE OF JURISDICTION V SPECIAL RULES OF JURISDICTION: APPLICATION BY NATIONAL COURTS IN THE EU STATES IN CASES CONCERNING UKRAINIAN CHILDREN

II.1. The interaction of Art. 5 and Art. 6 of the 1996 Hague Convention

According to the general rule of jurisdiction, provided by Art. 5 of the 1996 Hague Convention, measures directed to the protection of the child's person or property should be taken by the judicial or administrative authorities of the Contracting State of the habitual residence of the child (Art. 5). Article 6 of the Convention sets out exceptions to the general rule of jurisdiction, i.e., the instances in which jurisdiction may lie with the authorities of a Contracting State in which the child is not habitually resident. These exceptions cover two groups of children: 1) refugee children and 2) internationally displaced children. Jurisdiction to take measures directed to the protection of these two groups of children have the authorities of the Contracting State on the territory of which children are present as a result of their displacement. So, jurisdictional rules of Art. 5 of the Convention are based on the child's habitual residence and jurisdictional rules of Art. 6 – on the territorial presence of the child.

In addition to the jurisdictional rules of Art. 5 and 6, Chapter 2 of the 1996 Hague Convention – "Jurisdiction", contains rules on jurisdiction in cases for children who were wrongfully removed or retained (Art. 7), transfer of jurisdiction (Arts. 8 and 9), jurisdiction of the authority seized of divorce (or separation) of the parents (Art. 10), jurisdiction to take urgent measures (Art. 11) and provisional measures (Art. 12). It's also necessary to mention rules of Art. 13 regulating coordination of concurrent jurisdiction.

The "habitual residence of the child" provided by Art. 5 of the 1996 Hague Convention as a primary jurisdictional criterion corresponds to the interests of both the child and

justice and seems quite logical. The judicial or administrative authorities of the Contracting State of the habitual residence of the child are geographically most accessible to the child and can objectively examine the conditions of the child's living and upbringing.

In an effort not to deprive the term of its flexibility, the Hague Conference on PIL, resisting some criticism from legal academics and practitioners, has persistently refused to further elaborate on the meaning of habitual residence in its conventions.[21] Because the concept of "habitual residence of a child" is not defined by the 1996 Hague Convention or any other international instrument, it has to be determined by judicial authorities on a case-by-case basis on the grounds of the actual circumstances. Judgments of the CJEU are very helpful in solving the problem of qualifying a child's habitual residence as a criterion for determining international jurisdiction. Summarizing its case law, the habitual residence of the child is determined according to the criterion of proximity and aims to safeguard the best interests of the child. In short: it is the place, which reflects some degree of integration by the child in a social and family environment. It is determined on a case-by-case basis for each child, taking into account such factors, as duration, regularity, conditions, and reasons for the stay, onsideration of the child's age, tangible steps as indicators of a change in habitual residence.[22]

However, regarding migrant (refugee, internationally displaced) children, habitual residence as the ground of jurisdiction can no longer be applied with reference to their home country due to the fact that children had to leave their country. On the other hand, children, who have just reached a hosting state, cannot be considered as having a habitual residence there, because of the lack of the necessary stability and degree of integration in new social environment that the notion of habitual residence implies. Migrant children are in need of protection well before they acquire habitual residence in a new state. Their mere presence on a territory of the Contracting State of the 1996 Hague Convention is thus considered a sufficient link to allow such state to assert jurisdiction, for example for the purpose of appointing a guardian (or a legal representative), conducting proper investigations into the child's situation and adopting appropriate measures for their protection. The Explanatory Report to the 1996 Convention highlights this thesis: the children contemplated by paragraph 1 of the Art. 6 often have need, even without a situation of urgency, for their protection to be organized in a lasting manner. For example, they may be led to apply for asylum or be the subject of a request for adoption. It is, therefore, necessary to designate a legal representative.[23]

One of the main questions is how the rules of Art. 5 and Art. 6 of the Convention interplay. Par. 1 of Art. 6 provides that the authorities of the Contracting State on the territory of which refugee children and children who, due to disturbances occurring in their country, are internationally displaced are present have general jurisdiction to take measures di-

[21] BAETGE, D. Habitual Residence. In: Jürgen Basedow – Klaus J. Hopt – Reinhard Zimmermann – Andreas Stier (eds.). *The Max Planck Encyclopedia of European Private Law. Volume II*. Oxford: Oxford University Press, 2012, p. 179.

[22] For the interpretation of „habitual residence" see, f.e., Judgments of the CJEU in cases: C-523/07, C-512/17, C-497/10, C-499/15.

[23] LAGARDE, P. *Explanatory Report on the 1996 HCCH Child Protection Convention.* paras 44. In: *assets.hcch.net* [online]. [2024-06-02]. Available at: <https://assets.hcch.net/docs/5a56242c-ff06-42c4-8cf0-00e48da47ef0.pdf>.

rected to the protection of the child's person or property generally attributed to the authorities of the State of the child's habitual residence under Art. 5 of the Convention. And par. 2 of Art 6 extends the solution of par. 1 (general jurisdiction of the court where the refugee or displaced child is present) "to children whose habitual residence cannot be established." So, as a result of the systematic interpretation of paragraphs 1 and 2 of Art. 6 of the Convention we may conclude that jurisdictional rules of par. 1 of Art. 6 should be applied for the children who have the established habitual residence in other Contracting state.

The interaction of Art. 5 and 6 of the 1996 Hague Convention concerning Ukrainian children during the Russian war was on the agenda of several discussions, roundtables and trainings, organized by the Permanent Bureau of the Hague Conference on PIL and the European Judicial Network in 2023–2024 (Eighth Meeting of the Special Commission on the Practical Operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention (Hague,10 – 17 October 2023), 22nd Annual Meeting of the Members of the European Judicial Network in civil and commercial matters (Brussels, 29-30 January 2024), Ukrainian HCCH Training on the 1996 Child Protection Convention (23 February 2024)). As to the Ukrainian children under the temporary protection in the EU states, the Permanent Bureau of the HCCH has constantly underlined that Ukraine continues to be the state of the permanent (habitual) reside for children and keeps its jurisdiction under the Art. 5 of the 1996 Hague Convention. However, Ukrainian children are actually present in other states, and jurisdictional authorities of these states can take child protection measures under Art 6 of the 1996 Hague Convention. It should also be noticed that jurisdiction based on the territorial presence of the child (Art. 6) is temporary, as it will cease as soon as a stable and safe solution for the Ukrainian child is arranged and they settle down and return to Ukraine or acquires a habitual residence somewhere.

Another aspect of the application of Art. 6 of the 1996 Hague Convention highlighted by the Permanent Bureau of the Hague Conference on PIL and the United Nations High Commissioner for Refugees (UNHCR) is the declaratory character of refugee status in the interpretation of the article. It is necessary to make a reservation that this interpretation of the term "refugee" differs from its formal, narrow understanding, set forth in the Ukrainian national legal science. The legal specifics of temporary protection for forcibly displaced Ukrainians, as well as its main fundamental differences from the legal status of a refugee is considered to be very specific area for recent scientific research. Many Ukrainian legal scholars stay on the position that the EU countries do not provide for Ukrainians the opportunity to obtain the refugee status, but only recognize them as persons under temporary protection. It is concluded that the legal status of a refugee differs from the legal status of a forcibly displaced person who received temporary protection in EU member states by several characteristics.[24, 25]

In order to further clarify the understanding of refugees and persons in need of international protection and the declaratory character of refugee status, it's necessary to refer

[24] KUZMENKO, O., RYNDIUK, V., KOZHURA, L., CHORNA, V., TYTYKALO, R. Legal aspects of temporary protection for Ukrainians in the member states of the European Union. *Juridical Tribune*. 2023, Vol. 13, No. 2, pp. 224–240.
[25] SUSHCH, O. P. Problems of Temporary Protection of Ukrainians Abroad in Terms of Armed Aggression of the Russian Federation (European Experience). *Juris Europensis Scientia*. 2023, No. 6, pp. 18–24.

to a Note published by UNHCR in 2017 – "Persons in Need of International Protection". It underlines that the need for international protection arises when a person is outside their own country and unable to return home because they would be at risk there. Their country is unable or unwilling to protect them. Risks that give rise to a need for international protection classically include those of persecution, threats to life, freedom, or physical integrity arising particularly from armed conflict. Regarding the declaratory character of refugee status, the 2017 Note mentions that "it is important to recall that all persons who meet the refugee criteria under international law are refugees for the purposes of international law, whether or not they have been formally recognized as such".[26] The UNHCR's Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status (par. 28) explains that "a person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not, therefore, make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee".[27] Recital 21 of the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or persons eligible for subsidiary protection, and for the content of the protection granted (recast)[28] reaffirms that "the recognition of refugee status is a declaratory act". "The Grand Chamber of the CJEU also held in the case *M v Ministerstvo vnitra* that" ...the fact of being a "refugee" for the purposes of Article 2(d) of the EU Qualification Directive of 2013 and Article 1(A) of the 1951 Convention is not dependent on the formal recognition of that fact through the granting of "refugee status".[29]

II.2. Possible scenarios for the application of Art. 5, 6, 11 or 12 of the 1996 Hague Convention in the case concerning the protection measures for the Ukrainian child

Jurisdiction based on the child's habitual residence (Art. 5) and jurisdiction based on the child's presence (Art. 6) implies full jurisdiction that means that the authorities of the Contracting State have jurisdiction to take all necessary measures of protection concerning a child whether or not the situation is urgent. Such jurisdiction is opposed to the competence of the authorities of a Contracting State in whose territory the child or

[26] UNHCR, Note of 2017 "Persons in Need of International Protection". In: *UN High Commissioner for Refugees* [online]. [2024-06-02]. Available at: <https://www.refworld.org/policy/legalguidance/unhcr/2017/en/121440>.

[27] UNHCR's Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status (The Handbook was first published in 1979 and re-issued in 1992 and in 2019). In: *UN High Commissioner for Refugees* [online]. [2024-06-02]. Available at: <https://www.unhcr.org/media/handbook-procedures-and-criteria-determining-refugee-status-under-1951-convention-and-1967>.

[28] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast). OJ L 337, 20.12.2011, p. 9–26.

[29] Judgment of the CJEU, Grand Chamber, C-391/16, 14 May 2019. In: *InfoCuria* [online]. [2024-06-02]. Available at: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=214042&doclang=EN>.

property belonging to the child is present and which is aimed at issuing measures of protection in cases of urgency (Art. 11) or is applied where there is need for provisional and protective measures (Art. 12). Articles 11 and 12 of the 1996 Hague Convention could not be applied for the Ukrainian children as a general rule. It is because they may be a possible ground for taking the urgent measure, which is not on the substance of the dispute, but is provisional and has the aim to stop the "emergency", and they have limited territorial effect. From our point of view, it's necessary to agree with the professor of Law Nigel Lowe's and judge Michael Nicholls QC's thesis on some importance of the rules of Art. 11 of the 1996 Hague Convention in the context of international child abduction where the "abduction court" might wish to put in place a raft of protective measures to ensure the child's safety on arrival in the requesting State. The lawyers have mentioned that "measures could and, commonly do, include directing the left-behind parent to provide accommodation, financial support and transport for the abducting parent (usually the child's mother) and the child upon their return and also, perhaps, to prevent them being harassed or molested by the left-behind parent".[30] On our point of view, it's necessary to underline that due to the objective circumstances (war, removal of a child abroad), situations when one of the parents-citizens of Ukraine who remained in Ukraine and lost contact with their children as a result of their removal abroad, are frequent. The courts of the European Union states, resolving disputes regarding the return of Ukrainian children, may take protective measures under the mentioned Art. 11 of the Convention.

Currently, there are many proceedings in the EU national courts for applying measures directed to the protection of Ukrainian children. The most typical are cases on parental custody and determining the child's place of residence, cases on depriving parental rights and taking away children from families on the basis of improper performance of parental duties, and cases of taking away children from accompanying persons and recognizing children as unaccompanied ones.

If a national court of the EU Member state asks itself whether it has jurisdiction in the case concerning the protection measures for the Ukrainian child who has arrived in the state as a result of the full-scale Russian invasion in Ukraine, it will probably come to the conclusion that it has jurisdiction either under Art. 5 or 6 of the 1996 Hague Convention, – of course, it depends on all circumstances of the case, especially for, how long has the child been in the state, how is the situation concerning a return of a child to Ukraine. For example, as it was rightly noted, leaving Ukraine for Poland only with the aim to protect oneself from the danger of war does not automatically entail the loss of the previous residence in the former state and the creation of a new permanent residence abroad, especially when the child does not show signs of integration into the host society, does not attend school there, does not make efforts to learn the language, etc.[31]

[30] LOWE, N. V., NICHOLLS, M. *The 1996 Hague Convention on the Protection of Children*. London: Family Law, 2012, p. 43.

[31] PILICH, M. Jurysdykcja i prawo właściwe dla stosunków między rodzicami a dzieckiem w relacjach polsko-ukraińskich. [Jurisdiction and law applicable to parent-child relations in Polish-Ukrainian relations]. *Problemy Prawa Prywatnego Międzynarodowego*. 2022, Vol. 31, p. 34. In: *journals.us.edu.pl* [online]. [2024-06-02]. Available at: <https://journals.us.edu.pl/index.php/PPPM/article/view/14798/11691>.

Of course, the situation is changing as the Russian war in Ukraine continues. At the beginning of the war, the mere departure of a child after the outbreak of the war did not enable foreign courts to consider that the habitual residence of Ukrainian children had been relocated, while the departure was meant to be temporary for the sake of security and safety. Consequently, Art. 6 of the 1996 Hague was therefore often applied by foreign courts as the ground for jurisdiction, specially conceived for children who are "internationally displaced because of disturbances in the State of their habitual residence". However, as time passes, the issue calls for a case-by-case analysis. Every court remains free to appreciate from what moment the habitual residence of the Ukrainian child should be considered as having changed from Ukraine to the hosting country.

Unfortunately, we have to presume: the longer the war continues and the longer a Ukrainian child stays in other country, the more likely will be the assessment that the child changes its habitual residence. It is because the longer the time that a child remains on the territory of a hosting state, the more the child becomes integrated into its society. Another factor worth considering is the change of intentions. For example, immediately after the outbreak of the war, the initial intentions were related to security and safety. But the strength of these intentions may be weakening, and a family (a child and some members of their family) may decide not to go back to Ukraine and stay abroad, even if their former place of residence in Ukraine is safe. These circumstances may be considered a long-term relocation, and it would be quite challenging to accept a general rule that a child does not change their habitual residence. According to the Office of the United Nations High Commissioner for Refugees (UNHCR), in the context of a prolonged war, the number of Ukrainian war refugees in Europe in 2024 will remain significant and amount to 5.9 million people, among them children under 18–38 %.[32]

III. MAINSTREAMS OF THE SUPREME COURT OF UKRAINE CASE-LAW ON THE ISSUES OF JURISDICTION CONCERNING UKRAINIAN CHILDREN UNDER TEMPORARY PROTECTION IN THE EU STATES

Most cases which are factually related to the Russian war in Ukraine and fall under the scope of the 1996 Hague Convention, are still at the stage of consideration on the merits, in local courts of Ukraine, which act as the courts of the first instance. But there are already several legal positions of the Civil Cassation Court within the Supreme Court of Ukraine on this category of cases, which are briefly summarized below.

III.1 The first legal position

National courts of Ukraine keep their jurisdiction on disputes concerning the child's place of residence or any other family law disputes related to the rights of the child who has left

[32] ІСД. *Українські біженці війни в Європі: між інтеграцією та поверненням* [NISS. *Ukrainian war refugees in Europe: between integration and return*]. In: *National Institute for Strategic Studies* [online]. [2024-06-02]. Available at: <https://niss.gov.ua/doslidzhennya/sotsialna-polityka/ukrayinski-bizhentsi-viyny-v-yevropi-mizh-intehratsiyeyu-ta>.

Ukraine and moved abroad because of the Russian war against Ukraine. This position was stated in the Resolution of the Joint Chamber of the Civil Cassation Court within the Supreme Court of Ukraine from 11 December 2023 in the case of the suit of the minor child's father to his mother on determining the child's place of residence. According to the circumstances of the case the parties were divorced and could not agree on the child's place of residence. At the moment of filing the lawsuit in the Ukrainian court, the child was living with his great-grandmother (the mother's grandmother), as the mother was abroad at the time. The father provided a notarized consent for his son's temporary departure from Ukraine to go abroad (to Poland, Slovakia, Hungary, and Spain), mainly from July 15, 2021, to August 31, 2021. After the minor son left for the Kingdom of Spain in August 2021, the defendant (mother) did not bring the child back.

Concerning jurisdiction in this case, the Supreme Court has concluded that the mere fact of the child's residence abroad (regardless of whether the child was taken abroad before or after filing a lawsuit on determining the child's place of residence) does not affect the resolution of a dispute on determining the child's place of residence by the courts of Ukraine. The mother's departure with her child abroad after the outbreak of the full-scale Russian-Ukrainian war cannot be qualified as a change of the child's habitual place of residence. The court underlined that departure had a special aim – to take a child to a safe and peaceful place of presence, and it is temporary.[33]

In this case the Supreme Court highlighted that the 1996 Hague Convention provides high degree of child's ties with the state for its qualification as the state of the child's habitual residence. In many of its Resolutions the Supreme Court of Ukraine stated the thesis of the Practical Handbook on the operation of the 1996 Hague Convention that "since habitual residence is a factual concept, there may be different considerations to be taken into account when determining the habitual residence of a child for the purposes of this Convention"[34] and summarized that habitual residence corresponds to a place that reflects a certain degree of integration of the child into the social and family environment, for this purpose the following circumstances should be taken into account: in particular, the duration, regularity, conditions and reasons for staying in the territory of a Member State and the family's move to that State, the child's nationality, place and conditions of school attendance, language skills, as well as the child's family and social relations in that State. Habitual residence is confirmed by the attendance at a (pre)school educational institution, and various clubs; it is based on the results of the established circumstances: the child is undergoing a medical examination, the child has friends hobbies, the child has stable family ties and other facts that indicate that

[33] Resolution of the Joint Chamber of the Civil Cassation Court within the Supreme Court of Ukraine, case No. 607/20787/19, 11 December 2023. In: *reyestr.court.gov.ua* [online]. [2024-06-02]. Available at: <https://reyestr.court.gov.ua/Review/116606725>.

[34] Practical Handbook on the operation of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, published by The Hague Conference on Private International Law, Permanent Bureau, 2014. In: *The Hague Conference on Private International Law* [online]. [2024-06-02]. Available at: <https://assets.hcch.net/docs/eca03d40-29c6-4cc4-ae52-edad337b6b86.pdf>.

the child considers their place of residence to be permanent, comfortable and the place of residence of their family.[35]

III.2 The second legal position

If Ukrainian court has established that Ukrainian child has already acquired a new habitual residence abroad, the court has to close the proceedings by its ruling.

According to the case-law, depending on the factual circumstances of each individual case, some Ukrainian children may have kept their habitual residence in Ukraine and some children may have acquired a new habitual residence outside of Ukraine.

As a result, very often Ukrainian courts establish that Ukrainian child has already acquired a new habitual residence abroad, apply the rule "jurisdiction follows the habitual residence of a child" and conclude that Ukrainian courts don't have legal grounds to consider the claim on the merits and that's why it's necessary to close the proceedings.

For example, in the case No. 372/2558/21, it was established by the court and not disputed by the parties that the minor child, a citizen of Ukraine, resides in the Federal Republic of Germany, has a permit for temporary residence dated May 25, 2021, until May 24, 2024, and is enrolled in the first grade of a primary school located in the Federal Republic of Germany.

The Supreme Court, in essence, stated that the plaintiff (the child's mother) filed to the Ukrainian court a lawsuit for determining the child's place of residence in July 2021, so it was after the child acquired the right for temporary residence in the Federal Republic of Germany. As a result, the claim in this case is not subject to the jurisdiction of the national courts of Ukraine. That's why the courts of previous instances had no legal grounds to consider the claim on the merits. The courts should apply paragraph 1 of part one of Article 255 of the Code of Civil Procedure of Ukraine, according to which the court shall close the proceedings by its ruling if the case is not subject to review by the court to which the statement of claim has been submitted.[36]

III.3 The third legal position

Given that the child's permanent place of residence at the time of the opening of the proceedings is Ukraine, the relevant Ukrainian court has jurisdiction to resolve the dispute over the child's place of residence.

According to the circumstances of the case No. 359/2356/21, the court of the first instance was considering a case on the mother's claim on determining the child's place of residence and on the father's counterclaim on determining the child's place of residence. The court of the first instance closed the proceedings on the counterclaim on the basis of paragraph 1 of part one of Article 255 of the Civil Procedure Code of Ukraine, considering

[35] Resolution of the Supreme Court of Ukraine, case No. 607/23708/21, 08 March 2023. In: *reyestr.court.gov.ua* [online]. 8. 3. 2023 [2024-06-02]. Available at: <https://reyestr.court.gov.ua/Review/109479775>; Resolution of the Supreme Court of Ukraine, case No. 201/1577/21, 01 November 2022. In: *reyestr.court.gov.ua* [online]. 1. 11. 2022 [2024-06-02]. Available at: <https://reyestr.court.gov.ua/Review/107291658>.

[36] Resolution of the Supreme Court of Ukraine, case No. 372/2558/21, 28 June 2023. In: *reyestr.court.gov.ua* [online]. 8. 6. 2023 [2024-06-02]. Available at: <https://reyestr.court.gov.ua/Review/111998989>.

that this claim was subject to the jurisdiction of the Irish court (as the court of the state where a child now resides). The Court of Appeal canceled this judgment and reverted the case for the new consideration by the court of the first instance. The Supreme Court left the court of appeal's judgment unchanged, for the following reasons.

In this case the Supreme Court found that both at the time of the opening of the proceedings in this case on May 31, 2021, in the initial claim, and at the time of the filing of the counterclaim on June 09, 2021, in the dispute over the child's place of residence, the permanent place of residence of both the boy's parents - the parties to the case, and the child himself was in Ukraine. This fact was not disputed by the parties. As a result of the military aggression of the Russian Federation against Ukraine, the plaintiff and her son left Ukraine, in particular, according to copies of their passports, they crossed the border of Ukraine with Romania on March 06, 2022 and subsequently arrived in Ireland, where they have been living until now.

Thus, given that the child's permanent place of residence at the time of the opening of the proceedings was Ukraine, the relevant Ukrainian court has jurisdiction to resolve this dispute over the child's place of residence.[37]

It's necessary to mention, that in this case the Supreme Court applied not only Art. 5 of the 1996 Hague Convention, but also Art. 75 (part 1) of the Law of Ukraine On Private International Law, which states that "Jurisdiction of the courts of Ukraine for cases with a foreign element is determined at the time of the opening of the proceedings in the case, despite the fact that in the course of the proceedings the grounds for such jurisdiction disappeared or change."[38] This rule is known in the legal doctrine as the principle of *perpetuatio fori* (the principle of inadmissibility of change of jurisdiction) and means that once the competent court is seized of jurisdiction, it generally retains jurisdiction in the proceedings, even if the child acquires another habitual residence.

CONCLUSIONS

Current situation demonstrates that the mere fact that a Ukrainian child has left Ukraine to get temporary protection in the EU states as a result of the Russian war in Ukraine cannot be qualified as an automatic change of their habitual place of residence in Ukraine. Ukrainian children have left and, unfortunately, are still leaving Ukraine for a reason of disturbances caused by Russia's aggression, a so-called outside threat. Their departure is presumed to be temporary and has special aim – to take the safe and peaceful place of presence. That's why, as a general rule, the national courts of Ukraine, as the courts of the state of habitual residence, keep their jurisdiction in cases on taking protective measures for these children under Art. 5 of the 1996 Hague Convention.

However, the mere presence of the Ukrainian child under temporary protection on a territory of the Contracting State of the 1996 Hague Convention is considered a sufficient

[37] Resolution of the Supreme Court of Ukraine, case No. 359/2356/21, 12 June 2023. In: *reyestr.court.gov.ua* [online]. 12. 6. 2023 [2024-06-02]. Available at: <https://reyestr.court.gov.ua/Review/111647645>.

[38] Закон України від 23. 6. 2005 Про міжнародне приватне право. [Law of Ukraine from 23. 6. 2005 On Private International Law]. In: *Bulletin of Verkhovna Rada of Ukraine*. 2005, No. 32.

link to allow such state to assert jurisdiction, for example for the purpose of appointing a guardian (or a legal representative), conducting proper investigations into the child's situation and adopting appropriate measures for their protection. As a consequence, very often, national courts of the EU states apply Art. 6 of the 1996 Hague Convention as the ground for jurisdiction, specially conceived for children who are "refugees" or "internationally displaced because of disturbances in the State of their habitual residence."

According to the systematic interpretation of paragraphs 1 and 2 of Art. 6 of the 1996 Hague Convention jurisdictional rules of paragraph 1 of the Art. 6 should be applied for the children who have the established habitual residence in other Contracting state. So, the parallel existence of two jurisdictions is permissible: Ukrainian courts as the authority of the state of a child's habitual residence and national courts of the state of residence of a Ukrainian child under the status of temporary protection in this state. Of course, parallel proceedings may lead to the *lis(alibi)pendens* situations and for such situations Art. 13 of the 1996 Hague Convention may be applied. In any case there is a need for cooperation and coordination between the authorities of Ukraine and the state which gives the temporary protection status for Ukrainian child, particularly by the means of the International Hague Network of Judges and European Network of Judges.

Unfortunately, we have to presume: the longer the war continues and the longer a Ukrainian child stays in other country, the more likely will be the assessment that the child becomes integrated in its society and changes its habitual residence. Another factor worth considering is the change of intentions of a child and their family. These circumstances may be considered a long-term relocation. In the future, it would be quite hard to accept a general rule that a Ukrainian child did not change his/her habitual residence and that Ukrainian courts have jurisdiction under Art. 5 of the 1996 Hague Convention. The acquisition of habitual residence in another state should coincide with the loss of habitual residence in Ukraine. Naturally, every case will be dealt with on its own specific factual circumstances, taking into account the best interests of the child.