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The Influence of International Law on the Issue of Co-Parenting
Emerging Trends in International and European Instruments

Natalie Nikolina*

1. Introduction: the Dutch situation as an example

Today, more and more children experience the – often traumatic – situation of their parents' separation. In the Netherlands alone, this figure is approximately 57,000 children a year. That is more than one in four children.[1] The situation is not manifestly different in the rest of Europe. As parental separation can have many negative effects on the child, such as behavioural problems, poor school grades, depression and even delinquency, it is important that parents try to prevent such negative effects by making sound and practical agreements on issues regarding their children's upbringing and residence.

To ensure that the parent-child relationship suffers as little as possible from parental separation, the Dutch legislator has recently made two important legal changes. First, since 1998, joint parental authority now automatically continues after the parents' divorce.[2] Second, since the Promotion of Continued Parenting and Proper Divorce Act (*Wet bevordering voortgezet ouderschap en zorgvuldige scheiding*) came into force in 2009, separating parents have been obliged to agree on a parenting plan: an agreement that indicates how their parental responsibilities will be exercised after separation.[3] When they initiate divorce proceedings, the parents must submit this plan to the court. This new legislation has also given co-parenthood a special status: when deciding on a residential arrangement for the child or children after parental separation the judge should first consider the option of co-parenthood.[4] These legal changes indicate a trend towards co-parenthood after parental separation which is not limited to the Netherlands, but also occurs in the rest of Europe.[5]

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* Natalie Nikolina (e-mail: n.v.nikolina@uu.nl) is a PhD Candidate at the Molengraaff Institute for Private Law, Utrecht University School of Law (the Netherlands). She is currently conducting comparative socio-legal research on the residential arrangements of children after parental separation.

1 Numbers from the Dutch Central Bureau for Statistics and the 2010 study by E. Spruijt on divorce and children presented during the *Scheiden en de kinderen* congress on 12 October 2010. See for additional information: E. Spruijt & H. Kormos, *Handboek scheiden en de kinderen: voor de beroepskracht die met scheidingskinderen te maken heeft*, 2010.

2 C.G. Jeppesen de Boer, *Joint parental authority: a comparative legal study on the continuation of joint parental authority after divorce and the breakup of a relationship in Dutch and Danish law and the CEFL principles*, 2008, p. 101.

3 *Stb*. 2008, 500.

4 Co-parenthood in the light of the new Dutch law is described very thoroughly in M.V. Antokolskaia, 'Solomo's oordeel nieuwe stijl: verblijfsco-ouderschap in België en Nederland', 2010 *Tijdschrift voor Privaatrecht*, no. 3.

5 See for national examples: A. Singer, 'Active parenting or Solomon's justice? Alternating residence in Sweden for children with separated parents', 2008 *Utrecht Law Review* 4, no. 2, pp. 35-37; F. Granet, 'Alternating residence and relocation. A view from France', 2008 *Utrecht Law Review* 4, no. 2, pp. 48-52; C.G. Jeppesen de Boer, 'Parental relocation. Free movement rights and joint parenting', 2008 *Utrecht Law Review* 4, no. 2, pp. 73-82.

Co-parenting is generally seen by the Dutch legislator as beneficial for the child and as a 'safety net' to prevent the negative effects of parental separation. However, a great deal is still unknown about both the legal and practical reality of co-parenthood. One question that remains unanswered is how international law regulates the issues surrounding it, and therefore whether the legal movement towards co-parenthood fits within the international legal framework.

In view of the growing influence of international and regional organizations, such as the European Union, and their instruments on national law, these organizations and their instruments cannot be disregarded in legal research. International and regional instruments have now become an integral part of the national systems they apply to. Therefore, before looking at how the national systems function, which flaws they contain, or how they can be changed, it is prudent to first examine the international framework in which they have to function. This paper does just that. In order to answer the question of whether international legal instruments support co-parenting after parental separation, it analyzes the international framework for co-parenthood.

This paper includes only a discussion of those international and regional instruments that are relevant to the topic of co-parenting. These include issues such as the allocation and exercise of parental responsibilities, the child's rights in proceedings dealing with his or her residence, the child's rights in proceedings concerning the care of or contact with the child, and the provisions concerning the child's residence after parental separation. If they add something to the main subject, other closely linked issues are also briefly considered.

While related to issues of co-parenthood, instruments on child abduction have deliberately been excluded from the paper. Even though child abduction can coincide with co-parenting (for example, when a co-parent abducts the child to another country), it is a large and complex subject that touches not only upon private international law, but also on elements of criminal law and public law.

Because there is no clear division between residence and contact, and extensive contact can in practice mean that the child lives for a substantial amount of time with the non-resident parent, when an instrument has no provisions on residence, but does include provisions on contact that can be relevant for co-parenting, these provisions are included in this paper.

2. Terminology and structure

In discussions on parental responsibilities and co-parenting after parental separation, legal and non-legal terminology is often used interchangeably, and terms can have different meanings depending on the context, the legal system in question, or the personal background of the author. Before moving on to the substantive part of the paper, it is therefore crucial to set out and explain the terminology.

The word *parent* refers to the legal parent of the child.

The definition of *child* may be different according to the instrument that is being discussed. Generally speaking, children are persons from birth until 18 years of age.

Co-parenthood means, for the purpose of this paper, the joint exercise of parental responsibilities by both parents combined with the alternating residence of the child.

Alternating residence is a semi-permanent arrangement whereby a child lives part of the week or month with one parent and the other part with the other. While it is possible to exercise parental responsibilities jointly without alternating residence, the reverse situation (alternating residence without the joint exercise of parental responsibilities) is not very likely. When speaking of co-parenthood or co-parenting in this paper, alternating residence is *always* implied in the term. Co-parenting is both the legal sharing of the care for the child (making child-raising decisions together), as well as the practical sharing of the child's time spent with the parents.

Parental responsibilities are a collection of rights and duties intended to promote and safeguard the welfare of the child.[6]

Contact between parent and child means the establishment or maintenance of a personal relationship. It can take many forms, ranging from the child staying with the parent for a period of time on a regular basis, to contact through correspondence and rare visits.

In the following sections binding and non-binding international instruments are discussed. First, Section 3 discusses *binding* international instruments, grouped according to the organization from which they originate, starting with the United Nations, the Hague Conference, the Council of Europe and, finally, the European Union. Section 4 presents *non-binding* instruments in the same order. Another soft law instrument by the Commission on European Family Law is added in this section. If available, each instrument's provisions on (1) the child's rights, (2) the parent-child relationship, (3) parental responsibility, and (4) its relevance for co-parenting are discussed. These main features of the instruments are analyzed in Section 5. Finally, Section 6 concludes by describing international law's possible influence on co-parenting.

3. Binding instruments

The binding international instruments discussed in this section, while having different names, such as Covenant, Convention and Charter, can all be defined as international treaties: agreements under international law entered into by actors in international law. These actors can be sovereign states or international organizations. These treaties bind the States Parties as to the rights or principles they contain. They are discussed in the order of their regional application, starting with the instruments of the United Nations, then those of the Hague Conference, the Council of Europe and, finally, the instruments of the European Union. When there are multiple instruments originating from the same organization, they are arranged by the type of legal provisions they contain: human rights first, private international law second and substantive law third. Where applicable, case law associated with the instruments is also discussed.

3.1. The International Covenant on Civil and Political Rights (United Nations)

The International Covenant on Civil and Political Rights (ICCPR) was the first international instrument to protect the rights of the family and the child.[7] In the years following its entry into force in 1976, the ICCPR has generated a large body of case law that has branched out into issues concerning parentage and contact. The two articles on which the most important case law (for this paper) is based are Article 23 on the protection of the family and Article 24 on the protection of the child. They will be discussed below (not necessarily in that order).

3.1.1. The child's rights

Article 24 lays down the rights of a child to protection (by his or her family, society and the state), a name and nationality. It is for each state to determine what measures might be needed for the protection of children in its territory and jurisdiction.[8] The Human Rights Commission, in its general comment on Article 24, emphasizes that children need protection in the event of the divorce of their parents: 'If the marriage is dissolved, steps should be taken, keeping in view the paramount interest of the children, to give them necessary protection and, so far as is possible, to guarantee personal relations with both parents.'[9]

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6 See for a full definition and an extensive explanation of Principle 3:1 of the CEFL Principles, K. Boele-Woelki et al., *Principles of European Family Law Regarding Parental Responsibilities*, 2007, pp. 25-31.

7 1966 International Covenant on Civil and Political Rights, 999 *United Nations Treaty Series* 171.

8 Human Rights Committee, *General Comment 17 (Thirty-fifth session, 1989)*, 7 April 1989, para. 3.

9 Ibid., para. 6.

3.1.2. Parent-child relationship

Where both Article 23 and Article 24 are intended to promote and protect the development and continuity of a child's relationship with both parents after divorce, the background of this protection is different. Article 23 protects the bond between parent and child from the point of view that the *family* should be protected and kept intact as far as possible, while Article 24 is intended to ensure the protection and the best interests of the *child*.

Because, generally, it is (considered to be) in the best interests of the child to have a bond with both parents, this bond should be protected. But 'in cases where the parents and the family seriously fail in their duties, ill-treat or neglect the child, the state should intervene to restrict parental authority and the child may be separated from his family when circumstances so require.'[10]

The definition of family is not confined to the concept of marriage and should be broadly interpreted; however, some minimum requirements for the existence of a family relationship are necessary, such as life together, economic ties and a regular and intense relationship.[11] The family relationship is not automatically terminated after divorce.[12]

> 'The idea of the family must necessarily embrace the relations between parents and child. Although divorce legally ends a marriage, it cannot dissolve the bond uniting father – or mother – and child: this bond does not depend on the continuation of the parents' marriage.'[13]

Because of this bond, Article 23(4) 'grants, barring exceptional circumstances, a right to regular contact between children and both of their parents upon dissolution of a marriage'.[14] The States Parties also have to ensure that the right to regular contact can be successfully enforced.[15]

While the relationship between the parent(s) and child is seen as a family bond and has to be protected by the state, the protection of this relationship initially does not seem to go beyond the need to ensure that there is regular contact between the parent(s) and child. The ICCPR does not prescribe co-parenting, either during the relationship between the parents or after their separation. What it does prescribe is equality. Article 23(4) states that States Parties should take appropriate steps to ensure the equality of rights and responsibilities of spouses as to marriage, during marriage and upon its dissolution and that in the case of dissolution, provisions should be made for the necessary protection of any children involved. The protection of the bond between the (divorced) parent(s) and child should be equally enjoyed by parents of both sexes: 'any discriminatory treatment in regard to the grounds and procedures for separation or divorce, child custody, maintenance or alimony, visiting rights or the loss or recovery of parental authority must be prohibited, bearing in mind the paramount interest of the children in this connection. States Parties should, in particular, include information in their reports concerning the provision made for the necessary protection of any children at the dissolution of a marriage or on the separation of the spouses.'[16]

This presupposition of equality can be applied to parenting: the equal exercise of care in the form of co-parenting. The case law has not (yet?) gone as far as to take this point of view.

3.1.3. Relevance for co-parenting

Applying both articles to the issue of co-parenting it can be said that the protection of the family and the bond between parent and child with the included presupposition of equality between the parents would strongly support co-parenting. The protection of the child principle would also support co-parenting

10 Ibid.
11 Communication No. 417/1990, *Santacana v. Spain*, Views adopted on 15 July 1994, para. 10.2.
12 S. Joseph et al., *The international covenant on civil and political rights: cases, materials, and commentary*, 2004, p. 588.
13 Communication No. 201/1985, *Hendriks v. the Netherlands*, Views adopted on 27 July 1988, para. 10.3.
14 Communication No. 514/1992, *Fei v. Colombia*, Views adopted on 4 April 1995, para. 8.9.
15 See Communication No. 945/2000, *L.P. v. Czech Republic*, Views adopted on 4 August 2005. In this case the applicant was prevented from (regularly) meeting his son by his ex-wife, despite the fact that he had been granted the right to see his son every other weekend by the court. Although the court repeatedly fined the ex-wife for not respecting the court's decision, these fines were not fully enforced, nor replaced by other measures. This was seen as a violation of Article 23.
16 Human Rights Committee, *General Comment 19 (Thirty-ninth session, 1990)*, 27 July 1990, para. 9.

as part of this right's intention is to guarantee, as far as possible, personal relations with both parents, because this is seen as beneficial for the child. However, in cases where shared care would have a negative effect on the child's well-being, the state should intervene. To summarize, co-parenting is supported by both Article 23 and Article 24, but Article 24 would discourage co-parenting in cases where this would negatively affect the child. This could be the case, for example, when the alternating residence would amount to an unreasonable burden for the child, for example because the parents live too far apart.

3.2. The Convention on the Rights of the Child (United Nations)

While the rights set out in the major international human rights instruments apply to both adults and children, children need extra protection, because they are more vulnerable than adults. For that purpose the Convention on the Rights of the Child (CRC) restates the most crucial rights already in place through other international instruments and supplements them with rights that deal specifically with issues related to children.[17] The CRC is the most prominent international instrument protecting children's rights, not only because it specifically focuses on children's rights, but also because it is one of the very few binding international instruments which, with 193 States Parties (significantly, the United States is not among these States Parties), has almost reached universal ratification.[18]

The CRC will always apply in issues concerning co-parenting, as these issues directly affect the life and welfare of children. Out of the CRC rights, the right to know and be cared for by one's parents, the right not to be separated from one's parents against one's will and the child's right to maintain personal relations and direct contact with both parents on a regular basis after separation are the most relevant rights for this paper.

3.2.1. The child's rights

Article 3(1) lays down the general principle – to be found throughout the Convention – that in all actions concerning children the best interests of the child should be a primary consideration. Even though this notion is flexible, its interaction with the rest of the Convention is summarised quite clearly by Tobin: 'a proposed outcome for a child cannot be said to be in his or her best interests where it conflicts with the provisions of the Convention.'[19] So where one (or more) of the rights of the CRC is at stake, the notion of the best interests of the child should be applied in conjunction with this/these right(s). When no other right is applicable, the notion of the best interests of the child can be relied upon as a stand-alone principle.[20]

Another aspect to keep in mind is that the best interests of the child are *a primary* consideration; it is not prescribed by the CRC that the best interests of the child should be the *determining* consideration. This means that even if a certain decision is not in the child's best interests, it can still be taken by the relevant authority without infringing the CRC if someone else's needs (for example, one of the parent's) outweighs the best interests of the child or there are practical impossibilities to act in conformity with the child's best interests.

3.2.2. Parent-child relationship

For the purpose of this paper, Article 7(1) sets out one of the most important rights of the child: the right, as far as possible, to know and be cared for by one's parents. Article 7(2) obliges the States Parties to ensure the implementation of this right. The words 'as far as possible' tend to weaken this right. The danger exists that these words will give rise to an arbitrary interpretation of the right. For example, the words 'as far as possible' allow the non-disclosure of information about the biological parent(s) in the case of adoption, but what about a decision that one of the parents is unfit to care for the child and therefore should

17 1989 Convention on the Rights of the Child, 1577 *United Nations Treaty Series* 3.

18 See for a list of signatory states and ratifications the United Nations Treaties website at: <http://treaties.un.org> (last visited 2 May 2011).

19 J. Tobin, 'Beyond the Supermarket Shelf: Using a Rights Based Approach to Address Children's Health Needs', 2006 *International journal of children's rights* 14, p. 287.

20 S. Detrick, *A commentary on the United Nations Convention on the Rights of the Child*, 1999, p. 90.

be completely excluded form the child's life and can a parent be thus excluded for the sole reason that the other parent does not want the child to interact with the parent in question because he or she would have a negative influence on the child? Combined with the interpretation of Article 3 – which states that in all actions concerning children the best interests of the child should be a primary consideration – the right to know and be cared for by one's parents should be interpreted in a way that it is in the best interests of the child to know and be cared for by his or her parents.

The child does not only have the right to know and be cared for by his or her parents, but also to 'preserve his or her family relations as recognised by law without unlawful interference'.[21] In a way, this right is broader than the right to know and be cared for by one's parents as this right applies to a larger group of people and does not contain the weakening 'as far as possible' limitation; on the other hand, the right does allow *lawful* interference with family relations, which is a limitation in itself.

Article 9 deals with parental separation and focuses specifically on contact between parent(s) and the child. Article 9(1) obligates States Parties to ensure that a child is not separated from his or her parents against the parents' will, unless such separation is necessary for the protection of the best interests of the child. A separation between one of the parents and the child often occurs when the parents themselves separate. The separation in such cases is physical: one of the parents leaves the family home. This would either be voluntary or as a result of a court order, thus the requirements of Article 9(1) are fulfilled and the separation is in accordance with the CRC.

A decision on whether separating the child from his or her parent(s) in a specific case is in the child's best interests can only be taken by the competent authorities and should be subject to judicial review.[22] Also, all interested parties should be given an opportunity to participate in the proceedings and make their views known.[23] All interested parties include the child in question.[24] This is supported by Article 12 which grants the child who is capable of forming his or her own views the right to express those views freely in all matters affecting him or her and it grants the child the right to be heard in any judicial and administrative proceedings affecting him or her. The views of the child should be given due weight in accordance with his or her age and maturity.[25] General Comment No. 12 on this right clarifies that 'all legislation on separation and divorce has to include the right of the child to be heard by decision makers and in mediation processes. Some jurisdictions, either as a matter of policy or legislation, prefer to state an age at which the child is regarded as capable of expressing her or his own views. The Convention, however, anticipates that this matter is to be determined on a case-by-case basis, since it refers to age and maturity, and for this reason requires an individual assessment of the capacity of the child'.[26]

Once it has been determined that it is in the best interests of the child to be separated from one or both of his or her parents or one or both of the parents separates voluntarily, for example one of the parents has left the family home after divorce, Article 9(3) becomes applicable to the situation. This paragraph grants the child who is separated from one or both parents the right to maintain personal relations and direct contact with both parents on a regular basis, unless – again – this is contrary to the child's best interests. This means that while the CRC prescribes a minimum of regular *contact* after separation, it does not go as far as to make *shared care* (in the form of co-parenting) compulsory.

The rights contained in Articles 7 and 9 do not make a distinction between married, cohabiting or divorced parents, and the relationship between the parents does not seem to be of any importance at all. Instead the rights emphasize the bond between parent and child. The CRC obliges States Parties to make sure that a child develops a relationship with both his or her parents, has regular contact with them and, where possible, is cared for equally by both parents.

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21 Art. 8(1) of the CRC.
22 Art. 9(1) of the CRC.
23 Art. 9(2) of the CRC.
24 Detrick, supra note 20, p. 175.
25 Art. 12(1) of the CRC.
26 See the CRC General Comment No. 12, p. 15, discussing the right of the child to be heard. This document can be found on the website of the Office of the United Nations High Commissioner for Human Rights <www2.ohchr.org> (last visited 11 November 2011).

3.2.3. Parental responsibility

The CRC does not only focus on children's rights. Multiple articles give consideration to the rights and responsibilities of parents. Article 3(2) lays down an obligation for States Parties to take all appropriate legislative and administrative measures to ensure that the child receives such protection and care as is necessary for his or her well-being, *taking into account the rights and duties of his or her parents*, legal guardians, or other individuals legally responsible for him or her. The difficulty in applying Article 3(2) is that the States Parties on the one hand have to ensure the child's protection and care, while, on the other, they have to respect the parents' rights and duties. Upholding both can be very difficult when there are conflicting interests.

The States Parties not only have to give consideration to, but also to respect the responsibilities, rights and duties of parents (or other persons legally responsible for the child) to provide appropriate direction and guidance in the exercise by the child of the rights recognized in the CRC.[27]

It is not surprising that the CRC takes the rights and duties of the parents into account considering that it places the *primary* responsibility for the upbringing and development of the child on the child's parents (or legal guardians). Both parents have common responsibilities and the best interests of the child should be their basic concern.[28] One must keep in mind that *common responsibilities* do not necessarily mean *equal* or the *same* responsibilities. Thus the parents can have different responsibilities and it is also allowed by the CRC that one of the parents has more responsibilities than the other. Thus, it cannot be said that the parents have the right to *equally share the caring duties* as far as their child(ren) is/are concerned.

The CRC does not set out what responsibilities parents have or what they entail, but it does give an example in Article 27(2), stating that those responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the living conditions which are necessary for the child's development. This in itself is of course quite a vague provision.

3.2.4. Relevance for co-parenting

The rights enshrined in the CRC can be seen as supportive of joint parental authority over the child and regular contact with the child during the relationship and after separation, but nothing more. The fact that both parents have joint parental authority does not say anything about the division of care for the child, or about the child's residence.

However, one should be aware of the following. If joint parental authority is to be more than just a legal label, it should be exercised. This exercise will need at least some sort of communication and the making of arrangements between the parents. The joint exercise of parental authority will therefore in practice lead to the joint exercise of parental responsibilities. One can even wonder whether joint parental authority can be exercised effectively, or exercised at all, if there is no co-parenthood. Keeping this in mind, one could tentatively conclude that as the CRC explicitly encourages joint parental authority (even after separation), it implicitly also encourages co-parenting.

3.3. The 1996 Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibilities and measures for the protection of children (Hague Conference)

The 1996 Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibilities and measures for the protection of children (Hague Convention) does not contain any substantive law; its purpose is to provide rules on the jurisdiction and applicable law in disputes concerning children, including disputes about parental responsibilities.[29] It is a private international law instrument. This Convention is the first binding international instrument to talk about parental responsibilities as opposed to parental authority, which is a narrower term.

27 Art. 5 of the CRC.

28 Art. 18(1) of the CRC.

29 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibilities and measures for the protection of children, 19 October 1996 .

3.3.1. The child's rights

The Convention states in its preamble that the best interests of the child should be a primary consideration. The hearing of the child is also seen as very important. Not providing an opportunity for the child to be heard is in fact a valid reason not to recognise a foreign measure.[30]

3.3.2. Parental responsibility

Article 1(2) of the Convention defines the term parental responsibility as to include parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child.

Article 3 clarifies that the attribution, exercise, termination, restriction and delegation of parental responsibility all fall within the reach of the Convention, as do the rights of custody. This means that questions of jurisdiction and applicable law in disputes on co-parenting also fall within this Convention.

3.3.3. Relevance for co-parenting

The private international law provisions in this Convention will apply to disputes on co-parenting. In procedures relating to those disputes, the hearing of the child is important.

3.4. The Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe)

What the ICCPR is to binding international instruments, the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) is to European instruments.[31] It is the first and the most encompassing human rights treaty which has been set up to protect the most essential rights and freedoms of the peoples of Europe. For an international Convention, the ECHR has one of the strongest monitoring bodies possible in the form of the European Court of Human Rights (the Court) which has generated a large body of binding case law.

3.4.1. The child's rights

The ECHR protection of the child's rights is mostly associated with the protection of the parent-child relationship – more on which in the following subsection – but the Court has also made it clear that it is important to act consistently with the child's wishes where possible.[32] However, the case law demonstrates that states enjoy a wide margin of appreciation with regard to the degree of consultation with children and the weight attached to children's opinions in reaching decisions on family matters.[33]

In cases of contact, the child's wishes are important, but the domestic authorities should not base a refusal to grant access to the child solely on the negative attitude of a child. The child's age and maturity should be taken into account when deciding what significance should be attached to the child's opinion. The Court has not yet explained what should determine a child's maturity. It is also unclear whether a refusal by domestic authorities to take the view of a child who has reached a suitable age and maturity into account would violate the child's right to family life or the child's freedom of expression.[34]

3.4.2. Parent-child relationship

Article 8 of the ECHR – and the case law based thereon – is the only article in this Convention that has direct relevance for issues linked to co-parenting. This article protects the right to respect for private and family life and prohibits interference by a public authority with the exercise of this right, except when the interference is in accordance with the law and is necessary in a democratic society to protect certain legitimate aims.

In a number of decisions the Court has helped to define and explain the notion of family life. First of all, family life is not confined to marriage-based relationships and may encompass other de facto family

30 Art. 23(2)(b) of the Hague Convention 1996.
31 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 *United Nations Treaty Series* 221.
32 Ibid., para. 61.
33 Kilkelly, *The Child and the European Convention on Human Rights,* 1999, pp. 117-118.
34 Ibid., p. 119.

ties where the parties are cohabiting outside wedlock. A child born out of such a relationship is *ipso jure* part of that family unit from the moment and by the very fact of his or her birth. A bond thus exists between the child and his or her parents which amounts to family life even if at the time of his or her birth the parents are no longer cohabiting or if their relationship has ended.[35]

But even the cohabitation of the parents is not a necessary requirement for the existence of family life. The existence or non-existence of family life is essentially a question of fact depending upon the real existence, in practice, of close personal ties, in particular the demonstrable interest in and commitment by the father to the child both before and after the birth.[36]

While the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life and domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8, this does not automatically grant the parent the right to have parental authority over the child, or the right of contact with the child.[37] In decisions on granting or restricting parental authority, and granting, denying or restricting access to the child, as well as decisions on placing the child into care a fair balance must be struck between the interests of the child and those of the parent(s) and in striking such a balance, particular importance must be attached to the best interests of the child which, depending on their nature and seriousness, may override those of the parent(s).[38]

Article 8 is often relied upon in conjunction with Article 14: the provision on the prohibition of discrimination. Applied to cases concerning parental authority and contact, these two articles are used to prevent parental authority or access to the child from being denied to the parent because of discriminatory reasons. In *Salgueiro Da Silva Mouta,* for example, the Court found that awarding sole custody to the mother exclusively on the basis of the father's sexual orientation constituted discrimination and violated the ECHR.[39]

In the recent case of *Zaunegger* the prohibition of discrimination also played a role.[40] In this case a father wanted to have (joint) *elterliche Sorge* (a concept that lies somewhere between parental authority and parental responsibilities) with the mother over their daughter who was born during their cohabitation. Under German law married parents have the right and the duty to exercise parental authority (*elterliche Sorge*) over a minor child, but joint parental authority for parents of children born out of wedlock can only be obtained through a joint declaration (*gemeinsame Sorgerechtserklärung*), marriage, or a court order which requires the consent of both parents. As the mother was withholding her consent, despite the parents having a factual co-parenting arrangement, the domestic authorities denied the father's application.[41]

The father alleged before the European Court of Human Rights that the German law applied the right to family life in a discriminatory fashion, first by automatically granting sole custody to the unmarried mother and making an application for joint custody dependant on her consent.[42] Second, there was different treatment in comparison with married or divorced fathers, who are able to retain joint custody following divorce or a separation from the mother.[43] The Court agreed with the father that there had been a difference in treatment, but considered it justified for the protection of the child's interests to attribute parental authority over the child born out of wedlock initially to the mother in order to ensure that there is at least one person at birth who can act for the child in a legally binding way.[44] However, even if it may be justified in some cases to deny an unmarried father participation in parental authority, the idea that joint parental authority against the will of the mother of a child born out of wedlock is *prima facie* not in the child's interests could not be justified.[45] This should also be seen in the light of the Court's conviction that biological and social reality should prevail over a legal presumption, especially in cases concerning

35 ECtHR *Keegan v. Ireland*, Appl. No. 16969/90, 26 May 1994, para. 44.
36 ECtHR *Lebbink v. the Netherlands*, Appl. No. 45582/99, 1 June 2004, para. 36.
37 ECtHR *McMichael v. the United Kingdom*, Appl. No. 16424/90, 24 February 1995, para. 86.
38 ECtHR *Hoppe v. Germany*, Appl. No. 28422/95, 5 December 2002, para. 48; ECtHR *Johansen v. Norway*, 17383/90, 7 August 1996, para. 78.
39 ECtHR *Salgueiro Da Silva Mouta v. Portugal*, Appl. No. 33290/96, 21 December 1999, paras. 35-36.
40 ECtHR *Zaunegger v. Germany*, Appl. No. 22028/04, 3 December 2009, paras. 8-12.
41 Ibid.
42 Ibid., paras. 32-33.
43 Ibid., para. 43.
44 Ibid., paras. 49 and 55.
45 Ibid, paras. 56 and 59.

family relations.[46] The Court hinted that in circumstances as in the present case, where the father was a de facto co-parent of his daughter, the reasons for denying him parental authority will have to be particularly weighty as it will have to be proven that granting him parental authority would be manifestly contrary to the interests of the child.

In the case discussed the legal situation did not represent the factual situation. The opposite situation, in which the legal reality is not supported by the actual reality, is also possible. This is the case when the parents have an official co-parenting arrangement or joint parental responsibilities, but one parent is prevented from exercising his or her rights by the other parent. In such cases the Court has ruled that it is not sufficient for domestic authorities to grant parental rights, they should also ensure that the rights can be and are enforced.[47] The Member States therefore do not only have the negative obligation not to interfere with family life, but also the positive obligation to ensure *effective* respect for family life.[48]

3.4.3. Relevance for co-parenting

The findings in this section lead to the conclusion that while the ECHR and the case law on Article 8 do not prescribe co-parenting as such, they do make it more difficult for Member States to deprive parents of parental authority and contact with their children. The child's interests are also important, and in many cases decisive, in matters touching upon family life. The bond between parent and child is something that should be protected as much as possible, sometimes requiring positive action by the domestic authorities. The recent case law has also shown that an established practice of co-parenting should give the co-parent without legal rights the opportunity to apply for parental authority.

3.5. The European Convention on the Exercise of Children's Rights and the Convention on Contact Concerning Children (Council of Europe)

In 1996 and 2003, the Council of Europe adopted two new conventions concerning the exercise of children's rights and contact: the European Convention on the Exercise of Children's Rights and the Convention on Contact Concerning Children.[49] Although these conventions contain more detailed provisions and provide more protection than their predecessors, their influence in Europe is nonetheless limited, even questionable, because the number of signatories to and ratifications of the conventions remain very limited; 16 ratifications of the European Convention on the Exercise of Children's Rights and 6 ratifications of the Convention on Contact Concerning Children.[50]

3.5.1. The child's rights

Throughout the text of this Convention two very important family law notions are restated and anchored: the idea that in proceedings concerning children, their best interests should be the primary consideration as well as the right of children to be informed and express their view in proceedings affecting them.

The obligation to consider the best interests of the child applies to all parties concerned, meaning that while the Convention can only bind the States Parties directly, it does state that the parents, generally speaking, should also consider their child's best interests and that the national judicial authority should take decisions in the best interests of the child.[51]

Article 3 provides that those children who are considered by internal law as having sufficient understanding should – in proceedings affecting them – receive all relevant information and be given the opportunity to express their views. Children should be able to participate in such proceedings whether

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46 ECtHR *Kroon v. the Netherlands*, Appl. No. 18535/91, 27 October 1994, para. 40.

47 See for example the recent case: ECtHR *Dąbrowska v. Poland*, Appl. No. 34568/08, 2 February 2010.

48 ECtHR *Hokkanen v. Finland*, Appl. No. 19823/92, 23 September 1994, para. 55.

49 1996 European Convention on the Exercise of Children's Rights, *European Treaty Series* 160; 2003 Convention on Contact Concerning Children, *European Treaty Series* 192.

50 The states that have ratified the Convention on the Exercise of Children's Rights are: Austria, Croatia, Cyprus, the Czech Republic, Finland, France, Germany, Greece, Italy, Latvia, Montenegro, Poland, Slovenia, the former Yugoslav Republic of Macedonia, Turkey and Ukraine. The states that have ratified the Convention on Contact concerning Children are Albania, Croatia, the Czech Republic, Romania, San Marino and Ukraine.

51 See the preamble, Art. 1(2) and Art. 6(a) of the European Convention on the Exercise of Children's Rights.

directly or through a special representative and should be assisted, if needed, in expressing their views.[52] The holders of parental responsibilities (usually the parents) should help the child – even if they are not the legal representatives of the child – to understand the proceedings, the information and to express his or her views.[53] The judicial authority should give due weight to the views expressed by the child before taking a decision.[54]

3.5.2. Parent-child relationship

The Convention on Contact Concerning Children stresses that a child and his or her parents have the right to obtain and maintain regular contact with each other. Also the notions of the best interests of the child and the child's right to be given information and to express his or her views are included in the Convention text.

Contact for the purposes of the Convention is broadly defined; not only is staying with or meeting the non-resident parent covered by the term contact, but also any form of communication between the parent and the child and the provision of information to the parent about the child or to the child about the parent is included in the definition.[55] One can see this inclusion as both limiting and extending the rights of the non-resident parent, depending on how it is interpreted. Limiting, as it could create the danger that the non-resident parent will only be given information about the child or allowed to correspond, but not actual contact, as correspondence is also seen as 'contact' under the Convention; extending, if the interpretation would allow for correspondence and information *in addition* to regular meetings with the child.

The most important provision of the Convention on Contact is to be found in Article 4 which states that a child and his or her parents have the right to obtain and maintain regular contact with each other and that such contact may only be restricted or excluded in case a restriction or exclusion is necessary in the best interests of the child. Contact is therefore seen as very important for both the child and the parents and practical obstacles, such as for example the fact that the parents do not live in the same state, are not sufficient to restrict or deny such contact.

In decisions on contact the child's best interests are important, even decisive (when deciding to restrict or exclude contact) and the notion of the best interests of the child reappears in the text of the Convention on multiple occasions.[56]

The child is not merely the object of decisions on contact, he or she – if having sufficient understanding – also has the right to receive all relevant information, to be consulted and to express his or her views. These views, wishes and feelings of the child should be given due weight by the authority that takes the decisions on contact.[57] But also, should the child become older and express his or her wishes against the enforcement of the contact arrangement, then his or views should be respected.[58]

Other than against the child's best interests or wishes, the text of the Convention urges the States Parties to do all that they can to enforce contact orders.

3.5.3. Relevance for co-parenting

While the maintenance of regular contact is not at all the same as co-parenting – for that closer co-operation between the parents is necessary and they must have an arrangement when both parents take decisions about the care and upbringing of the child, combined with alternate residence arrangements – regular contact could lead to co-parenthood as it forces the parents to co-operate with each other and share information about the child. One could say that by promoting contact between (both) parents and child despite practical obstacles, the Convention on Contact sends out a positive message for more intensive co-operation between the parents that may result in co-parenthood.

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52 Art. 1(2), Arts. 3-6 and Art. 10 of the Convention on the Exercise of Children's Rights.
53 *European Convention on the Exercise of Children's Rights Explanatory Report*, para. 22.
54 Art. 6(c) of the Convention on the Exercise of Children's Rights.
55 Art. 2(a) of the Convention on Contact Concerning Children.
56 The Preamble, Arts. 4, 6, 7 and 8 of the Convention on Contact Concerning Children.
57 Art. 6 of the Convention on Contact Concerning Children.
58 *Convention on Contact Concerning Children Explanatory Report*, para. 32.

The application of the Convention on the Exercise of Children's Rights to the issue of co-parenthood would mean that the question of how the child's residence, the care for the child and the contact with the child after the separation of the parents should be devised, must be answered taking into account the best interests of the child and the child's views. These types of decisions are not up to the parents to decide as they deem fit. The procedures have to be child-oriented instead of parent-oriented.

3.6. The EU Charter (European Union)

While most EU laws deal with harmonization and cross-border issues, an important exception to this is the Charter on Fundamental Rights of the European Union (the Charter).[59] The Charter is a recent addition to European Community law, having been adopted in December 2000, but only gaining binding force through the entry into force of the Lisbon Treaty on 1 December 2009.[60] The Charter contains human rights provisions and has been strongly influenced by other (binding) human rights instruments such as the ICCPR, the CRC and the ECHR with some overlapping provisions. An important difference between these international instruments and the Charter is the monitoring. As the Charter is now a binding EU instrument its provisions can be relied upon directly before the national courts of the Member States and before the European Court of Justice. This is more individualized protection than most (binding) human rights treaties offer. It will be interesting to see whether this will encourage more Europeans to invoke these rights. So far, it is too early to make any conclusions as the Charter has only been binding for a very brief period of time. The human rights set out within the Charter are presented as common (European) values. The two Charter articles that can influence co-parenthood (in the future) are Article 24, which deals with the rights of the child, and Article 7, which lays down the right to respect for private and family life.

3.6.1. The child's rights

Article 24(3) provides that 'every child [should] have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests'. This provision is based on Article 9(3) of the CRC, but unlike Article 9(3) of the CRC, Article 24 of the Charter applies to all children instead of children who are separated from their parents. 'A personal relationship and direct contact' are factual instead of legal notions.

Article 24(2) is a restatement of Article 3(1) of the CRC and prescribes that in all actions relating to children the child's best interests must be a primary consideration. Just as the CRC, the Charter does not explain what those best interests are exactly.

Another notion that has been borrowed from the CRC is the right of children to express their views and the obligation to take these views into consideration in matters concerning them.[61] However, unlike the CRC, the Charter does not grant the child the explicit right to be heard in proceedings concerning him or her.

3.6.2. Parent-child relationship

Apart from the rights of the child, the Charter also protects the family. Article 7 provides that 'everyone has the right to respect for his or her private and family life, home and communications'. This provision is an exact replica of Article 8(1) of the ECHR. However, Article 8 of the ECHR has a second paragraph that sets out the possible exceptions to the right. Article 7 of the Charter does not have a similar system of exceptions. Does this mean that the right to respect for private and family life is unconditional? This is unlikely, but because the Charter is such a new instrument, there has not yet been any case law to either disprove or confirm the right's status.

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59 2000 Charter of Fundamental Rights of the European Union, 2000/C 364/01.

60 2007 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, *Official Journal* 2007/C 306/01.

61 Art. 24(1) of the Charter and Art. 12(1) of the CRC.

3.6.3. Relevance for co-parenting

When it comes to the interpretation of the above articles it will be interesting to see whether the domestic courts and the Court of Justice of the European Union (ECJ) are going to use the interpretation that has already been established in CRC and ECHR case law concerning similar provisions or whether they will devise a completely new line of interpretation. It would be premature to draw any conclusions at this stage, but considering that the ECJ has a long history of using other international instruments (including the ECHR) in the reasoning for its decisions, it is likely that the ECJ, at the very least, will not completely ignore the already established interpretation. This means that it is unlikely that the Charter will be interpreted to prevent or discourage co-parenting.

3.7. Brussels II bis (European Union)

When it comes to European Union legislation in the field of family law, it is mainly concerned with *cross-border implications* and the harmonization of private international law rules. The Brussels II bis Regulation on jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility is the most well-known and far-reaching private international law instrument in this area.[62] This Regulation sets out rules on jurisdiction, recognition and enforcement of judgments concerning, among other things, parental responsibility. Where it deals with the same issues as the 1996 Hague Convention, the Brussels II bis Regulation applies when the child concerned has his or her habitual residence on the territory of a EU Member State or when the case concerns the recognition and enforcement of a judgment delivered in a court of a EU Member State on the territory of another Member State.[63]

The Brussels II bis Regulation applies to the attribution, exercise, delegation, restriction or termination of parental responsibility as well as to the rights of custody and access.[64] This means that it will also apply in (cross-border) cases on co-parenting.

3.7.1. The child's rights

The hearing of the child plays an important role in the application of the Regulation as can be seen in Paragraphs 19 and 20of the Preamble and Articles 23(b), 41(2)(c) and 42(2)(a). The Regulation also frequently mentions the best interests of the child as being an important or primary consideration.[65]

3.7.2. Parental responsibility

The Brussels II bis Regulation does not repeat the definition of *parental responsibility* from the 1996 Hague Convention; instead it defines parental responsibility as 'all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect' including the rights of custody and the rights of access.[66]

3.7.3. Relevance for co-parenting

For co-parenting arrangements the Brussels II bis Regulation mainly provides much clarity on what to do in cross-border situations or what rights a parent has when the other parent moves to another Member State with the child. In the latter case the arrangement need not necessarily be changed (for example, when the move is just across the border and the distance between both parents and the child's school is still reasonable for the child to alternate between the parents), as a judgment (including a residential arrangement) delivered in one Member State shall be recognized in other Member States – unless one of the exceptions of Article 24 is applicable – and the Recommendation even provides rules on when such a judgment can be enforced (in other Member States).[67]

62 2003 Council Regulation (EC) No. 2201/2003 concerning jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, *Official Journal* L 338 , 23/12/2003, pp. 0001-0029.
63 Art. 61 of the Brussels II bis Regulation.
64 Art. 1(b) and 2(a) of the Brussels II bis Regulation.
65 See Arts. 12(1)(b) and 15(1).
66 Art. 2(7) of the Brussels II bis Regulation.
67 Chapter III of the Brussels II bis Regulation.

4. Non-binding instruments

In this section non-binding instruments are discussed. These instruments, although not binding, have a strong persuasive effect, because they have been drafted by renowned national experts and are often based on extensive research. A close link also often exists between the non-binding instruments and the legislature of international or European organizations, because many of the experts involved in the drafting of these instruments are employed by these organizations. Obviously the weakness of these instruments is their non-enforceability.

Three of the instruments discussed below, the Recommendation on Parental Responsibilities, the White Paper and the Draft Recommendation on the rights and legal status of children and parental responsibilities, originate from the Council of Europe; while the last one, the CEFL Principles, was drafted by the Commission on European Family Law, an independent, international, academic initiative. All of the instruments contain substantive law and are therefore discussed chronologically.

4.1. The Recommendation on Parental Responsibilities (Council of Europe)

The Recommendation on Parental Responsibilities was adopted by the Committee of Ministers of the Council of Europe on 28 February 1984 and was at that time the first international instrument dealing specifically with parental responsibilities.[68] The Recommendation sets out the way parental responsibilities should be allocated in different situations, when the competent authority should take measures if parental responsibilities are misused and what some of the responsibilities entail. Parental responsibilities are defined as 'a collection of duties and powers which aim at ensuring the moral and material welfare of the child, in particular by taking care of the person of the child, by maintaining personal relationships with him [or her] and by providing for his [or her] education, his [or her] maintenance, his [or her] legal representation and the administration of his [or her] property'.[69]

4.1.1. The child's rights

When taking a decision relating to the attribution or exercise of parental responsibilities or a decision that affects the essential interests of the child the competent authority is required to consult the child involved with regard to the decision. This requirement only exists if the child's degree of maturity so permits.[70]

4.1.2. Parental responsibility

The Recommendation makes a distinction between married, divorced and non-married parents when it comes to the exercise of parental responsibility. Married parents should have joint parental responsibilities for the child of their marriage.[71] When they decide to separate the competent authority requested to intervene should divide the exercise of the responsibilities between the two parents. The competent authority can only provide that the responsibilities should be exercised jointly if the parents consent to this, and in general the competent authority should take account of any agreement concluded between the parents, unless this is contrary to the interests of the children.[72]

When children are born out of wedlock and a legal filiation link is established with regard to both parents, domestic law can *only* provide that the parental responsibilities should be exercised jointly by both parents if they live together or if an agreement to this extent has been concluded between them.[73] This is the case even if the joint exercise of parental responsibilities would have been in the best interests of the child in a particular case. This is surprising as in Principle 2 it is stated that any decision by the competent authority concerning the attribution of parental responsibilities or the way in which these responsibilities are exercised should be based primarily on the interests of the child.

68 1984 Recommendation No. R (84) 4 on Parental Responsibilities.
69 Principle 1(a) of the Recommendation on Parental Responsibilities 1984.
70 Principle 3 of the Recommendation on Parental Responsibilities 1984.
71 Principle 5 of the Recommendation on Parental Responsibilities 1984.
72 Principle 6 of the Recommendation on Parental Responsibilities 1984.
73 Principle 7 of the Recommendation on Parental Responsibilities 1984.

Not only does the Recommendation set out the different possible ways in which the parental responsibilities should be allocated, but it also provides guidelines as to their exercise. Thus 'Principle 10' explains that where parental responsibilities are exercised jointly by both parents, any decision affecting the interests of the child should be taken with the agreement of both and in case of disagreement the competent authority should try to reconcile the parents insofar as the interests of the child so require. When reconciliation is not possible it is up to the competent authority to take the appropriate decision. Here one can see the best interests of the child being given priority over the individual wishes of the parents.

4.1.3. Relevance for co-parenting

The main conclusion that can be drawn from the provisions of the Recommendation on Parental Responsibilities is that co-parenthood after parental separation cannot be allocated against the parents' wishes, not even if it is in the best interests of the child (although one can question whether it could ever be in the child's best interests to force disputing parents into a co-parenting arrangement). The inability of the competent authority to choose co-parenting without the parents' consent/prior agreement could be seen as an obstacle to co-parenting, especially in situations where contact between the parents is reasonable and parental responsibilities could be exercised together in harmony, but one of the parents still refuses to consent.

4.2. The White Paper (Council of Europe)

For over a decade the Recommendation on Parental Responsibilities remained the only instrument regulating parental responsibilities. Then, in 1997, the Council of Europe's Committee of Experts on Family Law decided to request the preparation of principles on the legal status of children, to be included in an international instrument. This led to the drafting of the White Paper on principles concerning the establishment and legal consequences of parentage (the White Paper). Due to the low number of comments from the Council of Europe Member States and the fact that the national legislation in this field was then still in the process of development, it was eventually decided to adopt and publish this document as a Report instead of an official Recommendation.[74] It is now being replaced by the new Draft Recommendation.[75]

4.2.1. The child's rights

The child is not simply a subject that should be cared for, he or she is an autonomous person and a party in decisions on parental responsibilities. When exercising parental rights and responsibilities the child should have a right to express his or her views and due weight should be given to the views expressed by the child according to his or her age and maturity.[76] The same must be done by the competent authority when taking a decision relating to parental responsibilities.[77]

4.2.2. Parental responsibility

The White Paper sets the joint attribution and exercise of parental responsibilities as the point of departure, because it is seen as the ideal situation for the child.[78] It is presented as the norm and any departure from it as an exception, justified only by the best interests of the child.

Parental responsibilities are defined in Principle 18 as 'a collection of duties and powers, which aim at ensuring the moral and material welfare of children, in particular: care and protection, maintenance of personal relationships, provision of education, legal representation, determination of residence and

74 Council of Europe Committee of experts on Family Law, *Report on principles concerning the establishment and legal consequences of parentage – "The White Paper"*, 23 October 2006, CJ-FA (2006) 4 e; Council of Europe European Committee on Legal Co-operation, *"White Paper" on principles concerning the establishment and legal consequences of parentage*, 15 January 2002 (adopted 11-14 May 2004), CJ-FA (2001) 16 rev.

75 More on this in the next section.

76 Principle 21 of the White Paper.

77 Principle 25(2) of the White Paper.

78 Para. 66 of the White Paper.

administration of property'. This is essentially a restatement of Principle 1(a) of the Recommendation on Parental Responsibilities 1984, so the old definition is retained.

Principle 19 states that parental responsibilities should in principle belong jointly to both parents and when, by the operation of law, only one parent is allocated parental responsibilities, the other parent should be able to acquire them, unless it is against the best interests of the child. The lack of consent or opposition by the parent having parental responsibilities should not as such be an obstacle to the acquisition of parental responsibilities by the other parent.

Not only should the parents both *have* parental responsibilities, they should also have the equal right to *exercise* these responsibilities and should preferably do so *together*. Just as the allocation, the exercise of parental responsibilities is subject to the child's best interests and if those interests so require, the exercise of parental responsibilities may be divided between the parent or limited to one of the parents, based on the decision of a competent authority or on an agreement concluded between the parents.[79]

Parents may *only* be deprived – partly or totally – of parental responsibilities or of the exercise thereof in exceptional circumstances determined by the law and only upon a decision by a competent authority made in the best interests of the child. Such decisions, once made, should be reviewed periodically.[80]

Because the underlying idea of the principles is that the joint exercise of parental responsibilities is in the best interests of the child, no distinction is made between married and unmarried couples or between legitimate and illegitimate children.[81] To remove any doubt, in Principle 22 it is specifically stated that the dissolution or annulment of a marriage, the separation of the parents or the termination of the cohabitation should not *as such* affect the right of a parent to exercise parental responsibilities. However, in exceptional situations the competent authority may rule – after the relationship of the parents has changed – that parental responsibilities should be exercised differently if the automatic continuation of co-parenthood is clearly shown to be contrary to the best interests of the child.[82]

4.2.3. Relevance for co-parenting

The White Paper's strong promotion of the joint exercise of parental responsibilities can be seen as very favourable to co-parenting as co-parenting is essentially the joint exercise of parental responsibilities combined with the alternate residence of the child.

4.3. The Draft Recommendation on the rights and legal status of children and parental responsibilities (Council of Europe)

In 2009 steps were taken to revive the idea of a new instrument on (among other things) parental responsibilities; Nigel Lowe then wrote a report proposing a New European Convention on Family Status. This proposal was part of a study into the rights and legal status of children being brought up in various forms of marital or non-marital partnerships and cohabitation.[83] This resulted in a Draft Recommendation on the rights and legal status of children and parental responsibilities.[84] The Recommendation has not yet been adopted, but is expected to be approved and adopted very soon. The Recommendation is to provide minimum standards for issues concerning the rights and legal status of children and parental responsibilities.[85] There are many similarities between the Draft Recommendation and the White Paper. This is easily explained as both documents originate from the same organization, concern the same or similar issues and the Draft Recommendation was drafted within a relatively short period of time after the White Paper. Another source of inspiration for the Draft Recommendation has been the Principles of European Family Law Regarding Parental Responsibilities by the Commission on European Family Law (CEFL

79 Principle 20 of the White Paper.
80 Principle 24 of the White Paper.
81 Para. 66 of the White Paper.
82 Para. 66 of the White Paper.
83 Nigel Lowe, *A study into the rights and legal status of children being brought up in various forms of marital or non-marital partnerships and cohabitation*, 21 September 2009, CJ-FA (2008) 5.
84 Council of Europe Committee of Experts on Family Law, *Draft Recommendation on the rights and legal status of children and parental responsibilities*, 27 May 2010, CJ-FA-GT3 (2010) 2 rev. 2.
85 Preamble to the Draft Recommendation.

Principles).[86] Many of these Principles were either literally copied by the Draft or slightly amended and then used in the Draft.

4.3.1. Parental responsibility

The Draft uses the same definition of parental responsibilities as the Recommendation on Parental Responsibilities 1984 and the White Paper, but adds the word 'including' to the definition when listing the different responsibilities to highlight the intention not to make the list exhaustive.[87] The Draft gives an indication of for what objective parental responsibilities should be utilized: the holders of parental responsibilities should care for, protect, and educate the child to promote the child's personality in a manner consistent with his or her evolving capacities. The child should not be subjected to violence or treatment that could endanger his or her – mental or physical – health.[88] It is also stated explicitly and separately in Article 27 that parents should be under a duty to maintain the child.

Parental responsibilities should in principle belong to each parent and the dissolution, termination or annulment of the parents' marriage or other formal relationship, or their legal or factual separation should not *as such* constitute a reason for terminating parental responsibilities (by operation of law).[89] This is not an absolute obligation as can be seen by the words 'in principle' and Article 30(2) which provides that if only one parent has parental responsibilities by the operation of law, states should make procedures available for the other parent to have an opportunity to acquire parental responsibilities, unless it is against the best interests of the child. The state is therefore able to exclude certain parents from having and exercising parental responsibilities. The explanatory memorandum clarifies that this exception concerns *totally unfit* parents and gives rapist fathers as an example. The sole lack of consent or opposition by the parent who has parental responsibilities is not enough to refuse to grant parental responsibilities to the other parent.[90]

Just as parental responsibilities can be acquired by the parent previously not having them, they can end or a parent can be deprived thereof them. Parental responsibilities usually end when the child reaches majority or the age of emancipation.[91] The domestic competent authority may also, in exceptional circumstances, decide to partly or totally deprive the parent of parental responsibilities.[92] Exceptional circumstances may include the commission of criminal offences against the child or the mental illness of the parent.[93] Considering that the Draft's preamble states that the best interests of the child are a primary consideration in all actions concerning children, parents should *only* be deprived of parental responsibilities if it is in the best interests of the child. Also, (partial) deprivation of parental responsibilities does not have to be permanent. When such deprivation is no longer justified parental responsibilities should be restored.[94]

The Draft gives more elaborate directions as to the exercise of (joint) parental responsibilities than any other international instrument. Article 37 explains that not only should the holders of parental responsibilities have an equal right and duty to exercise such responsibilities; they should – where possible – exercise them jointly. For the joint exercise of parental responsibilities it is of course necessary that the parents agree with each other. Agreement between parents is strongly encouraged, but each holder of parental responsibilities has the right to act alone with respect to daily matters.[95] The consent of the other parent is then presumed.[96] Decisions concerning *important* matters should be taken jointly.[97] Article 38(2) gives an example of such matters: changing the child's school or the child's place of residence. In

86 More about these principles in Section 3.4.
87 Art. 21 of the Draft Recommendation; Principle 1(a) of the Recommendation on Parental Responsibilities 1984; Principle 18 of the White Paper.
88 Art. 31 of the Draft Recommendation.
89 Art. 23(1) and 23(3) of the Draft Recommendation.
90 Art. 23(2) of the Draft Recommendation.
91 Art. 25 of the Draft Recommendation.
92 Art. 27 of the Draft Recommendation.
93 Explanatory memorandum.
94 Art. 28 of the Draft Recommendation.
95 Art. 30(1) of the Draft Recommendation.
96 Explanatory memorandum.
97 Art. 30(2) of the Draft Recommendation.

urgent cases, however, national law may determine that certain important decisions may be taken by a holder of parental responsibilities acting alone. The other holder(s) of parental responsibilities should be informed about these decisions without undue delay.

In cases where the parents cannot reach agreement either parent may apply to the competent authority. The competent authority should promote the reaching of an agreement, but where an agreement cannot be reached, the competent authority should decide how or by whom the parental responsibilities should be exercised taking into account the best interests of the child and the child's wishes (if the child is sufficiently mature).[98]

4.3.2. Relevance for co-parenting

A unique feature of the Draft is that it regulates how the residential arrangements of the child and changes thereto should be made. It is (or it should be) the norm that the child lives with both parents.[99] However, when the holders of parental responsibilities are living apart, they should agree upon with whom the child resides. If a joint holder of parental responsibilities then wishes to change the child's residence within or outside the jurisdiction, he or she should inform the other holder of parental responsibilities in advance. If the other holder of joint parental responsibilities objects to the change of the child's residence, he or she may apply to the competent authority for a decision. It is then for the competent authority to decide whether the move can take place taking into account the child's best interests and wishes; the child's right to maintain personal relationships with the other holder of parental responsibilities; the ability and willingness of the holders of parental responsibilities to co-operate with each other; the personal situation of the holders of parental responsibilities; the geographical distance and accessibility; and the free movement of persons.[100]

The Draft clearly sets co-parenting as the norm, but leaves many possibilities to depart from the norm, especially if a departure would be in the best interests of the child. Agreement between the parents is strongly encouraged. The parents can of course agree that there should not be a co-parenting arrangement. It is then unlikely that they will be forced into one. The domestic competent authority is given quite a strong position as the deciding body when the holders of parental responsibilities cannot come to an agreement. The competent authority's main responsibility seems to be to ensure that the best interests and wishes of the child are respected and given primary consideration in these types of decisions.

4.4. The CEFL Principles

Finally, the Principles of European family law regarding parental responsibilities drafted by the Commission on European Family Law (the CEFL Principles) deserve a special mention in this paper even though they do not originate from an official European (or international) legislative organization.[101] It is nevertheless important to mention the CEFL Principles here, because Nigel Lowe is a member of the CEFL and has relied heavily on the CEFL Principles in the Draft Recommendation on the rights and legal status of children and parental responsibilities. The CEFL Principles were devised by comparing national legislation, taking into account international instruments, and searching for common ground as well as looking into the future. The CEFL Principles suggest how (European) family law should evolve and progress. Later the Principles were tested by applying them to the national systems of Estonia, Malta, Romania, Scotland, Denmark, England and Wales, and Turkey.[102] The CEFL Principles are also the most extensive and progressive principles on parental responsibilities – in the sense that they regulate more issues and in more detail than other instruments.

98 Art. 29 of the Draft Recommendation.
99 Explanatory memorandum.
100 Art. 32 of the Draft Recommendation.
101 K. Boele-Woelki et al., *Principles of European Family Law Regarding Parental Responsibilities*, 2007.
102 J. Mair & E. Örücü (eds.), *Juxtaposing Legal Systems and the Principles of European Family Law on Parental Responsibilities*, 2010.

4.4.1. The child's rights

Principle 3:37 explains that the hearing of the child should occur in all proceedings concerning parental responsibilities and if the competent authority decides not to hear the child it should give specific reasons to justify its decisions. The Principles also clarify where and how the hearing of the child should be done.

4.4.2. Parental responsibility

The CEFL Principles make a strong case in favour of parental equality judging from Principle 3:11 which states that parents having parental responsibilities should have an equal right and a duty to exercise such responsibilities and, whenever possible, they should exercise them jointly. According to Principle 3:10 these parental responsibilities should not be affected by parental separation.

The decision making on daily matters, important decisions, urgent decisions and the power of the national competent authority to decide in cases where the holders of parental responsibilities cannot reach an agreement have been discussed in detail in Paragraph 4.3. The CEFL Principles were slightly rephrased in the Draft Recommendation, but the meaning has remained the same.[103]

The CEFL Principles, however, have a couple of additional provisions that did not make it into the Draft Recommendation. These provisions regulate the exercise of parental responsibilities in more detail. As such, Principle 3:15 provides that subject to the best interests of the child, parents may agree that one of the parents may exercise parental responsibilities alone. This decision can also be taken by the competent authority. Parents, who have joint parental responsibilities, may also, subject to the best interests of the child, agree in general on the exercise of parental responsibilities and the way in which this should be done. Such agreements may be scrutinized by the competent authority.[104]

The provisions on termination, discharge and restoration of parental responsibilities are (again) very similar to those in the Draft Recommendation, although instead of stating that the competent authority *can,* in exceptional circumstances, deprive a holder of parental responsibilities of this possibility, the CEFL Principles provide when the competent authority *should* do so (namely where the behaviour of the holder of parental responsibilities causes a serious risk to the person or property of the child).[105]

The goal of the exercise of parental responsibilities is care, protection and education.[106] This has been adopted by the Draft Recommendation, but the more practical prohibition of corporal punishment and humiliating treatment has been replaced with a more vague prohibition of violence and harmful treatment.[107]

4.4.3. Relevance for co-parenting

For co-parenting, a term that implies alternating the residence of the child, Principle 3:20 on residence is very important as it explicitly provides for an alternating residence as an option after parental separation. This option may either be chosen by the parents or through a decision of a competent authority as long as it is in the best interests of the child. When deciding, the competent authority should take into account the age and opinion of the child, the ability and willingness of the holders of parental responsibilities to cooperate with each other in matters concerning the child, their personal situation and the distance between the residences of the holders of parental responsibilities, as well as the distances between these residences and the child's school.[108] This Principle proved inspirational for the Norwegian Child Law Commission when designing the 2010 law reforms. An alternating residence may now be imposed by the competent authority when 'special reasons so indicate'.[109]

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103 Daily matters, important and urgent decisions: Principle 3:12, corresponding with Art. 30 of the Draft Recommendation; Disagreement on this exercise: Principle 3:14, corresponding with Art. 29.

104 Principle 3:13 of the CEFL Principles.

105 Principle 3:32 of the CEFL Principles.

106 Principle 3:19(1) of the CEFL Principles, corresponding with Art. 31(1) of the Draft Recommendation.

107 Principle 3:19(2) of the CEFL Principles, corresponding with Art. 31(2) of the Draft Recommendation.

108 Principles 3:20 and 3:21 of the CEFL Principles, corresponding with Art. 32 of the Draft Recommendation.

109 T. Sverdrup, 'Equal parenthood: recent reforms in child custody cases' in *The international Survey of Family Law*, 2011, p. 305.

The CEFL Principles encourage co-parenting. Principle 3:20(2) does not decide whether co-parenting (which implies an alternating residence) should be the rule or the exception, but it does present it as a viable option, one that should be considered.[110]

5. Comparative synthesis

The various international instruments and their relevance have been described in the previous sections. In themselves, their influence is limited: to see the bigger picture, it is important to consider the relation between them; the differences and the similarities; the developments and changes over time; and their influence on national law.

5.1. Differences between binding and non-binding instruments

There are many differences between the instruments and their provisions. The greatest difference is between binding and non-binding instruments. The first difference is that the binding instruments tend to contain general ideas and broad notions such as the protection of the family (including the protection of the relationship between the parent and the child); the best interests of the child; the right of the child to know and be cared for by both parents; and the right of the child to be heard in proceedings concerning him or her. The non-binding instruments contain more specific rules, such as detailed prescriptions on the circumstances in which a parent can be deprived of parental responsibilities.

Similarly, *binding* instruments tend to be more 'conservative', meaning that their provisions usually contain general notions on which there is already some sort of consensus in the Member States. The *non-binding* instruments, on the other hand, tend to be more progressive, introducing new notions and terminology and proposing further-reaching rules. As an example one can take the introduction and definition of parental responsibilities in the 1984 Recommendation on Parental Responsibilities.[111]

To date, where the *binding* instruments have concentrated mainly on the legal aspects of parentage, such as parental authority and official contact arrangements, non-binding instruments have begun to regulate the more practical issues such as parental responsibilities and their exercise. This is not very surprising, first because legal bonds are easier to define and regulate and because where care and residence are ongoing, legal arrangements have to be established only when a major change in circumstances occurs. Rules relating to legal bonds are therefore easier to impose and monitor.

While *binding* and *non-binding* instruments are both intended to apply to states, the non-binding instruments focus more on children's rights than on the rights of the parents. They are drafted to ensure that the child's best interests are considered. The *binding* instruments focus more on the state and its role in making and enforcing rules concerning the parents or guaranteeing parents' rights.

5.2. Recurring notions and visible trends

Despite differences between the instruments, certain notions recur in the body of international and European instruments and trends in family law become visible.

This section lists and explains the most important notions that can be found in international instruments in the areas discussed earlier: children's rights, parent-child relationship and parental responsibilities. In the next section the relevance for co-parenting will be set out and the main question of this paper will be answered.

5.2.1. The child's rights

A notion that can be found in multiple provisions of different international instruments is that of the best interests of the child.[112] It is the idea that when decisions or actions must be taken that concern children, their best interests should be a primary consideration. This means that the best interests of the child do

110 Boele-Woelki et al., supra note 6, p. 135.

111 See section 4.1. The Hague Convention and Brussels II bis only introduced the term, in a more narrowly defined version, over a decade later.

112 This notion can be found in all international instruments either directly in the provisions or indirectly in explanatory reports or case law.

not have to be decisive, but have to be at least considered first. In all decisions and actions it should first be considered what course of action is in the best interests of the child. Only thereafter can the interests of the parents and other considerations be taken into account. In exceptional circumstances it is therefore possible that the parents' interests outweigh those of the child's.

Of the international instruments discussed, Article 3(1) of the CRC is the oldest provision containing the notion of the best interests of the child.[113] Ever since then, the notion has often been restated, and in many different other instruments. The notion has not changed much over time, but its influence has grown and it has become the key notion in (international) legislation concerning children.

The notion of the best interests of the child is not only used in itself or to explain how certain decisions or actions must be taken, but also to justify exceptions. For example, Principle 20 of the White Paper provides that parents should have an equal right to exercise parental responsibilities and, whenever possible, should exercise them together, *unless the best interests of the child otherwise require*.[114]

The child's position has also changed over the years, from an object of parental rights to an autonomous party in the process. Where, at first, the child was a pawn in a tug-of-war between the parents, now he or she is the main player. At least, that would be the ideal situation if the new rules are applied correctly.

The provisions that have been strengthened over the years give the child a voice. The child has the right to express his or her views and in case of proceedings concerning the child, he or she has the right to be heard.[115] There is a catch, however: only children who are considered to be sufficiently mature enjoy these rights.[116] No minimum age is set to enjoy these rights; instead the maturity of the child is decided on the basis of the facts of the case and the child in question. This, of course, gives the national legislator and the national competent authority a great deal of leeway to apply the provisions very restrictively should they want to do so.

5.2.2. Parent-child relationship

Even before international law started to specifically concern itself with children, children's rights and the child-parent relationship had already been protected, because the two oldest binding international instruments, the ECHR and the ICCPR, protected family life.[117]

While the provisions themselves are too broad and general to say anything about children's rights, parental responsibilities, or even anything directly on the parent-child relationship, they have generated a large body of case law. The case law expanded and adapted to a changing society and the emerging needs. From the notion of protection of family life it has derived the right to regular contact between children and their parents and the right of an unmarried father to apply for joint parental authority despite the mother's refusal, something that the organisations could not have been able to foresee at the time of drafting both instruments.

It is an established presumption in international law that it is in the best interests of the child to gain and maintain a good relationship with both parents. For this reason most instruments contain provisions to the effect that states should allow parents to at least have (regular) contact with their children.

The basis of these kinds of provisions lies in the CRC, more specifically in Articles 7 and 9.[118] The main idea is that the child should know and be cared for by both parents when possible and should not be separated from his or her parents against his or her will. Should separation occur, usually in the case of divorce or the breakdown of the relationship, there should at least be regular contact between parent and child. The EU Charter has recently restated this notion, but in general there has been a move away from the idea of regular contact and towards an equal or joint exercise of parental responsibilities especially

113 See Section 3.2.
114 See Section 4.2.2.
115 All of the discussed instruments except for the very general instruments: the ICCPR and the ECHR contain one or more provisions on the child's right to express his or her views or the child's right to be heard.
116 See for example Arts. 4 and 6 of the Convention on Contact, Section 3.3.
117 See Sections 3.4.2 and 3.1.2.
118 See Section 3.2.

in European instruments.[119] This is very likely because 'contact' and 'a good relationship' are very vague terms and allow for large discrepancies in interpretation between national systems.

5.2.3. Parental responsibility

Because of the vagueness and the minimum protection of such terms as contact and parental authority the more recent international instruments and also some national laws prefer the term parental responsibility. This term encompasses more rights and duties than parental authority. Not only parental rights, but also *duties* are included and the term has both legal as well as practical implications.

Because parental responsibilities have more practical implications than contact and parental authority, the first international instrument on parental responsibilities – the Recommendation on Parental Responsibilities 1984 – was very cautious in the allocation of parental responsibilities, making the joint (exercise of) parental responsibilities dependant on parental agreement.[120]

However, nowadays the main idea seems to be that parental responsibility should as a rule belong to both parents jointly. Neither the separation of the parents, nor the refusal of consent by one of the parents should be a sufficient obstacle for awarding joint parental responsibilities to the parents. Once the parents jointly hold parental responsibilities, it is also preferable that they exercise them together, especially in the case of important decisions concerning the child.[121]

This presumption of joint parental responsibility is also evident from the fact that the new instruments make depriving parents of parental responsibility by law very difficult and only possible if the child's best interests require this.

The distinctions that used to exist between married and unmarried, as well as divorced or separated parents have disappeared. The relationship between the parents is no longer important, the best interests of the child are. Even after separation the original situation (which was co-parenthood) should continue, unless there is a necessity related to the best interests of the child to change this situation.

This all means that in general there is a change in attitude towards parents, especially visible in European instruments, from providing the minimum rules on parental authority and contact to regulating the exercise of parental responsibilities. It is no longer the parents who are the main holders of rights, but the children. They have the right to care and contact. The parents have the duty to provide this care and an obligation to seek contact. International law is becoming more child-oriented.

6. Conclusion: the influence of international and European law on co-parenthood

Within the international framework, a movement can be discerned from a parent-oriented allocation of parental authority towards child-oriented co-parenthood. Where in the past international law was very reluctant to interfere in national family law, the new international legislation is introducing increasingly specific and substantial rules. This, of course, also has an influence on co-parenting, as national laws on parental responsibilities and the child's residence function within the international legal framework. It is safe to say that this influence is a positive one.

None of the instruments discussed forbid co-parenting outright, nor can any of the discussed instruments be interpreted as forming an obstacle to national legislation that allows co-parenting. However, it can be inferred from the notion of the best interests of the child that national legislation that would prescribe co-parenting in *all* post-separation cases could be in conflict with international law. This makes sense, considering, for example, that alternative residence in very conflict-ridden cases where the parents also live far apart would not be beneficial to the child. The same can be said about cases where there is violence or neglect. There is no obstacle, though, to establishing co-parenting as the norm, as long as there is enough room for exceptions in cases where co-parenting would be detrimental to the child.

Co-parenting within the international law framework needs to be child-centred, in the sense that the child's best interests need to be considered and the child's voice needs to be heard. While the child's

119 See Section 3.6.1.
120 See Section 4.1.
121 See Sections 4.2, 4.3 and 4.4.

views by no means need to be decisive, it is important that the child is included in the process, especially when decisions are made concerning his or her residence. Not all children will be able to cope well with moving back and forth between two houses.

Besides the protection of the child, international law also prescribes parental equality. This, however, should be seen in the light of non-discrimination on the basis of marital status, rather than an equal sharing of the child's time. This means that international law has stopped making distinctions between divorced and formerly cohabiting parents. Both types should be eligible to co-parent.

International law did not, until very recently, want to meddle in the residence arrangements of the child after parental separation. Only the most recent, non-binding instruments – the Draft Recommendation and the CEFL Principles – have tentatively ventured in this direction.[122] The new international instruments only make some minimal rules on residence and do not really speak in favour or against alternating residence. They only include it as a possibility.

As an answer to the main question of this contribution it can therefore be stated that international law in its current form does encourage co-parenting, but it would be going too far to state that co-parenting, in particular alternative residence, is prescribed (in all or most cases). This gives national legislators the freedom to adopt new rules or to amend old ones in order to make co-parenting the norm, should they wish to do so.

122 See Sections 4.3 and 4.4.