

THE RIGHTS-BEARING CHILD'S BEST INTERESTS:  
IMPLICATIONS OF THE EUROPEAN COURT'S  
REJECTION OF A CHILD-RETURN ORDER IN X V.  
LATVIA

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## I. INTRODUCTION

“The history of childhood is a nightmare from which we have only recently begun to awaken.” – Lloyd deMause<sup>1</sup>

Despite barriers created by culture, language, gender, and even age, there is one thing everyone holds in common: he or she was once a child. Children always have been, and always will be, important. Nonetheless, there remains no global consensus as to the legal role of the child. In the past few decades, however, this debate has gained considerable momentum and the rights of the child in international law have begun to crystalize.

In its 2013 Grand Chamber decision in *X v. Latvia*,<sup>2</sup> the European Court of Human Rights added Europe’s voice to the fray, and opined as to the role and rights of the child in European legal culture. In this decision, the European Court of Human Rights has done more than simply consider the best interests of the child; it has given that child a voice. This article will explore that judgment and explain how the European Court of Human Rights has employed the legal doctrines available to it in such a way that not only maintains the integrity of the legal instruments before it, but also furthers the child-centered jurisprudential dialogue.

First, this article will introduce the facts, procedural background, and legal analyses pertinent to the European Court of Human Rights’ *X v. Latvia* judgment. Second, by way of background, this article will then explore the relevant legal theories, history, and instruments at play in the judgment and the historical development of the best interests of the child standard and child-centered jurisprudence. Third, this article will present an analysis of how the above-mentioned legal theories, history, and instruments helped inform the European Court of Human Rights judgment in such a way that furthered the child-centered jurisprudential dialogue in a sustainable manner easily adopted by domestic courts.

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<sup>1</sup> THE HISTORY OF CHILDHOOD 1 (1974).

<sup>2</sup> *X v. Latvia* (No. 27853/09), Eur. Ct. H.R., Grand Chamber (2013).

a. *The Facts of X v. Latvia*

The applicant (X.) is a Latvian national born in 1974, and, as of 2007, an Australian citizen.<sup>3</sup> X. met T. at the beginning of 2004, and moved into his apartment at the end of that year during the final stages of pregnancy.<sup>4</sup>

In early February 2005, X. gave birth to a daughter, but listed no father on the birth certificate.<sup>5</sup> As a result, X. was able to claim single-parent benefits from the Australian government while she continued to cohabitate with T.<sup>6</sup> X.'s relationship with T. began to "deteriorate," although she continued to live with T. as a tenant.<sup>7</sup>

In July 2008, X. left for Latvia with her then three-year old daughter.<sup>8</sup> One month later, in August 2008, T. sought to establish his parental rights with respect to the child in Australian Family Court by means of a sworn affidavit that stated:

[H]e had been in a relationship with the applicant [X.] since 2004 and the [applicant] had always indicated that he was the father of the child; the rental agreement . . . was a sham and had been a mutual decision; he had made false statements to the [Australian] social-security services in order to enable the applicant to receive single-parent benefit. T. asserted that the applicant [X.] had left Australia with the child without his consent.<sup>9</sup>

T. further claimed that X. had fled to an unknown location in Latvia, and submitted correspondence with members of his family in support of this claim.<sup>10</sup> While X. had been invited to attend the hearing through various electronic means, she was not present.<sup>11</sup> On November 6, 2008, the Australian Family Court recognized T.'s paternity in respects of the child, and further held that T. had exercised joint responsibility for the child since the child's birth.<sup>12</sup>

T. therefore sought to pursue matters under the Hague Convention on the Civil Aspects of International Child Abduction (Hague Abduction Convention), an international instrument that entered into force in 1980 in order to help address the rising problem of international parental child

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<sup>3</sup> *Id.* ¶ 9.

<sup>4</sup> *Id.* ¶ 10.

<sup>5</sup> *Id.* ¶ 11.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* ¶ 12.

<sup>9</sup> *Id.* ¶ 13.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* ¶ 14.

<sup>12</sup> *Id.* ¶ 15.

abduction.<sup>13</sup> The Australian judge refused to rule on whether the child's removal had been wrongful pursuant to the Hague Abduction Convention and expressly left that determination for Latvian courts; X. nonetheless did not appeal the judgment.<sup>14</sup>

*b. Procedural Developments Leading to the 2013 Decision by a Grand Chamber of the European Human Rights Court*

On September 22, 2008, the Latvian Central Authority received a request from T. asking that the child be returned to Australia under the Hague Abduction Convention.<sup>15</sup> The Australian Central Authority furnished a sworn affidavit detailing the pertinent Australian law and guaranteed that T. had exercised joint custody over the child with X. on the date the child had been removed from Australia.<sup>16</sup> On November 19, 2008, the Riga City Zemgale District Court considered the Hague Abduction Convention request in the presence of both X. and T.<sup>17</sup>

At this hearing, X. denied that T. had any paternal rights, as she had been married to another man at the time of the child's birth, and T. had made no efforts to have his paternity recognized before the child's departure from Australia.<sup>18</sup> X. further alleged that T. had acted aggressively towards her, and accused T. of initiating proceedings under the Hague Abduction Convention "only in order to benefit from them in criminal proceedings that had allegedly been brought against him in Australia."<sup>19</sup>

The representative appointed by the local Latvian guardianship institution urged the District Court to dismiss T.'s request, arguing that X. had been a single mother at the time of the child's removal from Australia, and "that the child had developed ties with Latvia."<sup>20</sup> X. further lodged a complaint under Article 13 of the Hague Abduction Convention.<sup>21</sup>

The Latvian District Court instead granted T.'s request, ruling that the child's removal had been wrongful and ordering that the child be returned to Australia immediately (not later than six weeks after its decision).<sup>22</sup> The court held that, pursuant to an uncontested judgment by an Australian family court, T. and X. exercised joint parental

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<sup>13</sup> Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T. I. A. S. No. 11670 . [hereinafter Hague Abduction Convention].

<sup>14</sup> *X v. Latvia, Grand Chamber*, ¶¶ 15–16.

<sup>15</sup> *Id.* ¶ 17.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* ¶ 18.

<sup>18</sup> *Id.* ¶ 19.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* ¶ 20.

<sup>21</sup> *See id.* ¶ 21.

<sup>22</sup> *Id.*

responsibility.<sup>23</sup> The court surmised that the Latvian courts did not have the authority to reverse that decision, or interpret the relevant Australian law.<sup>24</sup> The District Court equally dismissed the allegation of potential psychological harm as unfounded.<sup>25</sup>

X. appealed the Latvian District Court's judgment, alleging that she had been the child's sole guardian both in law and in fact upon their departure from Australia.<sup>26</sup> X. further claimed that the child's return to Australia would "expose the child to psychological harm."<sup>27</sup> X. submitted a psychologist's certificate, which had been prepared after the District Court's judgment, supporting this assertion.<sup>28</sup> Moreover, X. submitted additional evidence seeking to establish the child's ties with Latvia, including that the child spoke Latvian as a native language.<sup>29</sup> Further, X. alleged that T. had mistreated both her and her child, and accused the District Court of wrongfully refusing to request information from the Australian Central Authority regarding T.'s criminal record.<sup>30</sup>

On January 6, 2009, the District Court responded to an application by X., ordering a stay of execution of its November 2008 decision.<sup>31</sup> The District Court stated that, pursuant to the Preamble of the Hague Abduction Convention, the child's best interests should take priority over expeditious return.<sup>32</sup> On January 26, 2009, the Riga Regional Court (Regional Court) upheld the District Court's judgment.<sup>33</sup> The Regional Court held that T. had not only complied with the Hague Abduction Convention, but that "there are no grounds for doubting the quality of welfare and social protection provided to children in Australia, given that, according to the [sworn affidavit], Australian legislation provides, *inter alia*, for the security of children and [their] protection against ill-treatment within the family."<sup>34</sup> The Regional Court further dismissed any allegations of ill treatment, and held that the child had "not reached an age or level of maturity which would allow her to formulate an opinion concerning a return to Australia."<sup>35</sup>

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* ¶ 22.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* ¶ 23.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* ¶ 24.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* ¶ 25.

<sup>34</sup> *Id.* (quoting the Regional Court) (alteration in original).

<sup>35</sup> *Id.* ¶ 26 (quoting the Regional Court).

X. later refused to comply with orders from a court bailiff instructing her to return the child by February 19, 2009.<sup>36</sup> The court bailiff later submitted an application with the District Court for execution of the order to return the child; the District Court concurrently scheduled a hearing on April 16, 2009, at the request of X.<sup>37</sup> On March 6, 2009, the Latvian Central Authority communicated T.'s request to see the child to local Latvian authorities.<sup>38</sup> On March 14, 2009, T. met X. and the child unexpectedly and abducted the child back to Australia through Estonia.<sup>39</sup>

The Estonian Central Authority requested information from the Latvian Central Authority in order to allow T. to take a flight out of the country, and the Latvian Central Authority responded by furnishing information concerning T.'s right to return to Australia with the child.<sup>40</sup> X. filed an abduction complaint with the Latvian Central Authority, which, in addition to a disciplinary appeal against the same body, was dismissed.<sup>41</sup>

*c.      The Grand Chamber's Treatment of Conflicts Between the European Rights Treaty and the Hague Child Abduction Convention*

The Court first noted that, in the instance before it, Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) must be interpreted "in the light of the requirements of the Hague Convention . . . and of the relevant rules and principles of international law applicable between the Contracting Parties."<sup>42</sup> The Court stressed that such an approach required "combined and harmonious application" of pertinent international instruments, notably including the European Convention on Human Rights Article 8 and the Hague Abduction Convention.<sup>43</sup> Subsequently, the Court reiterated that international law, including the Hague Abduction Convention, holds the best interests of the child as "paramount."<sup>44</sup>

Further, the Court reiterated a belief that "harmonious interpretation" of both the European Convention on Human Rights and the Hague Abduction Convention is possible, and that it requires two conditions.<sup>45</sup> First, the Court observed that the exceptions to immediate

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<sup>36</sup> *Id.* ¶ 27.

<sup>37</sup> *Id.* ¶ 28.

<sup>38</sup> *Id.* ¶ 29.

<sup>39</sup> *Id.* ¶ 30.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* ¶ 31.

<sup>42</sup> *Id.* ¶ 93.

<sup>43</sup> *Id.* ¶ 94.

<sup>44</sup> *Id.* ¶ 96.

<sup>45</sup> *Id.* ¶ 106.

return in Articles 12, 13, and 20 of the Hague Abduction Convention must “*genuinely* be taken into account by the requested court,” especially when raised by a party.<sup>46</sup> The Court further noted that courts must issue a “sufficiently reasoned” decision in order for reviewing courts to verify that lower courts adequately examined these points.<sup>47</sup> Second, the Court stated a requirement that the above-mentioned factors be evaluated “in the light of Article 8 of the Convention . . . [which] imposes on the domestic authorities a particular procedural obligation . . . when assessing an application for a child’s return.”<sup>48</sup>

*d. The Grand Chamber’s Holding*

The Court found that Latvia had violated X.’s right to respect for family life, under Article 8 of the European Convention on Human Rights, by failing to consider the allegations of grave risk under Article 13(b) of the Hague Abduction Convention as put forth by the applicant in the form of the psychological report.<sup>49</sup>

In addition to the above-mentioned harmonious interpretation requirement, the Court cited Brussels II *bis* Regulation,<sup>50</sup> in tandem with Article 13(b) of the Hague Abduction Convention<sup>51</sup> and Article 24 section

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<sup>46</sup> *Id.* (emphasis added).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* ¶¶ 106–07.

<sup>49</sup> *Id.* ¶¶ 119–20.

<sup>50</sup> Council Regulation 2201/2003, 2003 O.J. (L338) (EC). The Brussels II *bis* Regulation governs jurisdiction and the recognition and enforcement of judgments in parental responsibility and matrimonial issues. *Id.* The Regulation reads, in pertinent part:

(12) The grounds of jurisdiction in matters of parental responsibility established in the present Regulation are shaped in the light of the best interests of the child, in particular on the criterion of proximity. This means that jurisdiction should lie in the first place with the Member State of the child’s habitual residence, except for certain cases of a change in the child’s residence or pursuant to an agreement between the holders of the parental responsibility. (13) In the interests of the child, this Regulation allows, by way of exception and under certain conditions, that the court having jurisdiction may transfer a case to a court of another Member State if this court is better placed to hear the case. However, in this case the second court should not be allowed to transfer the case to a third court.

*Id.* ¶¶ 12-13.

<sup>51</sup> Hague Abduction Convention, *supra* note 13, art. 13. The Hague Convention aims to discourage international child abduction by setting forth certain requirements, jurisdictional and otherwise, to govern cases regarding international child abduction between signatory States. *Id.* art. 1. In particular, Article 13(b), which seeks to incorporate the best interests of the child, reads:

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that . . . b) there is a grave risk that his or her return would expose

2 of the Charter of Fundamental Rights of the European Union.<sup>52</sup> The Court interpreted these provisions, as well as Article 8 of the European Convention on Human Rights, to “expressly enshrine[] . . . the principle of the child’s prompt return to his or her country of habitual residence, that such a return cannot be ordered automatically or mechanically.”<sup>53</sup> Further, the Court noted that the child’s best interests often do not coincide with the interests of the parents, and that the best interests of the child must be noted in the context of application for return under the Hague Abduction Convention.<sup>54</sup>

According to the Court, the obligation of harmonious interpretation implies not only that a court must consider “arguable allegations” of grave risk associated with a child’s return, but also that a court must provide “a ruling giving specific reasons in the light of the circumstances of the case.”<sup>55</sup> Therefore, the Court found that the Latvian appeals court had violated the procedural obligation under Article 8 of the European Convention on Human Rights by refusing to consider the psychological evaluation, which had only been raised on appeal.<sup>56</sup> Article 8 requires that an “arguable allegation of ‘grave risk’” to a child facing return “be effectively examined by the courts and their findings set out in a reasoned court decision.”<sup>57</sup> The Court explicitly recognized that Article 11 of the Hague Abduction Convention requires courts to act “expeditiously.”<sup>58</sup> Nonetheless, the Court further stated this requirement “does not exonerate [courts] from the duty to undertake an effective examination of

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the child to physical or psychological harm or otherwise place the child in an intolerable situation.

*Id.* art. 13(b).

<sup>52</sup> *X v. Latvia, Grand Chamber*, ¶ 97; The Charter of Fundamental Rights of the European Union, 2000 O.J. (C364) 13, art. 24. The Charter embodies enumerated political, social, and economic rights of the European Union. *Id.* at pmb1. Importantly, Article 24 governs the rights of the child:

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity. 2. In all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration. 3. Every child shall 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.

*Id.*

<sup>53</sup> *X v. Latvia, Grand Chamber*, ¶ 98.

<sup>54</sup> *Id.* ¶¶ 100–01.

<sup>55</sup> *Id.* ¶ 107.

<sup>56</sup> *Id.* at 46 (DeAlbuquerque, J., concurring).

<sup>57</sup> *Id.* ¶ 115.

<sup>58</sup> *Id.* ¶ 118.



allegations made by a party on the basis of one of the exceptions expressly provided for, namely Article 13 (b) in this case.”<sup>59</sup> While the Court did not explicitly rule on whether the Latvian courts had a duty to request information from Australia about T.’s criminal history, it made sure to highlight that the Latvian courts had refused to initiate such a request:

The court, having refused on the other hand to request information from the Australian authorities about T.’s previous convictions and the charges allegedly brought against him, ultimately dismissed the allegation of a risk of psychological danger to the child in the event of her return, finding that the applicant had failed to substantiate it.<sup>60</sup>

Consequently, the Court found that X.:

[S]uffered a disproportionate interference with her right to respect for her family life, in that the decision-making process under domestic law did not satisfy the procedural requirements inherent in Article 8 of the Convention, the [Latvian appeals] [c]ourt having failed to carry out an effective examination of the applicant’s allegations under Article 13 (b) of the Hague Convention.<sup>61</sup>

The Court therefore found that Latvia had violated Article 8 of the European Convention on Human Rights by failing to adequately consider the psychological assessment under Article 13(b) of the Hague Abduction Convention.<sup>62</sup> Pursuant to Article 41 of the European Convention on Human Rights, the Court ordered Latvia to pay €2000 in costs and expenses to X.<sup>63</sup>

## II. BEST INTERESTS OF THE CHILD: THEORETICAL AND INTERNATIONAL LEGAL FRAMEWORK

In order to adequately address and understand the judgment of the European Court of Human Rights in *X v. Latvia*, especially how this judgment furthers the child-centered jurisprudential dialogue, a thorough background of legal theories and laws affecting children must be acquired. As such, the following sections will provide a background on theories of the child and law in addition to introducing and briefly exploring both international and European law relevant to the *X v. Latvia* judgment.

### a. *Theories of the Child and the Law*

The law’s treatment of children as a particularly vulnerable group is long and robust, dating back to thirteenth century England, when Edward I’s court claimed wardship over “all natural fools and idiots,” leading to

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.* ¶ 111.

<sup>61</sup> *Id.* ¶ 119.

<sup>62</sup> *Id.* ¶¶ 117, 120.

<sup>63</sup> *Id.* ¶ 125.

the birth of the *parens patriae* doctrine.<sup>64</sup> This power was later vested in the Court of Wards and Liveries in the late sixteenth century, and eventually evolved into a theory of the king “as a father” and gave rise to what we today understand as a state’s right to interfere in family life.<sup>65</sup>

In the early eighteenth century, the British Court of Chancery first invoked the *parens patriae* doctrine in order to assert jurisdiction over a child custody dispute in *Eyre v. Shaftsbury*.<sup>66</sup> The doctrine began to gain traction in English courts, and was eventually made famous in American jurisprudence by Justice Cardozo in *Finlay v. Finlay*.<sup>67</sup> The doctrine is firmly rooted in the idea that children, like the mentally incapacitated, are unable to form intelligent opinions about their well-being.<sup>68</sup> Up until the mid-twentieth century, courts treated children in a paternalistic manner, harkening back to the historical origins of the doctrine where the king claimed interest over his subjects as property.<sup>69</sup>

Regardless, the history of the *parens patriae* doctrine has clearly given rise to three parties with potentially competing interests in legal disputes regarding children: the parent, the state, and, more recently, the child. The following section will explore the *parens patriae* doctrine, the rise of “best interests” as a legal concept, competing modern legal theories of the role of children, and their best interests, before the law.

#### i. The Parens Patriae Doctrine

Latin for “parent of his or her country,” *parens patriae* refers to the power of a state to act as a guardian for those unable to care for themselves.<sup>70</sup> Importantly, the doctrine extends not only to children, but also to disabled individuals.<sup>71</sup> *Parens patriae* found its roots as early as the sixteenth century England’s chancery courts, and meant that the king:

acting through his representative, the chancellor of the court, could depart from due process of law and, as a benevolent parent, not only exempt children from the penalties set for various criminal offenses, but also take control over children who had not committed crimes but were involved in vagrancy, idleness, incorrigibility, or association with

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<sup>64</sup> Lawrence B. Custer, *The Origins of the Doctrine of Parens Patriae*, 27 EMORY L. J. 195, 195 (1978).

<sup>65</sup> *Id.* at 201 (citing W. STAUNFORD, AN EXPOSITION OF THE KINGES PREROGATIE 37 (London 1567)).

<sup>66</sup> *Eyre v. Shaftsbury*, (1722) 24 Eng. Rep. 659, 659.

<sup>67</sup> *Finlay v. Finlay*, 240 N.Y. 429, 433–34 (1925). Judge Cardozo held that, per the *parens patriae* doctrine, it is the judge’s duty to do “what is best for the interest of the child,” and that the State should put itself in the position of a “wise, affectionate, and careful parent’ and make provisions for the child accordingly.” *Id.* (citation omitted).

<sup>68</sup> *Id.* at 431.

<sup>69</sup> *Id.* at 434.

<sup>70</sup> BLACK’S LAW DICTIONARY 868 (10th ed. 2014).

<sup>71</sup> *Id.*

undesirable persons. Under the concept of *parens patriae*, all children are regarded as subject to the benevolent protection of the courts.<sup>72</sup>

Originally, the Chancery Court employed the doctrine to allow the Court to oversee the property of wealthy orphan children.<sup>73</sup> In the seventeenth century, the Court expanded the *parens patriae* doctrine to take actions based on concerns surrounding a child's best interests.<sup>74</sup> In the nineteenth century, the U.S. Government began to use the doctrine in order to justify the removal of poor children from their homes.<sup>75</sup> In many ways the use of the *parens patriae* doctrine in U.S. federal courts guided the creation of the contemporary foster care system.<sup>76</sup> The U.S. Government continually employed the doctrine in order to refuse to return children to their homes, to assert an interest in the education of children, and even to help establish group homes.<sup>77</sup>

The doctrine, in its most contemporary manifestation, now represents a state's rights to sue on behalf of its citizens.<sup>78</sup> The *parens patriae* doctrine can be found in many U.S. statutes, including, but not limited to, those related to class actions, administrative lawsuits, and environmental law.<sup>79</sup>

## ii. The Birth of Best Interests

Best interests of the child, as a general concept, undoubtedly has roots far deeper than the *parens patriae* doctrine, extending back further than Christ.<sup>80</sup> One of the first uses of the actual term "best interests," however, was little more than a nineteenth century "façade" in British custody determinations.<sup>81</sup> The following sections detail the sources, and evolution, of the "best interest" concept in legal jurisprudence.

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<sup>72</sup> RONALD B. FLOWERS, *THE ADOLESCENT CRIMINAL: AN EXAMINATION OF TODAY'S JUVENILE OFFENDER* 154 (1990).

<sup>73</sup> *Parens Patriae*, in 1 *ENCYCLOPEDIA OF ADOLESCENCE* (Roger J.R. Levesque ed., 1963).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Romualdo P. Eclavea, Annotation, *State's Standing to Sue on Behalf of Its Citizens*, 42 A.L.R. FED. 23 (1979).

<sup>79</sup> *See, e.g.*, Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d)(2) (2011) (enacted by Congress to address what it saw as widespread abuses involving class action litigation and to grant federal district courts original jurisdiction over certain class actions with an aggregate amount in controversy exceeding \$5 million and with minimal diversity between the parties).

<sup>80</sup> Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J. L. & FAM. STUD. 337, 340-41 (2008).

<sup>81</sup> *Id.* at 346-47.

### 1. *Children as Property*

A theory of law treating children as a form of parental property continues to be widely embraced and understood before differing legal systems.<sup>82</sup> This theory continues to thrive in spite of a universal belief that it is “intrinsicly taboo to consider another human being as chattel.”<sup>83</sup> Legal theory surrounding children continues to, in a majority of instances, treat them in a manner that smacks of a paternalistic rhetoric of “ownership, possession, and exchange.”<sup>84</sup> This theory has only recently come under scrutiny, and even then largely because it undermines the rights of paternal fathers.<sup>85</sup>

Up until the late nineteenth century, sentimentality had no place in the family environment.<sup>86</sup> Law and economics treated children as important cogs in the industrial machine, giving rise to the functional view of children as property.<sup>87</sup> As one observer notes, however, legal historians often oversimplify the legal theory of children as property:

While fathers had almost absolute control over their children, fathers also had considerable responsibilities, both to their own children and to children legally bound to them as apprentices. In that sense the relationship between father and child was more that of master and servant than of owner and chattel. A master-servant relationship, although not equal, required that master give something to servant in exchange for the servant’s labor. In addition, a master could not injure the servant, while an owner theoretically might dispose of his chattel in any manner, including extermination.<sup>88</sup>

The treatment of children as property, while least friendly to child sovereignty, nonetheless mandates that the best interests of the child be considered. Regardless, this view posits a theory that leaves the determination of the child’s best interests entirely in the hands of outside parties in the form of adult family members or the state.<sup>89</sup>

As this particular conceptualization of child legal theory is rooted in economic pragmatism, it follows that the best interests determination under this theory is also rooted in economic pragmatism. In pre-industrial

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<sup>82</sup> See generally Kevin Noble Maillard, *Rethinking Children as Property: The Transitive Family*, 32 CARDOZO L. REV. 225 (2010) (discussing how the law continues to treat children as property).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> See generally *id.* (discussing family law cases with a property framework to analyze the law’s imbalanced treatment of paternal fathers).

<sup>86</sup> MARY ANN MASON, FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 2–3 (1994).

<sup>87</sup> *Id.* at 3.

<sup>88</sup> *Id.* at 7.

<sup>89</sup> See *id.* at 7–8 (discussing English and early American labor and education laws).

society, families were often seen as economic units; the majority of economic activity took place within the household.<sup>90</sup> The head of this economic unit was therefore awarded rights over a child as against the world, unless the child's (a future citizen) welfare was in jeopardy: "A parent has a right to the custody of his child as against all the world unless he has forfeited that right or the welfare of the child demands that he should be deprived of it."<sup>91</sup> A child's worth, and his or her best interests, were measured against his or her economic productivity.<sup>92</sup> A parent, or other master, could exercise complete sovereignty over the child so long as that child's long-term economic output was not unduly threatened or harmed.<sup>93</sup> Eventually, the belief that it was in society's best interests to elevate the needs of the child over the needs of the adult evolved to incorporate a "preference for privacy in relation to the child-parents relationship."<sup>94</sup> This particular discourse surrounding child-centered jurisprudence continues to evolve, and will be explored below.

## 2. *Child-Centered Jurisprudence*

Unlike feminist jurisprudence, which has gained legitimacy by broadly questioning the law's male-centricity, child-centered jurisprudence is instead premised on discreet questioning of individual issues facing children.<sup>95</sup> Traditionally, evolutions in child-centered jurisprudence have been motivated by attempts to reject full parental autonomy over children.<sup>96</sup> Thus far, movements in child-centered jurisprudence have failed to question the extent to which legal and social norms regarding children inform societal conceptions of children.<sup>97</sup>

As a result, child-centered jurisprudence has fractured into two main camps: quasi-civil rights and dependency rights.<sup>98</sup> Each will be discussed, respectively, in the following sections.

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<sup>90</sup> Heather L. Ross & Isabel V. Sawhill, *The Family as Economic Unit*, THE WILSON Q., Winter 1977, at 84, 84.

<sup>91</sup> *Stafford v. Stafford*, 217 Ill. App. 548, 551 (1920).

<sup>92</sup> Mason, *supra* note 86, at 4.

<sup>93</sup> *Id.* at 3–4.

<sup>94</sup> CLAIRE BREEN, THE STANDARD OF THE BEST INTERESTS OF THE CHILD: A WESTERN TRADITION IN INTERNATIONAL AND COMPARATIVE LAW 46 (2002).

<sup>95</sup> Annette Ruth Appell, *The Pre-Political Child of Child-Centered Jurisprudence*, 46 HOUS. L. REV. 703, 724 (2009) [hereinafter Appell, *Child-Centered Jurisprudence*].

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 724–25.

<sup>98</sup> *Id.* at 727.

*a. Quasi-Civil Rights*

Quasi-civil rights are modeled after civil rights as applied to adults, but depend on the fact that the child has not yet attained the age of majority.<sup>99</sup> Importantly, quasi-civil rights, which curb State action, include the following: the right to be free from coercive State intervention; the right to equal treatment among dependents; the right to procedural due process; and other modified rights afforded to adults under the Constitution.<sup>100</sup> According to one commentator, civil rights extend to children—and are equally mediated by—a child’s “developmental status and their position as dependents in a liberal democracy.”<sup>101</sup>

As indicated, quasi-civil rights operate under a liberal democratic model and are largely rooted in the U.S. Constitution.<sup>102</sup> Consequently, the theory of children’s quasi-civil rights has been repeatedly tested and developed through U.S. Supreme Court jurisprudence.<sup>103</sup> It therefore follows that the quasi-civil rights theory constitutes a largely Western legal theory that does not enjoy global recognition.

*b. Dependency Rights*

Dependency rights have far more historical underpinnings than quasi-civil rights.<sup>104</sup> Unlike quasi-civil rights, which trim adult civil rights to adjust them to children, the dependency rights model assumes that children gain rights as they become less dependent.<sup>105</sup> As a child ages, his or her rights necessarily expand.<sup>106</sup> The concept, however, is premised on the belief that adults owe children certain obligations, which include meeting the child’s basic needs.<sup>107</sup> Notably, dependency rights predate children’s rights as orphans, and other children had the right to pursue legal action against abusers.<sup>108</sup>

Nineteenth century adoption procedures further evidence dependency rights’ historical underpinnings. A prospective parent would be granted custody over a child after proving he or she was capable of meeting the child’s basic needs.<sup>109</sup> Eventually, governments even began to

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<sup>99</sup> *Id.* at 727–28.

<sup>100</sup> Annette Ruth Appell, *Uneasy Tensions Between Children’s Rights and Civil Rights*, 5 NEV. L. J. 141, 153–54 (2004).

<sup>101</sup> *Id.* at 156.

<sup>102</sup> *Id.*

<sup>103</sup> *See generally id.* at 153–56.

<sup>104</sup> *Id.* at 156.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 156–57.

<sup>108</sup> *Id.* at 157.

<sup>109</sup> *Id.*

remove children from their homes on the grounds that their basic needs were not being met, although the American government tended to target immigrants of Native American families.<sup>110</sup> Importantly, dependency rights are not vested in children, but instead in parents or government representatives, who will make decisions on behalf of children.<sup>111</sup>

*b. International Law on a Child's Best Interests*

One observer notes that understanding children's rights is predicated on a universally accepted definition of child; yet, there remain many differing manifestations of childhood according to cultural and historical norms.<sup>112</sup> In recent years, international law has struggled to create a universal definition of childhood.<sup>113</sup> The following sections will explore some of these international law views on children, both in Europe and more globally.

*i. European Views*

One only needs to look to the pages of a Charles Dickens's novel to understand some of Europe's worst offenses against children: industrial Europe, like many other industrial nations, exploited children and childhood.<sup>114</sup> At the close of World War II, Europe began to reimagine its views on human rights, resulting in a number of declarations, which made reference to the rights of children.<sup>115</sup> As time went on, the European community paid greater and greater attention to the rights of children.<sup>116</sup> European documents pertaining to the rights of the child will be explored below.

*1. 1950 European Convention on Human Rights and Fundamental Freedoms*

In the wake of World War II, members of the Council of Europe sought to draft a complementary European instrument to the Universal Declaration of Human Rights that would expand human rights in Europe, resulting in the European Convention on Human Rights and

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<sup>110</sup> *Id.* at 157–58.

<sup>111</sup> *Id.* at 160–61.

<sup>112</sup> TREVOR BUCK, INTERNATIONAL CHILD LAW 1 (2d ed. 2011).

<sup>113</sup> *Id.*

<sup>114</sup> *See generally* THE WORLD OF CHILD LABOR: AN HISTORICAL AND REGIONAL SURVEY (Hugh D. Hindman ed., 2009).

<sup>115</sup> *See infra* Part II(b)(i)-(ii).

<sup>116</sup> THE WORLD OF CHILD LABOR, *supra* note 114, at xxv.

Fundamental Freedoms (European Convention on Human Rights).<sup>117</sup> Article 5 of Protocol 7 of the European Convention on Human Rights, titled “Equality between Spouses,” most prominently features children.<sup>118</sup> The Article reflects both dependency rights and the *parens patriae* doctrine in two respects. First, the Article ensures that “[s]pouses shall enjoy equality of rights and responsibilities . . . in their relations with their children.”<sup>119</sup> In this way, Article 5 incorporates children’s rights as rooted in the idea of children as parental property. Second, the Article reserves for States the right to take “measures as are necessary in the interests of the children,” unquestionably encapsulating the *parens patriae* doctrine.<sup>120</sup>

Children feature only minimally in the articles of the European Convention on Human Rights itself, only meriting explicit mention in Articles 5 and 6.<sup>121</sup> Article 5, which governs rights to liberty and security, does not confer rights to minors, but instead proscribes instances where detention of minors is lawful.<sup>122</sup> Article 5 allows the lawful detention of a minor, with a procedure prescribed by law: “[T]he detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority.”<sup>123</sup> While this provision ensures that minors, like adults, enjoy liberty, it does not afford minors a right. Instead, the article grants States a right to interfere with the liberty of a minor in enumerated circumstances.<sup>124</sup>

The European Convention on Human Rights makes a third and final reference to children in Article 6, which sets forth the right to a free trial.<sup>125</sup> The article stipulates that a judicial authority may exclude both the press and the public from trial proceedings “where the interests of juveniles . . . so require.”<sup>126</sup> Nonetheless, judgments will be pronounced publically.<sup>127</sup>

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<sup>117</sup> CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, NOV. 4, 1950, 213 U.N.T.S. 222, amended by Protocol No.14, C.E.T.S. 194 (June 1, 2010), available at [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf).

<sup>118</sup> *Id.* at Protocol 7, art. 5.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* arts. 5–6.

<sup>122</sup> *Id.* art. 5.

<sup>123</sup> *Id.* art. 5(1)(d).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* art. 6.

<sup>126</sup> *Id.* art. 6(1).

<sup>127</sup> *Id.*



## 2. *Other European Instruments*

The Directorate-General of Justice for the European Commission makes a publically available list of European legal and policy documents relating to the rights of children, the table of contents of which alone spans an impressive twenty pages.<sup>128</sup> The list includes documents pertaining to the rights of children as they relate to trade, food for infants, children with disabilities, equal treatment of children, combatting sexual abuse, exploitation of children, and child pornography, and the list even incorporates country-specific recommendations.<sup>129</sup>

Importantly, Article 24 of the Charter of Fundamental Rights of the European Union is dedicated specifically to the rights of children, although the Directorate-General notes that “[a]lmost all articles apply to children as well as adults.”<sup>130</sup> The Article, titled “the rights of the child,” reads:

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration.
3. Every child shall 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.<sup>131</sup>

Moreover, the European Convention on the Exercise of Children’s Rights was opened for signature on January 25, 1996, and entered into force July 1, 2000.<sup>132</sup> The objective promotes children’s rights generally, grants them procedural rights, and further endeavors to ensure that children are both adequately informed and allowed to participate in judicial proceedings themselves or through a representative.<sup>133</sup>

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<sup>128</sup> Directorate-General Justice, *EU acquis and policy documents on the rights of the child*, Eur. Comm’n, JUST.C1/MT-LB (Jan. 2015), available at [http://ec.europa.eu/justice/fundamental-rights/files/acquis\\_rights\\_of\\_child.pdf](http://ec.europa.eu/justice/fundamental-rights/files/acquis_rights_of_child.pdf).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 38.

<sup>131</sup> Charter of the Fundamental Rights of the European Union, *supra* note 52, art. 24.

<sup>132</sup> *Chart of Signatures and Ratifications: European Convention on the Exercise of Children’s Rights*, C.E.T.S. No. 160, COUNCIL OF EUROPE, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=160&CM=&DF=&CL=ENG> (listing the various countries who have either ratified or signed the European Convention on the Exercise of Children’s Rights) (last visited Mar. 27, 2014).

<sup>133</sup> *European Convention on the Exercise of Children’s Rights*, ch. 1, art. 1(2), E.T.S. No. 160, COUNCIL OF EUROPE (2009), <http://conventions.coe.int/Treaty/en/Treaties/Html/160.htm>.

Importantly, Article 3 of the European Convention on the Exercise of Children's Rights specifically grants children the right to participate in legal proceedings:

A child considered by internal law as having sufficient understanding, in the case of proceedings before a judicial authority affecting him or her, shall be granted, and shall be entitled to request, the following rights:

- a. to receive all relevant information;
- b. to be consulted and express his or her views;
- c. to be informed of the possible consequences of compliance with these views and the possible consequences of any decisions.<sup>134</sup>

Article 3 reflects a theory of jurisprudence that incorporates children, subject to the limits of their ability to understand the matters at hand, as fully independent parties in legal proceedings affecting their interests.<sup>135</sup>

Finally, the European Council has prepared a number of international documents pertaining specifically to the rights of children in family law matters, including European Convention on the Adoption of Children, European Convention on the Legal Status of Children Born Out of Wedlock, European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children, and European Convention on the Exercise of Children's Rights.<sup>136</sup>

## ii. Global Views

As indicated earlier, garnering global consensus on what exactly constitutes a child's "best interests" is extremely difficult in light of drastically differing cultural values and interpretations of childhood. Many international agreements reference children, including the 1948 Universal Declaration of Human Rights,<sup>137</sup> the 1966 International

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<sup>134</sup> *Id.* art. 3.

<sup>135</sup> *Id.*

<sup>136</sup> *Complete list of the Council of Europe's treaties*, COUNCIL OF EUROPE, <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG> (last visited Feb. 6, 2015).

<sup>137</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 25 (Dec. 10, 1948) (stating that "[m]otherhood and childhood are entitled to special care and assistance. All children . . . shall enjoy the same social protection").

Covenant on Economic, Social, and Cultural Rights;<sup>138</sup> and the 1966 International Covenant on Civil and Political Rights<sup>139</sup>

Two international agreements devoted specifically to children and children's issues merit special discussion in the discourse regarding global standards surrounding the best interests of the child. The 1980 Hague Child Abduction Convention and the 1989 Children's Rights Convention both boast extremely high State membership (with 93 and 194 State Parties, respectively).<sup>140</sup> Both will be discussed below.

#### 1. 1980 HAGUE CHILD ABDUCTION CONVENTION

The 1980 Convention on the Civil Aspects of International Child Abduction (Hague Abduction Convention) came to fruition following an emerging pandemic of child abductions across State borders.<sup>141</sup> The Hague Abduction Convention seeks to establish "prompt return as an international remedy for the wrongful taking or retention of [children] across national borders."<sup>142</sup> In its forty-five articles the Hague Abduction Convention addresses the return remedy, access rights, and admonishes State Parties to establish a "Central Authority" through which to process claims under the Hague Abduction Convention.<sup>143</sup>

Largely jurisdictional in nature, the Hague Abduction Convention gives more attention to procedural issues rather than the best interests of the child.<sup>144</sup> As few courts enforced foreign custody orders prior to the enactment of the Hague Abduction Convention, a trend emerged in which parents absconded with their children across borders in order to forum

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<sup>138</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. no. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3. Among other references to children and childhood, the tenth article stipulates that "[t]he widest possible protection and assistance should be accorded to the family, . . . particularly for its establishment and while it is responsible for the care and education of dependent children." *Id.* art. 10(2).

<sup>139</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, art. 24 (Dec. 16, 1966), available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>. Article 24, devoted specifically to children, states: "[every child] shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State." *Id.* art. 24(1).

<sup>140</sup> *Status Table*, HAGUE CONF. ON PRIVATE INT'L L., [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=24](http://www.hcch.net/index_en.php?act=conventions.status&cid=24) (last visited March 28, 2015); *Status*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?mtmsg\\_no=IV-11&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?mtmsg_no=IV-11&chapter=4&lang=en) (last visited March 28, 2015).

<sup>141</sup> See Am. Soc'y Int'l Law, *International Law Respecting Families and Children*, in BENCHMARK ON INTERNATIONAL LAW § III.B (Diane Marie Amann ed., 2014), available at [www.asil.org/benchmark/family.pdf](http://www.asil.org/benchmark/family.pdf).

<sup>142</sup> *Id.* at III.B-5.

<sup>143</sup> *Id.*

<sup>144</sup> See generally Hague Abduction Convention, *supra* note 13.

shop.<sup>145</sup> This often effectively prevented the left-behind parent from exercising any custody rights.<sup>146</sup> Further, many left-behind parents had a great deal of difficulty even locating their abducted child, and were therefore unable to identify a competent jurisdiction in which to enforce their custody rights.<sup>147</sup>

Recognizing the harmful effects abduction often had on children, the international community drafted the Hague Abduction Convention.<sup>148</sup> In its own words, the Hague Abduction Convention seeks to “protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence.”<sup>149</sup> The following sections will introduce and address the particular articles of the Hague Abduction Convention that both pertain to children’s rights and that the European Court of Human Rights identified as relevant to its legal analysis in *X v. Latvia*.<sup>150</sup>

*a.      The Preamble*

The term “best interests” does not appear once in the text of the Hague Abduction Convention, even in its preamble.<sup>151</sup> Instead, the Convention’s preamble states that State signatories are “[f]irmly convinced that the interests of children are of paramount importance in matters relating to their custody.”<sup>152</sup> As mentioned, the preamble further iterates a desire “to protect children internationally.”<sup>153</sup>

*b.      Article 13*

Many of the Hague Abduction Convention’s articles were drafted with the best interests of the child in mind, although a preliminary reading of the articles does not make this factor immediately apparent.<sup>154</sup> Most obviously, Article 13(b) of the Hague Abduction Convention provides an exception for return when “there is a grave risk that [the child’s] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.”<sup>155</sup> Facially, Article 13’s exception implies that the risk to the child must be very great, and creates

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<sup>145</sup> Lynda R. Herring, *Taking Away the Pawns: International Parental Abduction & the Hague Convention*, 20 N.C. J. INT’L L. & COM. REG. 137, 142–43 (1994).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 138–40.

<sup>148</sup> See Hague Abduction Convention, *supra* note 13, at pmbl.

<sup>149</sup> *Id.*

<sup>150</sup> *X v. Latvia* (No. 27853/09), Eur. Ct. H.R., Grand Chamber ¶ 34 (2013).

<sup>151</sup> See Hague Abduction Convention, *supra* note 13, at pmbl.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> See Hague Abduction Convention, *supra* note 13.

<sup>155</sup> *Id.* art. 13(b).

a rather substantial burden of proof on the parent seeking to establish the existence of the grave risk.

*c. Article 18*

Further, while Article 18 of the Hague Abduction Convention makes no mention of the child's interests, it is nonetheless constructed in such a way that has allowed decision-making bodies to read-in best interests of the child: "The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time."<sup>156</sup> A competent decision-maker who recalls the underlying Objects and Purposes of the Hague Abduction Convention may order return outside of the scope of the Convention based on the child's best interests, even though no provision explicitly encourages such action.<sup>157</sup>

*d. Article 20*

Article 20 of the Hague Abduction Convention reads, in pertinent part: "The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms."<sup>158</sup> Again, while Article 20 makes no explicit reference to the rights of the child, it nonetheless allows for the rights of the child to be read in through the vehicles of "human rights" and "freedoms."<sup>159</sup>

*e. The Perez-Vera Report*

Absent the mentioned careful constructions and remarkably subtle allusions to the interests of the child, the Hague Abduction Convention would have undoubtedly failed to attract the high number of State Parties it now enjoys. The Explanatory Report that accompanies the Hague Abduction Convention, by E. Perez-Vera (Perez-Vera Report), further indicates that the best interests of the child remained paramount in the minds of the drafters throughout the drafting process.<sup>160</sup> Importantly, the Grand Chamber cites the Perez-Vera Report in its interpretation of the

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<sup>156</sup> *Id.* art. 18.

<sup>157</sup> Brief for the United States as Amicus Curiae at 13–14, *Lozano v. Alvarez*, 134 S. Ct. 1224 (2014) (No. 12-820) (arguing that, in the interest of equity, courts have the discretion to return abducted child).

<sup>158</sup> Hague Abduction Convention, *supra* note 13, art. 20.

<sup>159</sup> *See id.*

<sup>160</sup> Elisa Pérez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention*, in 3 HAGUE CONF. ON PRIVATE INT'L L., ACTS AND DOCUMENTS OF THE FOURTEENTH SESSION, CHILD ABDUCTION ¶ 20-21, at 430-31 (1980), available at <http://www.hcch.net/upload/exp128.pdf> [hereinafter Pérez-Vera Report].

Hague Abduction Convention, and as such will be explored in this paper.<sup>161</sup>

The Perez-Vera Report explains that Article 13(b) is designed to deal with situations where return is procedurally required, but such return would be contrary to “its interests.”<sup>162</sup> The Perez-Vera Report further indicates that the terms within Article 13(b) are a result of “fragile compromise” between the drafters.<sup>163</sup> Moreover, the Perez-Vera Report indicates that the exclusion of the term “best interests of the child” from the Hague Abduction Convention was a calculated decision on the part of the drafters in order to avoid addressing the plethora of cultural ambiguities associated with defining “best interests”:

In this regard, one fact has rightly been highlighted, *viz.* that ‘the legal standard ‘the best interests of the child’ is at first view of such vagueness that it seems to resemble more closely a sociological paradigm than a concrete juridical standard. How can one put flesh on its bare bones without delving into the assumptions concerning the *ultimate* interests of a child which are derived from the moral framework of a particular culture? The word ‘ultimate’ gives rise to immediate problems when it is inserted into the equation since the general statement of the standard does not make it clear whether the ‘interests’ of the child to be served are those of the immediate aftermath of the decision, of the adolescence of the child, of young adulthood, maturity, senescence, or old age.<sup>164</sup>

Article 13 goes on to state that a decision-maker may refuse to order return if the “child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.”<sup>165</sup>

Thus, the Hague Abduction Convention has largely been seen as a jurisdictional statute, with the best interests of the child left to be determined by the competent authorities in the child’s home jurisdiction.<sup>166</sup>

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<sup>161</sup> X v. Latvia, (No. 27853/09), Eur. Ct. H.R., Grand Chamber ¶ 35 (2013).

<sup>162</sup> Pérez-Vera Report, *supra* note 160, ¶ 116. “The exceptions contained in *b* deal with situations where international child abduction has indeed occurred, but where the return of the child would be contrary to its interests, as that phrase is understood in this subparagraph.” *Id.* Interestingly, it is unclear whether use of the term “it” is meant to refer to the Convention more broadly, or instead to the child.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* ¶ 21.

<sup>165</sup> Hague Abduction Convention, *supra* note 13, art. 13.

<sup>166</sup> See generally SANFORD N. KATZ, JOHN EEKELAAR, & MAVIS MACLEAN, CROSS CURRENTS: FAMILY LAW AND POLICY IN THE US AND ENGLAND (2000).

## 2. 1989 Convention on the Rights of Children

Unlike the 1980 Hague Abduction Convention, the 1989 Convention on the Rights of the Child does not shy away from the use of the term “best interests” as regards children.<sup>167</sup> Indeed, the Convention on the Rights of the Child makes use of the term no less than eight times in its fifty-four articles.<sup>168</sup> This will come as no surprise to those familiar with the Convention on the Rights of the Child’s third article, which calls upon State Parties to ensure that the child’s best interests “shall be a primary consideration.”<sup>169</sup>

While the Convention on the Rights of the Child simultaneously treats the child as vulnerable, and in need of protection, it also recognizes that parents, too, have special rights that State Parties must respect:

States Parties undertake to ensure the child 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, and, to this end, shall take all appropriate legislative and administrative measures.<sup>170</sup>

Article 3 of the Convention on the Rights of the Child therefore manifests a tension between parental rights and the rights of the child, which also manifests itself in later articles.

Article 9 of the Convention on the Rights of the Child, for example, addresses situations in which a child is separated from his or her parents, and seeks to protect the integrity of the familial unit before it considers the interests of the child.<sup>171</sup> Article 9 focuses on the right to family and private life as it pertains to children.<sup>172</sup> The article calls upon State Parties to “ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine . . . that such separation is necessary for the best interests of the child.”<sup>173</sup> Article 9 further encourages full participation by all affected parties and requires that State Parties allow children to

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<sup>167</sup> UN General Assembly, Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, available at <http://www.refworld.org/docid/3ae6b38f0.html>. See also U.N. Treaty Collection, Convention on the Rights of the Child, [https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg\\_no=IV-11&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-11&chapter=4&lang=en) (last visited Feb. 7, 2015). This treaty, which entered into force on September 2, 1990, has 194 parties; the United States signed on February 16, 1995, but has not been ratified. *Id.* The only nonparty States are the United States, Somalia, and South Sudan. *Id.*

<sup>168</sup> Convention on the Rights of the Child, *supra* note 167, arts. 3(1), 9(1), 9(3), 18(1), 20(1), 21, 37(c), 40(2)(b)(iii).

<sup>169</sup> *Id.* art. 3(1).

<sup>170</sup> *Id.* art. 3(2).

<sup>171</sup> *Id.* art. 9.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* art. 9(1).

maintain communication with parents upon separation, except in instances where such communication would be “contrary to the child’s best interests.”<sup>174</sup>

Article 9’s elevation of familial rights above children’s rights, except in the most extreme circumstances, makes sense when thought of in the light of the fact that breaking up a family is the family law equivalent of the death penalty. Unsurprisingly, Article 9 does not admonish decision-makers to consider the views of the child in determining best interests, a paternal theme that continues throughout the Convention on the Rights of the Child.<sup>175</sup> All the articles that make reference to the child’s best interests put the determination of the child’s best interests squarely in the hands of the child’s parents or another authority.<sup>176</sup>

Take, for example, Article 21, which governs adoption.<sup>177</sup> The Article’s chapeaux states that “States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration.”<sup>178</sup> The article goes on to establish adoption out of country as acceptable when there is no suitable family or foster family for the child in country, impliedly stipulating that it is in a child’s best interests to remain in his or her home-country.<sup>179</sup> This five-part article makes no reference to the voice of the child, regardless of maturity.<sup>180</sup> This is likely a reflection not only for a person’s right to culture, but also of a State’s interest in sustaining its population.<sup>181</sup> While Article 21 of the Convention on the Rights of the Child attempts to establish a system that will ensure the safety and well being of children subject to inter-country adoption, the article fails to afford children any voice in their future housing and development.

Conversely, Article 12 of the Convention on the Rights of the Child encourages State Parties to “assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child,” and further stipulates that “the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child.”<sup>182</sup> This

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<sup>174</sup> *Id.* art. 9(3).

<sup>175</sup> *See generally* Convention on the Rights of the Child, *supra* note 167.

<sup>176</sup> *See id.*, arts. 3(1), 9(1), 9(3), 18(1), 20(1), 21, 37(c), 40(2)(b)(iii).

<sup>177</sup> *Id.* art. 21

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* art. 21(b).

<sup>180</sup> *See id.* art. 21.

<sup>181</sup> *See generally* International Covenant on Economic, Social and Cultural Rights, *supra* note 138.

<sup>182</sup> Convention on the Rights of the Child, *supra* note 167, art. 12.



article has one silent premise: the State has the capacity to hold judicial proceedings sophisticated enough to encompass family law matters.

The inherent conflict in the Convention on the Rights of the Child is in no way surprising. Instead, it is the natural result of a global community determined to express its collective belief that children play an important, evolving, and unique role in international law. Had the negotiating parties to the Convention on the Rights of the Child insisted on drafting a uniform and concise theory of the child's role in law, the Convention on the Rights of the Child would never have come into existence.<sup>183</sup> Instead, the Convention on the Rights of the Child manifests a beautiful compromise between the global community's desire to elevate concerns surrounding children in international law and individual States' desires to define childhood in a way that comports with their various cultural values.<sup>184</sup> This compromise will not only ensure the Convention on the Rights of the Child's longevity, but will also allow for the evolution of the role of the child in international law.

### III. THE DECISION IN *X v. LATVIA* MARKS A PATH FOR PROPER ENFORCEMENT OF THE BEST INTERESTS STANDARD UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

In an attempt to shed light on the reasoning of the European Court of Human Rights *X v. Latvia* judgment, the following sections will explore the relevance of legal theories and law specific to children and the best interests of the child standard as particular to the judgment. By addressing the previously introduced theories and laws in a manner specific to the *X v. Latvia* judgment, the following sections will illustrate specifically how the European Court of Human Rights furthered the child-centered jurisprudential dialogue while upholding the sanctity of all the legal regimes before the Court.

#### *a. Theories of the Child and the Law*

While children have not played an active role in the law or law making, children have historically been subject to numerous legal theories.<sup>185</sup> As these differing theories help illuminate the reasoning

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<sup>183</sup> See Daniel L. Skoler, *The U.N. Children's Convention: International Triumph, National Challenge*, FAM. ADVOC., Spring 1993, 38, 38 (noting that it took "10 years of intensive preparation and negotiation," to "[give] the world its first comprehensive piece of international law for children").

<sup>184</sup> See Jonathan Todres, *Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and Its Early Case Law*, 30 COLUM. HUM. RTS. L. REV. 159, 164–65 (1998) (describing the drafting of the CRC, and the eventual consensus reached by the diverse contributors despite initial criticisms and objections).

<sup>185</sup> See, e.g., Appell, *Child-Centered Jurisprudence*, *supra* note 95, at 724–32 (discussing child-centered jurisprudence, and the fact that children's voices are not driving the children's rights movement).

employed by the European Court of Human Rights in *X v. Latvia*, they will be explored below.

i. The Parens Patriae Doctrine

The European Court rightly makes no mention of the *parens patriae* doctrine in either its lower or Grand Chamber judgments in *X v. Latvia*.<sup>186</sup> In fact, the Grand Chamber does not even reference the historical treatment of children as property,<sup>187</sup> marking a full departure from the antiquated standards that haunt some courts into a new jurisprudential era marked by increased recognition of child sovereignty before courts.<sup>188</sup>

1. *Children as Property*

As with the *parens patriae* doctrine, the European Court makes absolutely no reference to theories of children as property in any of its *X v. Latvia* judgments.<sup>189</sup> That does not, however, mean that there are no echoes of the theory in the Grand Chamber's judgment. Given that the European Court grounded its judgment in a violation of the mother's Article 8 right to private and family life, the Court clearly roots the child's rights with a parent.<sup>190</sup>

This does not imply that the Court views the child in *X v. Latvia* as property in any way, especially considering that the pivotal point for the Grand Chamber was the *child's* views and health as expressed through the psychological assessment.<sup>191</sup> Importantly, however, this treatment of the child only harkens to the historical treatment of children as property before the law.<sup>192</sup> Instead, this historical tool affords the European Court of Human Rights with an anchor with which to ground its judgment, reflected by the fact that the Court's conclusion is rooted in the mother's rights.<sup>193</sup> This interpretation grounds the judgment in a way that reflects the more contemporary child-centered jurisprudential theories explored below.

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<sup>186</sup> *X v. Latvia* (No. 27853/09), Eur. Ct. H.R., Grand Chamber (2013); *X v. Latvia* (No. 27853/09), Eur. Ct. H.R. (2011).

<sup>187</sup> See *X v. Latvia*, Grand Chamber.

<sup>188</sup> See Appell, *Child-Centered Jurisprudence*, *supra* note 95, at 727–28 (explaining the emergence of children's quasi-civil rights, which "seek[] to preserve and protect children's voice and conscience, as in freedom of choice and speech cases, or in freedom from coercive intervention cases").

<sup>189</sup> See generally *X v. Latvia*, Grand Chamber; *X v. Latvia*, Eur. Ct. H.R.

<sup>190</sup> *X v. Latvia*, Grand Chamber, ¶¶ 119–20.

<sup>191</sup> *Id.* ¶¶ 117.

<sup>192</sup> Maillard, *supra* note 82, at 237.

<sup>193</sup> *X v. Latvia*, Grand Chamber, ¶¶ 117, 119–20.

## 2. *Child-Centered Jurisprudence*

Given that children—especially young children—do not yet enjoy full autonomy before the law, the Grand Chamber had to search for an appropriate vehicle with which to communicate the rights and needs of the child at issue.<sup>194</sup> Moreover, as none of the legal mechanisms available to the Court explicitly provide a vehicle for complete child sovereignty before, the Grand Chamber's opinion in *X v. Latvia* therefore appropriately draws upon theories of child-centered jurisprudence to incorporate the child's voice in its decision.<sup>195</sup>

### a. *Quasi-Civil Rights*

Quasi-civil rights aim to curb State action that infringes upon child sovereignty.<sup>196</sup> Less clear, however, is in what manner a quasi-civil rights theory would operate in the application of the Hague Abduction Convention. For instance, quasi-civil rights could operate to either compel or halt an application for return, or even both. How one views the Sending or Receiving State's action as curbing a child's quasi-civil rights determines how the convention operates in a particular situation.

When explored in tandem with human rights obligations, however, the State action in question becomes clearer: given that instruments such as the Convention on the Rights of the Child and the Charter of Fundamental Rights of the European Union aim to preserve the "best interests" of the child to varying degrees, quasi-civil rights works to hinder State interference with these interests regardless of any other competing interests at play (such as parental rights).<sup>197</sup> Therefore, quasi-civil rights theory works to prevent a State such as Latvia from enforcing a father's parental interests when these interests compete with the child's best interest as established by a psychological report.

*X v. Latvia* illustrates this harmonious application of quasi-civil rights in combination with the child's best interests as the Grand Chamber self-admittedly rules in such a way that prevents both the Latvian and Australian governments from acting in a manner that infringed upon the child's determined best interests.<sup>198</sup> Importantly, however, the quasi-civil rights theory is qualified in that it confers only

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<sup>194</sup> See, e.g., Appell, *Child-Centered Jurisprudence*, *supra* note 95, at 724.

<sup>195</sup> See *id.* at 724–26 (explaining that while children's rights are ordinarily derived from the rights or duties of others, child-centered jurisprudence focuses on and empowers the child).

<sup>196</sup> Appell, *Child-Centered Jurisprudence*, *supra* note 95, at 728–29.

<sup>197</sup> Todres, *supra* note 184, at 170; Charter of Fundamental Rights of the European Union, *supra* note 52, art. 24.

<sup>198</sup> *X v. Latvia* (No. 27853/09), Eur. Ct. H.R., Grand Chamber ¶¶ 117–18 (2013).

limited rights to children.<sup>199</sup> Especially when operating against a parent's vested parental rights as well as State interests, quasi-civil rights provide only a feeble justification for a court to obstruct State interference with a child's best interests.<sup>200</sup> Therefore, as alluded to in the discussion of children as property, courts must root their justification for action not solely in the child, as quasi-civil rights theory entails, but instead with a parent, as a dependency rights theory allows.

*b. Dependency Rights*

Facially, dependency rights would seem to operate in an opposite manner as compared to quasi-civil rights.<sup>201</sup> For instance, while the quasi-civil rights theory is focused on the child, the dependency rights theory postulates that a child's rights spring from a parent or other guardian.<sup>202</sup> In the former instance, the child's best interests will trump.<sup>203</sup> In the latter, however, parental interests will generally prevail.<sup>204</sup> While this may be the case, the Grand Chamber has crafted the *X v. Latvia* judgment in such a way as to allow the two doctrines to operate in harmony.

As illustrated above, the quasi-civil rights theory operates to prevent a State from unduly interfering with a child's rights. The quasi-civil rights theory does not, however, work in such a manner as to justify interference with established parental rights.<sup>205</sup> Conversely, dependency rights operate in such a manner as to create an obligation on a parent or State actor to act in the child's best interests.<sup>206</sup> In the instance of *X v. Latvia*, this obligation actuates quasi-civil rights theory in a manner that compels the court to act against both expressed government interests as well as the father's established parental interests in favor of protecting the best interests of the child.<sup>207</sup>

The Court's judgment in *X v. Latvia* further perfectly encompasses dependency rights by grounding the judgment in the mother's rights, and not the child's rights.<sup>208</sup> As indicated earlier, dependency rights operate by allowing a parent or government representative to make decisions on

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<sup>199</sup> See Appell, *Child-Centered Jurisprudence*, *supra* note 95, at 727–28 (noting how quasi-civil rights “may be cabined by children’s youth”).

<sup>200</sup> *Id.* at 728–29.

<sup>201</sup> *Id.* at 727.

<sup>202</sup> *Id.* at 729–30.

<sup>203</sup> *Id.* at 729.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 728–29.

<sup>206</sup> *Id.* at 729.

<sup>207</sup> *X v. Latvia* (No. 27853/09), Eur. Ct. H.R., Grand Chamber ¶¶ 115–20 (2013).

<sup>208</sup> *Id.* ¶ 119.

behalf of a child.<sup>209</sup> In the case at hand, the Grand Chamber grounds its ruling in a decision made by both the government (as represented by the European Court of Human Rights) and a parent (as represented by the mother putting forth a psychological report).<sup>210</sup> While this jurisprudential tool may seem lackluster in specifically promoting the rights of the child as an independent, legal person, it nonetheless perfectly balances the many legal obligations at issue in *X v. Latvia*, as will be subsequently explored.

*b. International Law on a Child's Best Interests*

International law on a child's best interests is sporadic and piecemeal.<sup>211</sup> Discerning a uniform international view—or even more simply an emerging trend—on the best interests of the child standard is challenging.<sup>212</sup> In some cases, the child's best interests may be rooted in a right to family, whereas in others the child's best interests may instead be more firmly rooted in a right to access certain developmental resources.<sup>213</sup> The differing views on children's best interests will be applied to the Grand Chamber judgment in *X v. Latvia* below.

*i. European Views*

Naturally, European legal espousals of the standards governing a child's best interests are of particular importance to the European Court of Human Rights. The European Convention on Human Rights in particular plays a pivotal role in helping the Grand Chamber embrace a progressive view on child sovereignty in *X v. Latvia* and will be addressed below.

*1. 1950 European Convention on Human Rights and Fundamental Freedoms*

The Grand Chamber in *X v. Latvia* rules that the *mother's* Article 8 rights to private and family life have been violated, not the child's.<sup>214</sup> Yet, this determination depends on a psychological assessment finding that the *child* would suffer great psychological harm if sent to live with her father.<sup>215</sup> In all likelihood, such a determination was the only way the Grand Chamber could effectively safeguard the interests of the child,

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<sup>209</sup> See Appell, *Child-Centered Jurisprudence*, *supra* note 95, at 729–30 (discussing dependency rights).

<sup>210</sup> *X v. Latvia*, Grand Chamber, ¶¶ 115–20.

<sup>211</sup> See Appell, *Child-Centered Jurisprudence*, *supra* note 95, at 707–08.

<sup>212</sup> *Id.* at 707.

<sup>213</sup> See *id.* at 708–15 (discussing the differing legal constructions of childhood).

<sup>214</sup> *X v. Latvia*, Grand Chamber, ¶¶ 119–20.

<sup>215</sup> *Id.* ¶¶ 115–18.

while also facilitating a judicial dialogue that would continue to evolve, and embrace the sovereign voice of the child, in light of existing legal obligations weighing on the case.

Importantly, the Grand Chamber ruled that the Latvian court's failure to consider this psychological harm violated the mother's rights under the European Convention on Human Rights for no other reason than the child did not have standing before the European Court of Human Rights.<sup>216</sup> The finding that the mother's rights had been violated may be considered simply incidental to the Grand Chamber's desire to rule in a way that addressed the child's interests and concerns as expressed through the psychological report. In this way, the Grand Chamber truly did adopt an approach that reflected a "combined and harmonious application" of the various international law obligations before it.<sup>217</sup> Given the child's age, at the time of the assessment, in addition to other factors discussed subsequently with the assessment of the Hague Abduction Convention below, the psychological report was the only way the Grand Chamber could consider the views of the child without greatly undermining the purposes of any of the international legal instruments before it.

## 2. *Other European Instruments*

The Grand Chamber's judgment further comports with the standards expressed in Article 24 of the Charter of Fundamental Rights of the European Union, which dictates that courts should consider the views of children in matters that affect them.<sup>218</sup> Article 24 further mandates that the child's best interests should be a primary consideration.<sup>219</sup> Nonetheless, Article 24 limits consideration of a child's views based on the child's age and maturity, a standard that likely would have precluded the child in *X v. Latvia* from offering her views to a court.<sup>220</sup> The European Convention on the Exercise of Children's Rights places limits that would have similarly excluded the views of a child as young as the girl at issue in *X v. Latvia* from judicial consideration.<sup>221</sup>

Importantly, the Grand Chamber reads the Brussels II *bis* Regulation, Article 24 section 2 of the Charter of Fundamental Rights of the European Union, Article 8 of the European Convention on Human

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<sup>216</sup> *Id.* ¶¶116–18.

<sup>217</sup> *Id.* ¶ 94.

<sup>218</sup> See Charter of Fundamental Rights of the European Union, *supra* note 52, art. 24(1).

<sup>219</sup> *Id.* art. 24(2).

<sup>220</sup> *Id.* art. 24(1).

<sup>221</sup> See European Convention on the Exercise of Children's Rights, *supra* note 133, art.

Rights, and Article 13(b) of the Hague Abduction Convention to prevent the Hague Abduction Convention's return mechanism from operating in an automatic manner.<sup>222</sup> In the view of the Grand Chamber, mechanical operation of the return mechanism would deprive a parent of process rights afforded to him or her under the above-mentioned European human rights obligations.<sup>223</sup> This does not, however, fully address whether the Grand Chamber considered the best interests of the child in this determination. The inclusion of Article 13(b) of the Hague Abduction Convention and Article 24 section 2 of the Charter of Fundamental Rights of the European Union indicates that the Grand Chamber did consider the child's best interests in this determination.

Both Article 13(b) of the Hague Abduction Convention and Article 24 section 2 of the Charter of Fundamental Rights of the European Union focus on children (in the case of the former, with regards to "grave risk," and in the case of the latter with regards to the rights of the child more generally) and not on parental rights to process.<sup>224</sup> Thus, their inclusion in the judgment can only indicate that the Grand Chamber sees the best interests of the child as placing a further limit on the Hague Abduction Convention's "automatic" return mechanism. However, one must note that the child's best interests did not operate independently of a parent's established legal interests, although the Grand Chamber took special care to incorporate the child's interests.<sup>225</sup>

Nonetheless, the Grand Chamber does not let the child's age limit preclude the Grand Chamber entirely from consideration of her views. Instead, the Grand Chamber cleverly disguises this consideration by employing the "best interests of the child" standard as articulated in the many international documents before it.<sup>226</sup> The Grand Chamber is not explicit in this maneuver, but the weighty emphasis placed on the psychological report may be read to signify an inclusion of the child's views through the best interests standard despite her very young age.<sup>227</sup> In many ways, this determination expands Article 3 of the European Convention on the Exercise of Children's Rights.<sup>228</sup> Article 3 of the European Convention on the Exercise of Children's Rights incorporates children as fully independent parties in legal proceedings affecting their interests

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<sup>222</sup> See *X v. Latvia, Grand Chamber*, ¶ 35, 73.

<sup>223</sup> *Id.*

<sup>224</sup> See generally Hague Abduction Convention, *supra* note 13, art. 13(b); Charter of Fundamental Rights of the European Union, *supra* note 52, art. 24.

<sup>225</sup> *X v. Latvia, Grand Chamber*, ¶¶ 95–96.

<sup>226</sup> See *id.* ¶ 96.

<sup>227</sup> See *id.* ¶¶ 68, 86, 117.

<sup>228</sup> European Convention on the Exercise of Children's Rights, *supra* note 133, art. 3.

subject to the limits of the child's ability to understand the matters at hand.<sup>229</sup>

Again citing the young age of the child at issue in *X v. Latvia*, many would surmise that the child lacked both the age and maturity to fully understand the consequences of the legal proceedings affecting her.<sup>230</sup> Nonetheless, the Grand Chamber incorporates the child's views through its consideration of the psychological report.<sup>231</sup> Consideration of this report first shields the European Court of Human Rights from criticism that it solicited views from a child that lacked the age and maturity to form and express views on a legal proceeding.<sup>232</sup> A psychological report allows a court to consider the views of the child without putting the child in the difficult position of having to testify before a judicial body, and therefore avoids the awkwardness of a court looking to a particularly young child's testimony on record.<sup>233</sup>

Further, the psychological report is likely the most effective way to glean a young child's views. A specialist, such as a psychologist, best understands the manner in which to pose particular questions so that a child may express otherwise difficult thoughts.<sup>234</sup> Not only does the consideration of the psychological report allow the European Court of Human Rights to consider the views of a young child, but it also opens the door for European judicial bodies to order psychological evaluation in Hague Abduction Convention matters so as to incorporate the child's views in the decision-making process.

## ii. Global Views

Despite being a European court, the European Court of Human Rights correctly places considerable emphasis both on the Hague Abduction Convention as well as the Convention on the Rights of the Child in the *X v. Latvia* judgment. While both conventions purport to address the child's best interests, the conventions serve strikingly different functions and are therefore somewhat difficult to remedy with one another.<sup>235</sup> Analysis of any of the mentioned international agreements

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<sup>229</sup> *Id.* art. 3.

<sup>230</sup> *X v. Latvia, Grand Chamber*, ¶ 112.

<sup>231</sup> *Id.* at 117.

<sup>232</sup> Charter of Fundamental Rights of the European Union, *supra* note 52, art. 24(1).

<sup>233</sup> *Guidelines for Psychological Evaluations in Child Protection Matters*, 68 AM. PSYCHOLOGIST 20, 20 (Jan. 2013).

<sup>234</sup> *Id.*

<sup>235</sup> Hague Abduction Convention, *supra* note 13, at pmbl. ("protect[ing] children internationally from the harmful effects of their wrongful removal or retention" and "ensur[ing] their prompt return to the State of their habitual residence"); Convention on the Rights of the Child, *supra* note 167, at pmbl ("Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development



does not reveal a universal or exclusive definition of “best interests.”<sup>236</sup> Instead, careful reading of agreements such as the Hague Abduction Convention and Convention on the Rights of the Child reveals a multifaceted definition of best interests that is highly fact-specific.<sup>237</sup> As such, the European Court of Human Rights’ careful efforts in *X v. Latvia* to impart a definition of best interests that fits both within the confines of the Hague Abduction Convention and European human rights obligations is entirely appropriate. Each aspect of the discussed international instruments will be applied to *X v. Latvia* below.

### 1. *The 1980 Hague Abduction Convention*

As earlier indicated, the Hague Abduction Convention’s primary purpose is to provide a remedy for a speedy return for wrongfully abducted children between Contracting States.<sup>238</sup> While the Convention does incorporate a hazy best interests standard, it nonetheless centralizes on parental rights.<sup>239</sup> When read in isolation from the human rights obligations at issue, the Grand Chamber’s ruling can be seen as nothing but absolutely undermining the Objects and Purposes of the Hague Abduction Convention to provide a speedy return remedy to wronged parents.<sup>240</sup>

The Latvian appeals court had no obligation to address evidence that had not been presented to the lower Latvian courts, and as a procedural matter was wholly correct in its refusal to consider the newly raised psychological report.<sup>241</sup> Given that the Hague Abduction Convention is largely procedural in nature, the Latvian court’s exclusion of the psychological report was also entirely proper under the rules and procedures of the Hague Abduction Convention.<sup>242</sup> Consideration of the report on appeal would allow desperate parents to clog appeals courts with new evidence, and therefore greatly undermine the express purpose of the Convention: speedy return.<sup>243</sup> In addition to undermining the speedy return purpose of the Hague Abduction Convention, this potential delay

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of the child, Recognizing the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries.”)

<sup>236</sup> See generally Hague Abduction Convention, *supra* note 13; Convention on the Rights of the Child, *supra* note 167.

<sup>237</sup> See generally Hague Abduction Convention, *supra* note 13; Convention on the Rights of the Child, *supra* note 167.

<sup>238</sup> Hague Abduction Convention, *supra* note 13, art. 1.

<sup>239</sup> See generally Hague Abduction Convention, *supra* note 13.

<sup>240</sup> *X v. Latvia* (No. 27853/09), Eur. Ct. H.R., Grand Chamber ¶¶ 115–20 (2013).

<sup>241</sup> *Id.* ¶ 114.

<sup>242</sup> *Id.* ¶¶ 110–14.

<sup>243</sup> Hague Abduction Convention, *supra* note 13, art. 1(a).

tactic could further serve to require courts to consider whether a child is “now settled” in its new environment as the court proceedings have been greatly lengthened by the consideration of new evidence.<sup>244</sup> As such, the Latvian courts were true to both the text and Objects and Purposes of the Hague Abduction Convention.

Nonetheless, the judgment of the European Court of Human Rights does not undermine the Hague Abduction Convention, although said judgment does create a potentially dangerous loophole in the application of the Convention in Europe. The Grand Chamber wisely hinged part of its consideration on the Hague Abduction Convention’s Article 13, which allows for refusals of return if a child should face a “grave risk of harm.”<sup>245</sup> In the view of the Grand Chamber, the risk of psychological harm to the child established in the psychological report constituted a “grave risk” of harm under Article 13 of the Hague Abduction Convention, thus allowing for a stay of return.<sup>246</sup>

This determination is important for two primary reasons. First, the judgment of the European Court of Human Rights does not undermine the Hague Abduction Convention, but in fact rightly operates entirely within the text of the Convention. Second, as with the European standards incorporating the views of the child, the Grand Chamber incorporates the views of the child into the application of the Hague Abduction Convention. After all, the child’s fears, as expressed to a psychologist, allowed the Grand Chamber to rule that her return would be so psychologically damaging that it constituted a “grave risk” of harm under Article 13 of the Hague Abduction Convention.<sup>247</sup> This employment of the Article 13 exception in the Hague Abduction Convention allowed the European Court of Human Rights to read its many legal obligations in a harmonious manner, and therefore prevented the Court from having to undermine any of the legal obligations before it.<sup>248</sup>

Both articles 18 and 20 of the Hague Abduction Convention provide courts with further recourse from the Hague Abduction Convention’s strict procedural requirements and further supported “harmonious” reading of the laws before the European Court of Human Rights.<sup>249</sup> First, Article 18’s statement that the Hague Abduction Convention does “not limit the power of a judicial or administrative authority to order the return of the child” solidifies the supremacy of judicial decision-making over the

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<sup>244</sup> *Id.* art. 12.

<sup>245</sup> *X. v. Latvia, Grand Chamber*, ¶ 34.

<sup>246</sup> *Id.* ¶ 116.

<sup>247</sup> *See id.*

<sup>248</sup> *Id.* ¶¶ 96, 106.

<sup>249</sup> Hague Abduction Convention, *supra* note 13, arts. 18, 20.

text of the Convention.<sup>250</sup> Second, Article 20 of the Hague Abduction Convention stresses that a court may refuse a return order if such a return would violate fundamental human rights principles of the Returning State.<sup>251</sup> The Grand Chamber's espousal on numerous human rights principles—from the European Convention on Human Rights to the Convention on the Rights of the Child—clearly legitimizes the refusal to return. The Grand Chamber rightly employs the metaphorical “get out of jail free” card afforded to it in Article 20 of the Hague Abduction Convention, again ensuring that its judgment in no way conflicts with the text of the Convention.<sup>252</sup>

## 2. 1989 Convention on the Rights of Children

The Grand Chamber's judgment fits neatly with the Convention on the Rights of the Child. If nothing else, the Convention on the Rights of the Child serves as a tool with which the Grand Chamber may declutter some of its confusing legal obligations as the Convention requires that a child's best interests “shall be a primary consideration”<sup>253</sup> By requiring that the child's best interests permeate every legal obligation before courts, the Convention on the Rights of the Child allowed the European Court of Human Rights to effectively manipulate the law before it in such a way so as not simply to ensure a ruling in the child's best interests. This also enabled the Grand Chamber to rule in such a manner that ensured the child had a voice in the proceedings that would so profoundly affect her.

The fact that the Convention on the Rights of the Child also treats children as particularly vulnerable further justifies the Grand Chamber's use of dependency rights in *X v. Latvia*. As indicated earlier, making the ruling through the mother's rights, and not the child's rights, allowed the European Court of Human Rights to interpret the laws before it in a purely harmonious manner. This methodology further allowed the European Court of Human Rights to consider the views of the child without turning well-established dependency rights jurisprudence entirely on its head. In this way, the European Court of Human Rights has pushed child-centered jurisprudence forward in a sustainable manner that both provides careful guidance to lower courts and allows the child to continue to manifest his or her sovereignty before courts.

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<sup>250</sup> *Id.* art. 18.

<sup>251</sup> *Id.* art. 20.

<sup>252</sup> *Id.* ¶¶ 117–20.

<sup>253</sup> European Convention on the Exercise of Children's Rights, *supra* note 133, art. 3(1).

## IV.      CONCLUSION

*X v. Latvia* embodies the true dawn of child judicial sovereignty. While the judgment of the European Court of Human Rights creates a potential loophole in the Hague Abduction Convention for wily parents, its artful and harmonious reading of the Hague Abduction Convention in tandem with the European Convention on Human Rights and other human rights documents serves to further elevate the child's voice in legal proceedings affecting the child.

The vying interests at hand in *X v. Latvia* will continue to challenge courts to properly balance multiple legal principles. While the tension manifested in these principles will present a great test for courts, these tensions also imbue courts with an opportunity to further the jurisprudential dialogue encouraging the further evolution of child-centered jurisprudence. The *X v. Latvia* judgment manifests contemporary views on this dialogue; while the Grand Chamber endeavored to include the child's voice in the proceedings, it did so in such a way that respected the sanctity of the many legal doctrines before it. In this way, the European Court of Human Rights has pushed the conversation on child sovereignty forward in a manner that encourages domestic courts to do the same.

While the *X v. Latvia* judgment may have been rooted in a finding that the mother's rights had been violated, it is important to understand this finding merely as a vehicle for the child's voice. Critics of the judgment will claim that it undermines the Hague Abduction Convention, or conversely that it does not do enough to promote true child-centered jurisprudence. Such critics would be shortsighted: the *X v. Latvia* judgment embodies perhaps one of the most progressive judicial rulings on child sovereignty, and marks an optimistic way forward for treatment of child-centered jurisprudence by European courts.