*Th.M. de Boer**

What we should *not* expect from a recast of the Brussels IIbis Regulation

Abstract

If the European Commission decides to recast the Brussels IIbis Regulation, it is likely to submit a proposal in which the focus will be on practical matters, such as judicial cooperation, the return of abducted children, or the further abolition of exequatur. The questionnaire that was used for the public consultation on the 'functioning' of Brussels IIbis did not leave much room for criticism of the Regulation's points of departure with regard to jurisdiction in matters of parental responsibility. Yet, there are a few issues that may be more important than the prevention of parallel proceedings or the free circulation of judgments within the EU. One of them concerns the virtually unlimited scope of the regulation in cases in which jurisdiction is determined by prorogation (Article 12). Another problem results from the perpetuatio fori *principle underlying Article 8. Both provisions confer jurisdiction even if the child is habitually resident outside the EU, which casts considerable doubt on the effectiveness of the court's decision.*

1. Looking back

The first time I wrote on the jurisdictional provisions of what was to become the Brussels II Regulation was in 1996.[1] At that time, the efforts of the European Community to harmonize private international law had mainly resulted in two conventions, one on jurisdiction and recognition and enforcement of judgments (the Brussels Convention of 1968) and one on the law applicable to contractual obligations (the Rome Convention of 1980).[2] Judicial cooperation in civil matters – covering most of the subject-matter of private international law – had not yet been transferred from the third to the first pillar of European integration,[3] which explains why the European Community had no authority to adopt supranational legislation on such matters and why the Council could only 'recommend' the member states to adopt a convention it had drawn up.[4] The groundwork for a convention on jurisdiction and the enforcement of judgments in matrimonial matters had been laid by the *Groupe Européen de Droit International Privé*,[5] and the Explanatory Report published in the *Official Journal* had been written by one of its members, Professor Alegría Borrás.[6] In its final version, the Convention covered jurisdiction and the recognition and enforcement of judgments in civil proceedings relating to (a) divorce, legal separation and marriage annulment, and (b) parental responsibility for children of both spouses if that issue would be raised in proceedings mentioned under (a). The Convention was signed on 28 May 1998, but as the Treaty of Amsterdam allowed its conversion into a regulation, the European Commission was quick to draft a proposal for a regulation covering the same topics.[7] The result was the Brussels II Regulation, which would become applicable as of 1 March 2001.[8]

Eight months before that date, on 3 July 2000, the French presidency of the European Union put forward a proposal to abolish exequatur proceedings for judgments concerning rights of access.[9] In November of the same year, the Justice and Home Affairs Council decided to expand the scope of the Brussels II Regulation to all civil proceedings relating to parental responsibility. The Commission then drafted a proposal for a separate regulation on such matters, in which it also included provisions on jurisdiction in case of child abduction, on the transfer of the case to a court in another member state, and on cooperation between central authorities.[10] Thus, the first steps towards a revision of the regulation were taken even before the original version became applicable. To add to the confusion, the Council authorized the member states to sign the Hague Convention on the protection of children of 1996,

* Emeritus Professor of private international law and comparative law, University of Amsterdam; member of the Dutch Standing Commission on Private International Law; deputy judge in the District Court of Alkmaar from 1986 to 2013.

1 Th.M. de Boer, 'Favor divortii en rechtsmacht, Commentaar op artikel 2 van het voorstel voor een bevoegdheids- en executieverdrag in zaken van familie- en erfrecht', in: S.C.J.J. Kortmann, J.M.M. Maeijer, A.J.M. Nuytinck, S. Perrick (eds.), *Op recht, Bundel opstellen aangeboden aan prof. mr. A.V.M. Struycken ter gelegenheid van zijn zilveren ambtsjubileum aan de Katholieke Universiteit Nijmegen*, Zwolle: W.E.J. Tjeenk Willink 1996, p. 19-31.

2 There were also various Protocols accompanying the Conventions, notably the Protocols on the interpretation of the Rome Convention by the European Court of Justice. Scattered provisions on choice of law could be found in several directives (e.g. no. 88/357/EEC on insurance, or no. 94/47/EC on timesharing) and regulations (e.g. no. 1408/71 on social security for migrant workers, or no. 2137/85 on European Economic Interest Grouping).

3 The Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts was signed on October 1997 and entered into force on 1 May 1999. It established 'an area of freedom, security and justice', which is meant to further the free movement of persons within the European Union. The key provisions in this respect can now be found in Title V of the Treaty on the Functioning of the European Union (Arts. 67 et seq.), notably Art. 81 on judicial cooperation in civil matters.

4 Cf. Art. K.3(2) of the Maastricht Treaty: 'The Council may … on the initiative of any Member State or of the Commission … (c) draw up conventions which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements.'

5 The original text covered marriage, matrimonial property, divorce and separation as well as paternity and succession. A 'Proposition pour une Convention concernant la compétence judiciaire et l'exécution des décisions en matière familiale et successorale' was published in *Rivista di Diritto Internazionale Privato e Processuale* 1993, p. 1083-1090 (with explanatory notes by Paul Lagarde); *IPRax* 1994, p. 67-69; *NIPR* 1995, p. 5-8.

6 Text of the Convention: *OJ* 1998, C 221/1; Explanatory Report: *OJ* 1998, C 221/27-64.

7 Proposal of 4 May 1999 for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for joint children, COM(1999) 220 final.

8 I reviewed the text of the Commission's proposal in an article entitled 'Brussel II: een eerste stap naar een communautair i.p.r.', *Familie- en Jeugdrecht* 1999, p. 244-249. Apart from some grumbling concerning the way in which the main provision on jurisdiction in matters of divorce had been drafted, I was fairly content with the new regulation. However, I would have applauded the addition of a provision allowing the spouses a choice of forum.

9 *OJ* 2000, C 234/7; cf. D. van Iterson, 'Het Franse initiatiefvoorstel tot afschaffing van het exequatur voor beslissingen inzake het omgangsrecht, in: H.F.G. Lemaire and P. Vlas (eds.), *Met recht verkregen, Bundel opstellen aangeboden aan mr. Ingrid S. Joppe*, Deventer: Kluwer 2002, p. 87-104.

10 Proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in matters relating to parental responsibility, submitted on 9 September 2001, COM(2001) 505 final; *OJ* 2001, C 332E/269.

which – apart from the choice-of-law issue – addressed the same legal issues as the ones covered by the Commission's proposal for a separate regulation on parental responsibility.[11] Eventually, this proposal was withdrawn. It was replaced by a draft covering both matrimonial matters and parental responsibility,[12] in which all of the proposed innovations – the abolition of exequatur for decisions on access rights, an expansion of the regulation's substantive scope with regard to parental responsibility, cooperation between Central Authorities, and a demarcation of the relation between the Hague Conventions on child protection and the regulation – had been brought together. This time, I was much more critical of the Commission's efforts than I had been with regard to the first version of the Brussels II Regulation. My objections to the complicated relationship between various conventions on child protection and the Brussels II(bis) Regulation are reflected in the title of a critique I wrote for the *Netherlands International Law Review* in 2002.[13] A few years later, after the Council had adopted the final version of the Regulation,[14] I analyzed some of the practical problems that were likely to arise in its application.[15]

The next change to the regulation was proposed by the European Commission in July 2006.[16] It provided for the introduction of prorogation in matrimonial matters, as well as a chapter on the law applicable to divorce and legal separation, both to be included in a new version of the Brussels II Regulation. While the introduction of a forum-selection clause with a view to divorce or legal separation did not meet with unmitigated approval, it was the chapter on choice of law that proved to be unacceptable to a number of member states. In my view, the true cause of their dissent was the fact that a neutral, geographical approach to choice-of-law issues may not be suitable in areas of substantive law deeply imbued with social, economic or cultural values.[17] In the end, the deadlock was solved by resorting to 'enhanced cooperation' between a limited number of participating member states, as provided in Article 20 of the EU Treaty. Instead of an amendment of the Brussels IIbis Regulation, a new regulation was proposed (known as the 'Rome III Regulation'), which would only cover the issue of the law applicable to divorce and legal separation and provided for enhanced cooperation between the member states favoring uniform choice-of-law rules in this area. 'Rome III' was adopted in December 2010 and became applicable in the participating member states on 1 July 2012.[18]

That brings us to the present time. With a view to a revision of Brussels IIbis, as indicated by Article 65, the Commission has published a report on its application, at the same time launching a public consultation on possible improvements.[19] The Commission's questionnaire consisted of 36 questions, none of which was concerned with the scope of the regulation or the rationale of any of its provisions. Obviously, the Commission was not interested in the respondents' views on such fundamental matters. It mainly wanted to know whether the regulation was considered as a 'helpful tool in cross-border cases', whether 'the existing rules function well', and whether the abolition of exequatur should be expanded to all decisions on parental responsibility. At the request of the Dutch Ministry of Security and Justice, the questionnaire has been discussed in the Dutch Standing Committee on Private International Law, in preparation of which I had made a number of suggestions. Unfortunately, I was unable to persuade the Standing Committee to endorse my views on what I perceive as the major flaws of the present regulation. That explains, in my view, why the Dutch response to the Commission's questionnaire is rather conservative and why it is unlikely to contribute to a fundamental discussion on the regulation's points of departure. I am under no illusion that my objections will tip the scales in favor of the amendments I should want the Commission to propose, but I do think they deserve to be given fair consideration by scholars and practitioners who are more interested in the soundness of the regulation's underpinnings than in its actual 'functioning'. It is my firm belief that a set of rules which is not based on a well-thought-out conceptual framework inevitably gives rise to questions of interpretation, which could have been avoided if more thought had been given to the consistency of the rules, their interrelation, and their relation to other sources of law.

The focus of this article is, therefore, not on the Commission's questionnaire, or on practical issues, such as the cooperation between Central Authorities or the (further) abolition of exequatur. Instead, I should like to address the issue of whether the territorial scope of the regulation with regard to matters of parental responsibility is (or should be) limited, which also touches upon the precedence of the regulation over other instruments covering the same subject-matter. A second question I should like to raise pertains to the principle of *perpetuatio fori*, as expressed in Article 8 of the regulation, which is another topic ignored in the Commission's questionnaire.[20]

11 Council Decision No. 2003/93/EC of 19 December 2002 authorizing the Member States to sign, in the interest of the European Community, the Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children, *OJ* 2003, L 48. Council Decision No. 2008/431/EC of 5 June 2008 authorized the Member States to ratify or accede to the Convention.

12 Proposal for a Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility repealing Regulation (EC) No. 1347/2000 and amending Regulation (EC) No. 44/2001 in matters relating to maintenance, COM(2002) 222 final; *OJ* 2002, C 203 E/155. The amendment of the Brussels I Regulation with regard to child maintenance was eventually achieved by a provision (Art. 68) in the Maintenance Regulation of 2008 (Regulation No. 4/2009).

13 'Jurisdiction and Enforcement in International Family Law: A Labyrinth of European and International Legislation', *Netherlands International Law Review* 2002, p. 307-351.

14 Regulation (EC) No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility repealing Regulation (EC) No. 1347/2000, *OJ* 2003, L338/1-29.

15 'Enkele knelpunten bij de toepassing van de Verordening Brussel II-bis', *Tijdschrift voor Familie- en Jeugdrecht* 2005, nr. 10, p. 222-230.

16 Proposal for a Council Regulation amending Regulation (EC) No. 2201/2003 as regards jurisdiction and introducing rules concerning applicable law in matrimonial matters, COM(2006) 399 final.

17 Cf. Th.M. de Boer, 'The Second Revision of the Brussels II Regulation: Jurisdiction and Applicable Law', in: K. Boele-Woelki and T. Sverdrup (eds.), *European Challenges in Contemporary Family Law*, Antwerp: Intersentia 2008, p. 321-341; id., 'Europese oogkleppen: waarom "Rome III" voor Nederland geen optie is', in: *Actuele ontwikkelingen in het familierecht, Vijfde UCERF-symposium*, Nijmegen: Ars Aequi Libri 2011, p. 73-86.

18 Council Regulation No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, *OJ* 2000, L 343/10.

19 Report from the Commission to the European Parliament, the Council and the European Social and Economic Committee on the application of Council Regulation No. 2201/2003, 15 April 2014, COM(2014) 225 final. The period of consultation lasted from 15 April to 18 July 2014; see: <http://ec.europa.eu/justice/newsroom/civil/opinion/>.

20 On both topics see also: D. van Iterson, *Ouderlijke verantwoordelijkheid en kinderbescherming*, Praktijkreeks IPR no. 4, Apeldoorn: Maklu 2011, *passim*; Th.M. de Boer, 'Ouderlijke verantwoordelijkheid, kinderbescherming, kinderontvoering', in: Th.M. de Boer and F. Ibili (eds.), *Nederlands internationaal*

As we shall see, the two issues have something in common: they both touch on the effectiveness of EU judgments in non-member states.

2. Different aspects of the 'scope' of a convention or regulation

Over the years I have noticed that international and European lawmakers do not seem to be very familiar with the way conventions or regulations should be demarcated from each other and from national sources of law, so as to enable practitioners to determine by which set of rules a legal issue must be solved if there is a choice between various alternatives. The first step is, of course, an examination of the *scope* of the respective instruments. Even though this concept may seem self-evident and despite the fact that the 'scope' of a convention or regulation is usually defined in one or more introductory provisions, it is quite often misunderstood as a term referring to the *subject-matter* or *substance* of an instrument only. Yet, if the expression 'scope' is equated with the 'ambit' or 'reach' of an international or European set of rules, two more aspects should be taken into consideration. Apart from the substantive scope of a convention or regulation, we should be aware that such instruments may be subject to limitations in time and space. Their temporal reach is usually expressed in what is called a 'transitional provision', referring to a type of event occurring after the instrument has entered into force. In the Rome I Regulation, for instance, the decisive type of event is the conclusion of a contract, which must have occurred after the regulation became applicable. The temporal scope of the Brussels IIbis Regulation is defined in Article 64, in which a distinction is made between its temporal applicability to jurisdictional issues – Article 64(1) – and to the recognition and enforcement of judgments, covered by Article 64(2), 64(3) and 64(4). In both examples, the temporal scope of the regulation is limited: neither Rome I nor Brussels IIbis has retroactive effect, in the sense that it covers events that occurred before they became applicable. As a matter of fact, there are few instruments on topics of private international law explicitly requiring their application to events that happened before their entry into force.[21] Where a transitional provision is missing, it should be assumed, as a rule, that the instrument has a limited temporal scope.[22]

3. The territorial reach of a convention or regulation

The third aspect of the scope of an international or European instrument pertains to its territorial demarcation. The question to be answered here is whether or not the application of a convention or regulation is limited to situations in which a contracting state or, respectively, a member state of the European Union has a specific connection with the case at hand. For instance: the scope of an instrument addressing the issue of recognition and enforcement of foreign judgments is generally limited. It does not apply to judgments originating from a country where the instrument is not in force. Or: with regard to jurisdiction, the Hague Convention of 1961 on the protection of minors does not apply to children who are not habitually resident in a contracting state.[23] It is often said that such limitations are based on 'reciprocity', a phrase I would rather avoid as it suggests a kind of *quid pro quo* even in cases in which no other contracting state is involved.[24] What counts, though, is the fact that a state is not bound to apply a convention or regulation if the conditions with regard to its territorial reach have not been met. In that case, the issue to be solved may be within the substantive, temporal and territorial scope of some other convention or regulation, and if not, the solution is left to national law.

Unfortunately, there are quite a few instruments in which nothing is said about the territorial scope of its provisions, and even if there is such a 'scope rule', it is not always conclusive. Article 4 of the Brussels Convention, for instance, suggested that jurisdictional issues were outside the territorial scope of the Convention if the defendant was not domiciled in a contracting state, unless jurisdiction could be derived from the rules on exclusive jurisdiction. Subsequently, in the Brussels I Regulation, Article 4 was amended, to the effect that there was no room for residual jurisdiction if a court in a member state had exclusive jurisdiction under Article 22, or if the parties had expressly agreed to confer jurisdiction on a court in a member state as allowed under Article 23. In the newest version of the Brussels I Regulation, also known as 'Brussels I (recast)' or 'Brussels Ibis', the same exceptions – plus two new ones – can be found in Article 6(1).[25] It is still unclear, however, whether or not the provision on 'implied prorogation' (formerly Article 24, now Article 26) applies if the defendant, who tacitly submits to the jurisdiction of a court in a member state, is domiciled in a third state.[26]

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personen- en familierecht – Wegwijzer voor de rechtspraktijk, Deventer: Kluwer 2012, p. 153 et seq., p. 156-159.

21 One example can be found in the 1978 Hague Convention on the celebration and the recognition of the validity of marriages. With regard to recognition, Art. 15 expressly provides that '[t]his Chapter shall apply regardless of the date on which the marriage was celebrated', unless a contracting state has reserved 'the right not to apply this Chapter to a marriage celebrated before the date on which, in relation to that State, the Convention enters into force'. In the same vein: Art. 24 of the 1970 Hague Convention on the recognition of divorces and legal separations.

22 See, for instance, the Hague Convention of 1961 on the protection of minors, the Hague Convention of 1971 on the law applicable to traffic accidents, or the Hague Convention of 1973 on the law applicable to products liability. With regard to the temporal scope of the latter Convention, see: H. Duintjer Tebbens and M. Zilinsky, *Productaansprakelijkheid*, Praktijkreeks IPR no. 18, Apeldoorn: Maklu 2009, p. 89, who assert that, as far as the Netherlands is concerned, the Convention only applies to damage caused after 1 September 1979, the date of the Convention's entry into force in the Netherlands.

23 Art. 13(1). Each contracting state could even reserve the right to apply the Convention only to children who are nationals of that state: Art. 13(3).

24 The Dutch Supreme Court has held that the 1905 Hague Convention on the effects of marriage is based on reciprocity, and that it is therefore only applicable to the effects of a marriage which, by the place where it was concluded or by the nationality of either spouse, was connected with two different contracting states: HR 19 March 1993, *NIPR* 1993, 230; *NJ* 1994/187, annot. J.C. Schultsz; *Ars Aequi* 1994, p. 611-619, annot. Th.M. de Boer. By contrast, it has never been suggested that, e.g., the 1961 Hague Convention on the protection of minors should only be applied if, apart from the fact that the child is habitually resident in the forum state (cf. Art. 1), there should be some connection with *another* contracting state. Yet, both Conventions could be said to be based on 'reciprocity'.

25 Regulation No. 1215/2012, *OJ* 2012, L 351/1-32. Art. 6(1) refers to jurisdiction over persons not domiciled in one of the member states. In such cases, jurisdiction shall be determined by national law, subject to Art. 18, para. 1 (proceedings brought by a consumer), Art. 21, para. 2 (proceedings brought by an employee), Art. 24 (exclusive jurisdiction), and Art. 25 (prorogation).

26 Recital 12 of the 'old' Brussels I Regulation (No. 44/2001) suggested that in such cases the regulation would not apply, as it required that '[i]n addition to defendant's domicile there should be alternative grounds of jurisdiction *based on a close link between the court and the action* or in order to facilitate the sound administration of justice' [emphasis added, dB]. Recital 13 of the Brussels I Regulation now in force simply states that '[t]here must be a connection between proceedings to which this Regulation applies and the

Where nothing is said – at least not explicitly – on the territorial scope of a convention or regulation, it usually follows from the text of the individual provisions whether they are meant to apply universally or leave some room for the application of national law. The Maintenance Regulation,[27] for instance, does not explicitly demarcate its territorial reach, but it is clear that it only applies to the recognition and enforcement of decisions rendered in another member state. With regard to jurisdiction, however, the territorial scope of the regulation is universal, in that the court seized is not allowed to resort to national law, not even if there is no connection with any other member state.[28]

4. The territorial reach of the Brussels IIbis Regulation

Contrary to 'Brussels I', whose complement it is with regard to matrimonial matters and matters of parental responsibility, the Brussels IIbis Regulation does not contain a general provision on the territorial reach of its rules on jurisdiction.[29] It must be assumed, however, that its reach is territorially limited, since there are two provisions referring to 'residual jurisdiction' that may be conferred by the national law of the forum state. Resort may be had to national law if 'no court of a Member State has jurisdiction' pursuant to any of the regulation's provisions.[30] Unfortunately, the current version of the regulation – in Article 6 – still refers to the 'exclusive nature' of divorce jurisdiction, which seems to exclude the application of national law in any case in which the respondent is either a national or a resident of one of the member states. In an analysis of the original version of the regulation ('Brussels II'), I have pointed out that it is unclear whether jurisdiction may be derived from national law if the respondent is a national or resident of a member state, and no court in a member state would have jurisdiction pursuant to the regulation.[31] With regard to divorce, Brussels IIbis does not clarify this matter: it is still doubtful whether the application of national law under Article 7 is excluded if one of the requirements of Article 6 has been met. That is why Article 4(1) of the Dutch Code of Civil Procedure expressly refers to the regulation's jurisdictional standards for cases in which the regulation 'is not applicable'. On the other hand, the regulation now contains a separate section on jurisdiction with regard to parental responsibility, in which no mention is made of the 'exclusive nature' of its provisions. Jurisdiction may be determined by national law if Articles 8 to 13 do not confer jurisdiction on the courts of any member state. With regard to parental responsibility, therefore, it could be thought that the regulation follows the example of the Hague Convention on child protection of 1996 which served as a model for the Brussels IIbis proposal, and that its territorial reach is limited to situations in which the child is habitually resident in a member state. Unfortunately, the European lawmakers have chosen to steer a different course where jurisdiction is determined by prorogation. Article 12 allows prorogation of jurisdiction either as an accessory choice of court in divorce cases, or as an independent choice in other proceedings regarding a child. Contrary to the Hague Convention – which only allows prorogation in divorce cases[32] – the regulation does not restrict this ground for jurisdiction to situations in which the child is habitually resident in another member state. If the divorce court has jurisdiction pursuant to Article 3, 4 or 5, it also has jurisdiction in matters of parental responsibility if the requirements of Article 12(1) have been met.[33] The child's habitual residence and nationality are irrelevant in this context. With regard to proceedings not covered by paragraph (1), the regulation does require 'a substantial connection' between the child and the forum state, 'in particular by virtue of the fact that one of the holders of

territory of the Member States'. If the court seized by the plaintiff would assume jurisdiction on the sole ground of defendant's tacit submission (Art. 26, recast), such a connection could well be lacking. On the doubtful territorial reach of Art. 24 of the Brussels I Regulation, see: L. Strikwerda, *Inleiding tot het Nederlandse internationaal privaatrecht*, 11th edn., Deventer: Kluwer 2015, no. 256; T. Simons and R. Hausmann (eds.), *Brüssel I-Verordnung, Kommentar zur VO (EG) 44/2001 und zum Übereinkommen von Lugano*, Munich: IPR-Verlag 2012, Artikel 24, no. 15 et seq. (Ilaria Queirolo and Rainer Hausmann, asserting that Art. 24 does not apply if the defendant is not domiciled in a member state: p. 590, no. 20, with further references). On the other hand, a considerable number of authors take the position that neither party needs to be domiciled in a member state, a view they derive from the decision by the European Court of Justice in *Group Josi* (ECJ 13 July 2000, C-412/98, *NIPR* 2000, 200); ibid., p. 589, no. 19. In the Netherlands, the latter interpretation is advocated by P. Vlas, *Burgerlijke Rechtsvordering*, loose-leaf edn., Deventer: Kluwer, 'EEX-verordening, Art. 24'; F. Ibili, *Tekst & Commentaar Burgerlijke Rechtsvordering*, 5th edn., Deventer: Kluwer 2012, p. 1930. It should be noted, however, that the *Group Josi* decision referred to the Brussels *Convention* and that the ECJ could not yet take cognizance of the recitals cited above.

27 Council Regulation (EC) No. 42/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, *OJ* 2009, L 7/1.

28 Thus, a French citizen living in New York could not start proceedings in France against her Swiss husband living in Switzerland, even if French national law would allow her to do so. Except for prorogation (Art. 4) or tacit submission (Art. 5), the Maintenance regulation does not offer her an opportunity to bring suit in France.
There is one provision in the regulation's chapter on jurisdiction, however, whose territorial scope is *not* universal. Art. 8, concerning proceedings to modify an existing maintenance decision or to have it replaced by a new decision, can only be applied to situations in which the original decision was rendered in a member state or in a state that is a party to the Hague Convention of 2007 on the international recovery of child support and other forms of family maintenance. Furthermore, there may be room for the application of national law if the parties have agreed that the courts of a non-member state shall have jurisdiction. Art. 4 only refers to a choice of forum in one of the member states or a state that is a party to the Lugano Convention.

29 Cf. Van Iterson 2011, *supra* note 20, p. 47.

30 Art. 7 refers to Arts. 3, 4 and 5 with regard to divorce, separation and annulment. With regard to parental responsibility, Art. 14 allows the application of national law if no court in a member state would have jurisdiction pursuant to Arts. 8 to 13.

31 De Boer 2002, *supra* note 13, p. 321. The example I gave there went like this: a French citizen living in Canada starts divorce proceedings in France against his Spanish wife living in Mexico. As a national of a member state (Spain), she cannot be sued in 'another member state' (France). In this situation, neither the French court nor any court in another member state would have jurisdiction under the regulation's provisions. Does that mean that the French court seized by the husband should decline to assume jurisdiction altogether (as suggested by Art. 6), or is it free to resort to its national law (as allowed by Art. 7)?

32 Art. 10: '... the authorities of a Contracting State exercising jurisdiction to decide upon an application for divorce or legal separation of the parents of a child habitually resident *in another Contracting State*, or for annulment of their marriage, may, if the law of their State so provides, take measures directed to the protection of the person or property of such child if …' [emphasis added, dB].

33 Those requirements are: (a) at least one of the spouses has parental responsibility in relation to the child; (b) jurisdiction has been accepted expressly or unequivocally by the spouses and the holders of parental responsibility at the time the court was seized, and (c) the assumption of jurisdiction is in the best interests of the child.

parental responsibility is habitually resident in that Member State or that the child is a national of the Member State'. Thus, a protective measure could be taken by a Dutch court if the child is a Dutch citizen, or if one of its parents is a Dutch resident, or perhaps even if there is some other 'substantial connection' with the Netherlands,[34] but its jurisdiction does not depend on the child being habitually resident in one of the member states.

While the other provisions on jurisdiction in matters of parental responsibility do not expressly require a 'substantial connection' between the child and the forum state, the territorial reach of Articles 9 and 10 is limited to situations in which the child has been moved – lawfully or unlawfully – to another member state. If the child has moved to a state outside the European Union (or to Denmark), jurisdiction cannot be derived from Brussels IIbis, which implies that, in accordance with Article 14, recourse may be had to national law. Article 13 confers jurisdiction on the courts of the member state in which the child is present if its habitual residence cannot be established and jurisdiction cannot be exercised on the basis of prorogation. The same applies to refugee children and internationally displaced children. It could be argued, then, that the regulation's territorial reach with regard to parental responsibility extends to situations in which (a) the child is either habitually resident or present in one of the member states, or (b) the requirements for prorogation have been met. In the latter group of cases, it is irrelevant whether or not the child is habitually resident or present in the forum state or in another member state. In this respect there is a marked difference between the regulation and the Hague Convention upon which it was modeled, as Article 10(1) of the Convention does require the child to be habitually resident in another contracting state.[35]

I do not know why the drafters of Brussels IIbis have chosen to expand the regulation's territorial reach in this way. It could be argued, perhaps, that the member states of the European Union have an interest in all matters of parental responsibility in which the child is a national of one of the member states (regardless of the child's habitual residence or that of its parents), or in which one of the holders of parental responsibility is an EU resident (regardless of the nationality or habitual residence of the child or the nationality of its parents). On the other hand, neither the nationality of the child, nor the habitual residence of one of the holders of parental responsibility figures as a jurisdictional standard in any other provision than Article 12(3). If there is no agreement on prorogation, jurisdiction in matters of parental responsibility solely depends on the child's habitual residence in a member state. It is hard to see, then, why the well-being of children residing outside the EU would only be of interest to the member states in case of prorogation.

My main objection to the extension of jurisdiction to cases in which the child is not habitually resident in one of the member states is the likelihood that the court's decision will not be recognized outside the EU. Absent a convention on recognition and enforcement, there is no guarantee that protective measures rendered in one of the member states will be recognized and enforced in the non-member state of the child's habitual residence. Proceedings concerning parental authority are often grim, fraught with emotions, and hard to give up. Chances are that parents who have lost their case on custody rights or rights of access will continue to contest the decision, either in higher courts, or in the courts of another country. Chances are that they will argue that there are new facts to consider, or that the foreign court was prejudiced or misinformed. Chances are that the court of the child's present habitual residence will ask for a (new) report on its living conditions, or that it will want to hear the child itself. None of these legal squabbles is likely to be in the best interests of the child, and that is why I think that no court should assume jurisdiction pursuant to Article 12 unless all parties concerned not only agree on prorogation but also on the substance of the decision.[36]

From my own judicial experience, however, I know that courts are reluctant to deny jurisdiction if there is no compelling reason to do so, especially if the respondent has no objection against the venue chosen by the applicant. A denial of jurisdiction would force the parties to start all over again in another country, at the cost of time, money and emotions. Since it is a matter of speculation whether the decision of the court seized will be contested abroad, the 'best interests of the child' may not be a sufficient ground to deny jurisdiction. For that reason, it would have been wiser, I think, if the European lawmakers had decided to subject jurisdiction by prorogation to the condition that the child is habitually resident in another member state. Thus, the territorial reach of Brussels IIbis with regard to parental responsibility could have been expressed in one introductory provision declaring Articles 8 to 13 to be exclusive if the child is habitually resident (or present if the conditions of Article 13 are met) in one of the member states, while allowing the application of national law in all other cases. This solution would have the added advantage of clarifying the relationship between the regulation and the Hague Convention of 1996. If the child is not habitually resident in a member state, the regulation's provisions on jurisdiction must give way to those of the Convention if the child resides in a contracting state, and to the domestic law of the forum state in other cases.[37]

34 The phrase 'substantial connection' is rather (too) flexible. The connections to which Art. 12(3) expressly refers may not be 'substantial' at all, for instance if the child of an American father and a Dutch mother lives with his parents in the United States: the child is a Dutch/American national, but not in any other way connected with the Netherlands. Similarly: is there a substantial connection with the Netherlands if an American child is living with her American mother in the United States, while her American father is habitually resident in the Netherlands? Conversely, there may be a strong connection with the Netherlands even if the child is not a Dutch national and neither parent is a resident of the Netherlands. What if refugee parents have returned from the Netherlands to their home country and decide to send their child back to the Netherlands to be raised by a Dutch foster family?

35 It should be noted that the original proposal for the Brussels IIbis Regulation – COM(2002) 222 final, Art. 12(1)(a) – did require the child to be habitually resident in another member state if the issue of parental responsibility would be raised in divorce proceedings. Curiously, this requirement did not apply to other proceedings regarding parental responsibility. Under Art. 12(2) – now Art. 12(3) – the child should have a 'substantial connection' with the forum state, but there was no need for it to be habitually resident in another member state, as required in Art. 12(1); see: De Boer 2002, *supra* note 13, p. 329/330.

36 For instance: if the parties are in agreement on custody rights, rights of access, the child's habitual residence, etc., the decision in which their agreement is judicially approved is more likely to be recognized in a third state than a decision in which the court was forced to choose between opposing points of view. In the latter situation, chances are that the losing party will continue to contest the decision in any state in which it should be effected, first of all in the state of the child's current habitual residence.

37 In member states in which the Hague Convention of 1961 and/or the Hague Convention of 1996 on child protection are in force, it should be asked at the outset of the proceedings whether the case is within the substantive, temporal and territorial scope of (one of) the convention(s) and/or the regulation. If it is assumed that matters of parental responsibility are part of the subject-matter of all three instruments and that the case is not outside their temporal reach, their provisions are bound to overlap if the

5. *Perpetuatio fori*

Another suggestion I made for the improvement of the Brussels IIbis Regulation, which was rejected by the Dutch Standing Committee on Private International Law and which I do not expect the European Commission to take up, would seem to be of a quite different order than my suggestion with regard to the regulation's territorial reach. Yet, they are both based on my conviction that European and international lawmakers should be aware that there are limits to their legislative authority, and that judicial decisions rendered within the circle of participating states may have little or no effect outside that circle, particularly where the decision touches upon national religious or cultural sensitivities. That is why I would be all in favor of an amendment of Brussels IIbis to the effect that its territorial scope with regard to jurisdiction in matters of parental responsibility is limited to situations in which the child is habitually resident in one of the EU member states.

Again, there is a marked difference between Brussels IIbis and the Hague Convention of 1996 when we compare each instrument's basic rule on jurisdiction: Article 8 of the regulation and Article 5 of the Convention. They both confer jurisdiction on the courts of the state in which the child is habitually resident, but they differ in the way they deal with a possible change of residence. Article 8 expressly states that the situation 'at the time the court is seised' is decisive.[38] If the child subsequently moves to another country, jurisdiction does not shift to the authorities of the child's new habitual residence but can still be exercised by the authorities of the state of the child's former residence. Pinning jurisdiction to the circumstances as they exist at the time the court is seized and ignoring a change of circumstances as long as the litigation continues is usually expressed in the Latin phrase *perpetuatio fori*. It is considered a principle of procedural law that a court may continue to exercise jurisdiction until it has rendered a judgment that is final and no longer open to appeal, even if in the meantime there has been a change in the circumstance on which jurisdiction was originally based.[39] *Perpetuatio fori* is the point of departure in most systems of civil procedure, and in this perspective it is not very surprising that it has been incorporated in Brussels IIbis.

The 1996 Hague Convention is based on the opposite principle.[40] Article 5(2) makes it quite clear that the authorities of the child's habitual residence, when seized of a request for a protective measure, do not retain jurisdiction after the child has acquired a new habitual residence in another contracting state. During the negotiations, an Anglo-American proposal supporting the principle of *perpetuatio fori* was rejected by a strong majority of the delegations. Some of them would prefer to have this issue resolved by national law, but as pointed out in the Explanatory Report by Paul Lagarde, this solution is 'not acceptable' if there is a change of habitual residence from one contracting state to another, a situation 'which is located entirely within the interior of the scope of application of the Convention'.[41] Moreover, the solution adopted in Article 5(2) is in accordance with the one 'which currently prevails for the interpretation of the Convention of 5 October 1961'.[42] By contrast, if the child moves from a contracting state to a non-contracting state, 'Article 5 ceases to be applicable from the time of the change of residence and nothing stands in the way of retention of jurisdiction, under the national law of procedure, by the authority of the Contracting State of the first habitual residence which has been seised of the matter'.[43] In other words: if the child moves to a non-contracting state pending the proceedings the solution of the *perpetuatio fori* issue is left to national law.

One of the advantages of *perpetuatio fori* is, of course, the fact that legal proceedings need not be discontinued on account of a change of circumstances, and that there is no need to start all over again before a different court or, in international cases, a court in another country. In this respect, *perpetuatio fori* advances the interest of procedural efficiency. It may also advance the interest of justice, in that it might discourage the defendant from manipulating the facts determining jurisdiction. There is no point in changing one's residence just to rob the court of its jurisdiction if such a change is procedurally irrelevant once the court is seized. To the extent that *perpetuatio fori* shields the plaintiff from a change of circumstances attributable to the defendant's actions, it also promotes the interest of legal certainty. However, these advantages may be outweighed by other considerations. It could be argued that procedural efficiency is not furthered at all if a judicial decision rendered in country A will not be recognized in country B where the child now has its habitual residence, which may mean that new proceedings must be brought anyhow. Conversely, nothing is gained if jurisdiction is declined on the ground that the child did not yet have its habitual residence in the forum state at the time the court was seized, even though

child resides in a state that is both an EU member state and a state party to either (or both) convention(s). An overlap between the two Hague Conventions is solved by Art. 51 of the 1996 Convention. An overlap between the regulation and the 1996 Convention is solved by Art. 61(a) of the regulation, which gives precedence to the regulation if the child is habitually resident in a member state. If it is not, Art. 61(a) suggests – *a contrario* – that the Convention may be applied. If the regulation would only apply in intra-community cases, this situation would be outside the regulation's territorial reach altogether.

As to the relation between the regulation and the 1961 Convention: if the child is habitually resident in a member state that is also a party to the Convention, the regulation may justly claim precedence – as it does in Art. 60(a) – under the rule *lex posterior derogat legi priori*; cf. Art. 30(4) of the Vienna Convention of 1969 on the law of treaties. If the child does not reside in an EU member state, the case would be outside the regulation's territorial reach anyhow if my suggestion were to be followed. However, if the child does live in a member state and has the nationality of a contracting state outside the EU, precedence of the regulation is unwarranted, as the case does not only touch upon 'relations between Member States', as Art. 60 requires, but also upon relations with a non-member state. For instance: if a Turkish child is living in France, the parties could confer jurisdiction on a Dutch court by way of prorogation under Art. 12 of the regulation. Yet, a choice of court is not allowed under the 1961 Convention. The Turkish authorities would not be obliged, therefore, to recognize the Dutch decision. By contrast, the regulation would not apply if a Dutch child were living in Turkey and the parents had agreed on proceedings in a Dutch court: if the regulation's territorial reach were limited to situations in which the child is habitually resident in a member state, the court would have no alternative but to apply the 1961 Convention.

38 See: Van Iterson 2011, *supra* note 20, p. 98 et seq.

39 *Perpetuatio fori* may also determine the continued application of procedural rules (including rules on jurisdiction) that were in force at the time the court was seized, even if they have been subsequently amended, repealed, or replaced. Cf. the decision by the Dutch Supreme Court in HR 19 March 2004, *NIPR* 2004, 98; *NJ* 2004/295, discussed by Susan Rutten, '*Perpetuatio fori* in ouderlijk gezagskwesties', *NIPR* 2005, p. 11-19, at p. 11.

40 See: Van Iterson 2011, *supra* note 20, p. 95.

41 Explanatory Report on the 1996 Hague Child Protection Convention ('Lagarde Report'), Proceedings of the Eighteenth Session of the Hague Conference on Private International Law (1996), tome II, Protection of Children, no. 42.

42 Ibid., with further references.

43 Ibid.

it came to live in that state shortly afterwards. Furthermore, it frequently happens that proceedings are brought both in the state in which the child was habitually resident at the time the court was seized and in the state of its new habitual residence. Obviously, such parallel proceedings are not in the best interests of the child, but they can hardly be avoided if the states involved are not bound by the same rules on *perpetuatio fori* or *lis pendens*. A further drawback of retaining jurisdiction after the child has moved to another state is, of course, the fact that the court has no means of obtaining information on the child's welfare if the authorities of the other state are not bound by a regulation or convention to provide such information. Absent such agreements, a national court cannot ask a foreign authority or agency to submit a report on the child's present situation.

In my opinion, these disadvantages militate against holding on to the principle of *perpetuatio forio* in matters of parental responsibility. It would seem that the drafters of Brussels II and Brussels IIbis have not been quite aware of the negative effects of the stipulation that the child should be habitually resident in the forum state at the time the court is seized. Both in its explanation of the original proposal for Brussels IIbis and in the memorandum preceding the text of the second proposal, the European Commission suggested that it had followed the Hague example of abandoning *perpetuatio fori*: 'As in the 1996 Hague Convention, jurisdiction is based in the first place on the child's habitual residence. This means that, where a child's habitual residence changes, the courts of the Member State of his or her new habitual residence shall have jurisdiction.'[44] What is meant, however, is no more than that proceedings should be instituted in the state where the child is habitually resident, not that the court seized should refrain from exercising jurisdiction after the child has moved to another state. The Commission did not explain why the phrase 'at the time the court was seised' – absent in Article 5 of the Convention – was added in the regulation. Nor did it examine the effect of this clause in cases in which the child has moved to another member state, or to a state party to the Hague Convention, or to a state where neither the regulation nor the convention is in force. The three situations are quite different, in that a decision is likely to be recognized (and, if need be, enforced) in another member state, while other states – even Hague Convention states – may deny recognition on the ground that the court issuing the decision no longer had jurisdiction once the child moved to another state, or on other procedural or substantive grounds. Despite the Commission's assurance that the regulation aims 'to attribute jurisdiction in all cases in a way that serves the best interests of the child',[45] I can hardly believe that the drafters were aware of the negative consequences of *perpetuatio fori* in matters of parental responsibility.

In the Netherlands, there used to be general agreement on *perpetuatio fori* as the point of departure in the law of jurisdiction, but it was also generally accepted that the principle should be subject to exceptions,[46] or at least be applied 'with flexibility'.[47] With regard to matters of parental responsibility, the best interests of the child are thought to be decisive.[48] This view was explicitly endorsed by the Dutch Supreme Court in a case in which the child of a Dutch father and a Swiss mother had moved from Switzerland to the Netherlands pending proceedings on custody rights which the father had brought before a Dutch court.[49] The mother argued that, under Article 1 of the Hague Convention of 1961, the court's jurisdiction depended on the child's habitual residence at the time the court was seized, which would confer jurisdiction on a Swiss court. The Supreme Court acknowledged that this argument would indeed be supported by the principle of *perpetuatio fori*, but that this is just a point of departure, 'not a rule without exceptions'. With regard to the protection of children, it was held, an exception is warranted by the interests of the child on which Article 1 of the Convention is based. This consideration strongly suggests that strict adherence to the *perpetuatio fori* principle in matters of parental responsibility is *not* in the best interests of the child.

It is remarkable, therefore, that the Dutch courts have been unwilling to find a way to escape the rigidity of the time factor in Article 8 of the Brussels IIbis Regulation, even in cases in which the child's habitual residence was transferred to a state in which neither the regulation nor one of the Hague Conventions applies. A telling example is the Supreme Court's decision concerning a child that moved to Iran after the father had started custody proceedings in the Netherlands. The mother's argument that jurisdiction should be declined was rejected, both at first instance and on appeal, on the ground that the principle of *perpetuatio fori* underlying Article 8 of the Brussels IIbis Regulation does not allow the court to take account of a change of circumstances that occurred after it was seized. The Supreme Court affirmed the lower court's judgment with the laconic statement that the view that a later change of the child's habitual residence does not affect the court's jurisdiction 'is correct'.[50] In my comment on this decision, I made a distinction between three situations: (a) internal EU cases, in which the child moves from one member state to another, (b) 'Hague Convention cases', in which the child moves from a member state to a non-member state in which the Hague Convention 1996 is in force, and (c) 'third state cases', in which the child moves from a member state to a non-member state which is not a party to the Hague Convention. The *perpetuatio fori* principle of the regulation does not pose a problem in the first group of cases, but in the second group it conflicts with Article 5(2) of the 1996 Convention, which would be a sufficient reason for the non-recognition of the decision on the ground of Article 23(2)(a). In the third group of cases, recognition may be denied on any ground, including lack of jurisdiction. In my opinion, the child's interests are not furthered in any way by a decision that is likely to be ignored in the state in which it should be effected. That is why I would favor an amendment of the regulation, in which the principle of *perpetuatio fori* is either set aside altogether, or reserved for intra-community cases.

In fact, the present text of the regulation already lends support to a restrictive interpretation of the time factor laid down in Article 8. First of all, recital 12 of the regulation's preamble confirms that '[t]he grounds of jurisdiction in matters of parental responsibility 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 parental responsibility.' The exceptions mentioned in this

44 Explanatory Memorandum COM(2001) 505 final, p. 6 (Art. 3); Explanatory Memorandum COM(2002) 222 final/2, p. 8 (Art. 10).

45 COM(2001) 505 final, p. 6; COM (2002) 222 final/2, p. 8.

46 J.P. Verheul and M.W.C. Feteris, *Rechtsmacht in het Nederlandse Internationaal Privaatrecht, deel 2 Overige verdragen, het commune I.P.R.*, Apeldoorn: Maklu 1986, p. 76: 'Uitzonderingen op deze regel zijn mogelijk om redenen van procesekonomische aard of ontleend aan de aard van de bevoegdheidsregel.'

47 G.E. Schmidt, 'Rechtsmacht inzake gezag en omgang', *NIPR* 2003, p. 127-133, at p. 133.

48 Rutten 2005, *supra* note 39, p. 18.

49 HR 28 May 1999, *NIPR* 1999, 130; *NJ* 2001/212, annot. ThMdB.

50 HR 18 February 2011, *NIPR* 2011, 150; *NJ* 2012/333, annot. Th.M. de Boer; *JBPr.* 2011/47, annot. A.E. Oderkerk.

last sentence are expressed in Articles 9 and 10 (change of residence) and in Article 12 (prorogation) respectively, but there is no indication that the preamble also refers to the situation in which the child, pending the proceedings, moves to a non-member state. In that situation, it would not be in the best interests of the child if the court seized would continue to exercise jurisdiction, nor could it be said that retaining jurisdiction would be in agreement with the proximity standard. Secondly, according to recital 19 'the hearing of the child plays an important role' in the application of the regulation, so much so that a failure to give the child an opportunity to be heard may be a ground for non-recognition.[51] To facilitate the hearing of a child that is not present in the forum state, the preamble suggests the use of the 'arrangements' laid down in Regulation 1206/2001 on judicial cooperation in the taking of evidence.[52] Obviously, such cooperation will not be possible if the child has moved to a non-member state. In that case, the child will probably not be heard at all, which might amount to a violation of public policy in the state where the decision should be effected. Thirdly, the drawbacks of *perpetuatio fori* can be mitigated by the possibility of transferring jurisdiction to a court which is better placed to hear the case.[53] Such a transfer, however, is not feasible between an EU member state and a non-member state.[54] Thus, even if the court seized would be convinced that it is no longer in a position to assess the best interests of a child who no longer resides in the forum state, it would be forced to hear the case on the ground that the conditions of Article 8 were satisfied at the time the court was seized and the child has since moved to a country which is not bound by any instrument providing for the transfer of jurisdiction. Finally, with regard to the relation between the EU and non-member states in which the 1996 Hague Convention is in force, Article 61 of the regulation does not specify whether the child should have its habitual residence in a member state at the time the court is seized or at the time the court issues its decision. In cases in which the child has moved to Denmark or another Hague Convention state in which Brussels IIbis does not apply, Article 61 could be interpreted in such a way that the regulation ceases to take precedence over the Convention from the moment the child's habitual residence is transferred to a non-member state. If the drafters of the regulation did not intend any discrepancy between Article 61 and Article 8, they should have included a reference date in *both* provisions.[55]

These considerations speak in favor of a restrictive interpretation of the time factor laid down in Article 8. In my view, the provision was conceived to function in an intra-community context, in which courts dealing with matters of parental responsibility are given the opportunity to consult each other on the way to proceed together in the best interests of the child, or to assist one another in cross-border hearings, or to leave the decision to a court which is better placed to hear the case. Once the child has left the EU, such intra-community cooperation is no longer possible, and there are no rules obliging a non-member state to recognize and enforce a decision issued in the EU.[56] It would seem, then, that the interests of the child are best served if the court seized could decline to exercise jurisdiction from the moment it can be assumed that the child will definitely not return to the forum state.[57] In this perspective, it could be argued that the current version of Brussels IIbis does not stand in the way of a flexible interpretation of the principle of *perpetuatio fori* in cases in which the child has

51 Art. 23(b). See also: Arts. 11(2), 42(2)(c), and 42(2)(a).

52 Council Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil and commercial matters. Arts. 10(4) and 17(4) suggest the use of modern communications technology, 'such as videoconferences and teleconferences', which would seem quite appropriate for the hearing of children who are not present in the forum state.

53 Art. 15 Brussels IIbis. The transfer of jurisdiction first emerged in the 1996 Hague Convention (Arts. 8 and 9) as a 'unique concept': L. Silberman, 'The 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children: A Perspective from the United States', in: *Private International Law in the International Arena (Liber Amicorum Kurt Siehr)*, The Hague: T.M.C. Asser Press 2000, p. 703-727, at p. 715.

54 During the negotiations on the 1996 Hague Convention, proposals to transfer jurisdiction to the authorities of a non-contracting state were rejected even if the transfer would be in the best interests of the child. Cf. the Lagarde Report, *supra* note 41, nr. 53: 'The reason for this refusal is that the measures taken by the authority of the third State benefiting from the transfer of jurisdiction could not, for lack of reciprocity, be recognized in application of the Convention in the Contracting States, and that a serious gap in the protection would result since there would no longer be, as a result of the transfer, any authority which would normally have jurisdiction within the meaning of the Convention.'

55 Art. 61(a) obviously refers to issues of jurisdiction. If it was meant to cover situations in which the child, pending the proceedings, moves to a non-member state it could have run like this: 'As concerns the relation with the Hague Convention of 19 October 1996 … this Regulation shall apply (a) where the child concerned has his or her habitual residence on the territory of a Member State *at the time the court is seised*.'

56 Even states parties to the Hague Convention 1996 would not be obliged to recognize a decision issued in an EU member state if the child was no longer habitually resident in that state at the time the decision was rendered. Under Art. 23(a), recognition may be refused 'if the measure was taken by an authority whose jurisdiction was not based on one of the grounds provided for in Chapter II'. In case of a change of the child's habitual residence, jurisdiction may only be exercised by the authorities of the child's new habitual residence: Art. 5(2).

It must be assumed that under the 1961 Convention – now only relevant in relation to Turkey and Macau, since the other contracting states are either EU member states or (as is the case with Switzerland) have become a party to the 1996 Convention – the same ground for non-recognition applies: Art. 7.

57 This may give rise to unwarranted speculation on the intentions of the child's caretaker(s) with regard to its habitual residence. A case decided by the Dutch Supreme Court (HR 3 May 2013, *NIPR* 2013, 100; *NJ* 2013/434, annot. Th.M. de Boer) offers a rather unpalatable example. An unwed mother, a victim of domestic violence for which the child's father had been convicted, decided to leave her partner and to move with her child from the Netherlands to Surinam to live with her parents. The child was enrolled in a Surinam school. The mother registered as a Surinam resident and started looking for work. Four months later, she fell ill and died in a Surinam hospital. Shortly afterwards, the child's father started proceedings in a Dutch court claiming guardianship. At first instance and on appeal, it was assumed that the child still had its habitual residence in the Netherlands, as the mother would have taken it to Surinam 'just for a vacation'. By the time the Supreme Court confirmed the appellate court's decision with regard to jurisdiction – it was quashed with regard to substantive aspects – the child had been living with its grandparents in Surinam for almost three years, a period that might be extended with at least another year until the case would be decided on remand. In the meantime, however, the father removed the child from Surinam to the Netherlands with the help of a Dutch TV program on child abduction. Since the father had been appointed as the child's guardian (even if this decision was now subject to review), it could not be said that the child had been wrongfully removed from Surinam. The case illustrates both the shortcomings of *perpetuatio fori* in matters of parental authority, particularly if the child has moved to a state which is not bound to recognize the decisions of the court seized, and the difficulties inherent in the determination of a child's habitual residence.

moved to a non-member state. So far, however, no Dutch court has dared to ignore the time factor of Article 8 in such cases, and obviously the Dutch Supreme Court has not felt the need to refer the Iran case to the European Court of Justice for a preliminary ruling.[58] As far as I know, the issue has not been raised in Luxembourg, which could mean that there are no judicial doubts on *perpetuatio fori* in extra-community situations. The revision of the regulation would therefore present an excellent opportunity to reconsider the cogency of the principle in such cases. Yet, judging by the absence of any question on this score in the Commission's questionnaire on the functioning of Brussels IIbis, and considering the reservations of the Dutch Standing Commission on Private International Law[59] I think it is most unlikely that an amendment of Article 8 will be put on the Brussels agenda.

6. Conclusion

Of course, there is more in the Brussels IIbis Regulation that is left to be desired. High on my wish list would be an amendment of Article 12 eliminating the requirement that an agreement on jurisdiction has been accepted by the parties 'at the time the court is seised'. I can see no reason why the interests at stake in matters of parental responsibility would not allow the respondent parties to give their consent at the time they file a response, or why their consent could not be inferred from the fact that none of the parties concerned has contested the court's jurisdiction.[60] Another improvement would be a revision of Article 15, which is now a confusing muddle of various elements taken from Articles 8 and 9 of the 1996 Hague Convention and a few ill-considered modifications by EU lawmakers. It would certainly help if a clear distinction were made between situations in which the case is transferred from the court seized to a court in another country – Article 8 of the Hague Convention – and the reverse situation (Article 9). Also, it might be wise to restrict the right of the parties to have a say in the matter, as provided for in Article 15(2), particularly by abolishing the requirement that a transfer proposed by a court must be accepted by at least by one of the parties. In short, the European lawmakers would have done better to follow the Hague example more closely. However, the Commission's consultation questionnaire does not refer to Article 15 at all, which suggests that the transfer of cases to a court in another member state is not considered much of a problem. The same is true, apparently, with regard to Article 20, in which no distinction is made between provisional measures and measures in case of urgency,[61] or with regard to Articles 60 and 61 on the relation between the regulation and other instruments, notably the Hague Conventions of 1961 and 1996.[62] In this article, I did not want to dwell on such problems, as I do not think that their solution by an amendment of the pertinent provisions would have much of an impact on the interests of the child. By contrast, restricting jurisdiction in matters of parental responsibility to intra-community situations would be directly to the benefit of the child, as it would eliminate the possibility that a decision rendered by a court in an EU member state cannot be effected in the country of the child's (current) habitual residence. That is why I would favor an amendment of Article 8, making it clear that jurisdiction depends on the habitual residence of the child at the time the decision is issued, not at the time the court is seized. Relinquishing the principle of *perpetuatio fori* would bring the regulation into line with the 1996 Hague Convention. Conflicts between the two instruments could thus be avoided, which would be conducive to the mutual recognition of judgments in EU member states and other contracting states. It can hardly be doubted that this would help to serve the best interests of the child.[63]

Another way of precluding the possibility that a decision from an EU member state will not be recognized in the non-member state in which it is meant to be take effect, could be found in a reduction of the regulation's territorial scope to situations in which the child has its habitual residence in one of the member states.[64] That would mean a return to the original version of Article 12(1) on prorogation, which – at least in divorce proceedings – required the child to be habitually resident in another member state, but in my view the same requirement should apply to the proceedings covered by Article 12(3).[65] By this added requirement, the regulation's provisions on jurisdiction in matters of parental responsibility would form 'a complete and closed system'[66] covering all situations in which

58 Cf. Oderkerk 2011, *supra* note 50, no. 6: 'a missed opportunity', which may have been due to the fact that the mother had not contested the validity of the *perpetuatio fori* principle in extra-community cases.

59 Having noted that this issue had not been raised in the consultation questionnaire, the Standing Commission did debate the pros and cons of *perpetuatio fori* in matters of parental responsibility. The majority endorsed the view that the principle should be retained, even in extra-community cases, mainly because the interest of procedural efficiency would not be served if the court seized would not be allowed to dispose of the case.

60 Cf. Art. 26 Brussels I Regulation (recast); Art. 5 Regulation No. 4/2009 on maintenance obligations (even where the dispute concerns child maintenance); Art. 9 Regulation No. 650/2012 on matters of succession.

61 Cf. the distinction between protective measures in case of urgency (Art. 11) and provisional measures (Art. 12) in the 1996 Hague Convention. In the Netherlands, it has been a matter of debate whether or not 'provisional measures' preceding divorce proceedings – cf. Art. 821(c) and (d) Dutch Code of Civil Procedure – are subject to Art. 20 Brussels IIbis. See: District Court The Hague 10 April 2006, *NIPR* 2006, 188; District Court The Hague 20 June 2008, *NIPR* 2008, 273, answering this question in the negative. See also: Van Iterson 2011, *supra* note 20, p. 125.

62 The relation between the regulation and the 1961 Hague Convention may no longer be of much practical import since the EU member states (except Italy so far) and Switzerland became parties to the 1996 Convention, but with regard to the relation between an EU member state and Turkey (and in a rare case Macau), Art. 60 is far from clear if the child is a national of one of the contracting states, does not have its habitual residence in a member state and the parties agree that the court seized has jurisdiction pursuant to Art. 12 of the regulation.
Art. 61 poses a problem when the child's habitual residence is moved to a contracting state outside the EU after the court is seized, or when the child's habitual residence is unknown and a court in a member state is said to have jurisdiction pursuant to Art. 13 of the regulation. In that situation, Art. 6 of the 1996 Convention would confer jurisdiction as well; cf. De Boer 2012, *supra* note 20, p. 168.

63 It must be conceded that this argument is less compelling in cases in which the child has moved from one member state to another, as the (non-)recognition of the decision would be subject to the provisions of the regulation. Still, even in this situation, the court seized may not be as well placed as the courts of the state of the child's new habitual residence to get the necessary information, or to offer the child an opportunity to be heard.

64 Exceptions should be made for refugee children and for children whose habitual residence cannot be established. Jurisdiction may then be made dependent on their presence in the forum state; cf. Art. 6 of the 1996 Hague Convention; Art. 13 of the regulation. A similar exception should be made for cases of urgency and/or provisional measures; cf. Arts. 11 and 12 Hague Convention, Art. 20 of the regulation.

65 The requirement of a 'substantial connection' with the forum state should be retained. The fact that the child is habitually resident in another member state is in itself not a sufficient reason to confer jurisdiction by prorogation on the court seized.

66 Cf. the Lagarde Report, *supra* note 41, no. 84: 'The rules of jurisdiction contained in Chapter II [of the Hague Convention, dB] … form a complete

a child has its habitual residence in one of the member states. It would be a proper basis for a distinction between cases subject to the regulation, subject to one of the Hague Conventions, or subject to the domestic law of the forum state. Where the child is habitually resident in one of the member states jurisdiction is determined by Articles 8 to 13 of the regulation, excluding both the two Hague Conventions and national law. If the child is not habitually resident in a member state, the case is outside the territorial scope of the regulation, which implies that jurisdiction could be based on the 1961 Hague Convention if the child is a national of the forum state,[67] or on the 1996 Hague Convention if the child is habitually resident in Denmark or another contracting state,[68] or on national law in other cases. Thus, a restriction of the regulation's territorial scope would not only reduce the number of conflicts between Brussels IIbis and other sources, it would also further the effectiveness of decisions on parental responsibility if the state in which they must be effected (generally the state of the child's habitual residence) is not one of the EU member states.

I do not know whether the public consultation on the functioning of the Brussels IIbis Regulation will result in a proposal for a 'recast' of its provisions. If it does, I do not expect that my suggestions for improvement will be adopted by the European Commission, considering that its questionnaire did not ask for comments on either the territorial scope of the regulation, or the validity of the principle of *perpetuatio fori* in matters of parental responsibility. Hence the title of my contribution to this special issue of *NIPR*. Nevertheless, I am glad to have had an opportunity to say something about these topics, as I am convinced that European lawmakers are generally unaware of the problems that may arise if the reach of a regulation or directive stretches beyond the territorial limits of the EU. Hopefully I have been able to explain what is meant by the 'territorial reach' of a regulation or convention, and why it is important to understand its implications. If so, I promise never to write on Brussels IIbis again!

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and closed system which applies as an integral whole in Contracting States when the child has his or her habitual residence on the territory of one of them.'

67 Art. 4(1) confers jurisdiction on '*les autorités de l'État dont le mineur est ressortissant*', provided that '*l'intérêt du mineur l'exige*'. Furthermore, the national authorities are required to inform the authorities of the state of the child's habitual residence of their intention to take protective measures.

68 Since most EU member states are states parties to the 1996 Hague Convention and the Convention applies to all cases in which the child is habitually resident in 'a contracting state', there will be a conflict between the regulation and the Convention if that state happens to be a member state. This problem is solved in the regulation by Art. 61(1) and in the Convention by Art. 52(2), in agreement with Art. 30(2) of the Vienna Convention on the law of treaties. See the Lagarde Report, *supra* note 41, no. 172, explaining that Art. 52(2) was included to meet the demands of the member states of the European Union which were then negotiating their own convention on the same subject-matter: *supra*, notes 5-7 and the accompanying text.