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**THE 1980 HAGUE CONVENTION ON THE CIVIL ASPECTS  
OF INTERNATIONAL CHILD ABDUCTION AND THE “BEST  
INTERESTS OF THE CHILD”**

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## **CONSLUSION**

## *CHAPTER I*

### *1. Underlying legal aspects of the international phenomenon of parental child abduction.*

In our increasingly mobile world, family relationships and problems often span national borders. These trans-border entanglements pose challenges both for individuals and legal regimes. A more global integrated society has led to an increasing number of binational marriages than ever before<sup>1</sup>. The result is children born to couple with potentially divergent ethos when it comes to child rearing and a disparate dual citizenship to match. Some scholars contend that when binational marriages break down greater problems arise than from traditional marriages<sup>2</sup>. When binational marriages dissolve, or a different dissolution of the household of two adults, one parent may decide to leave the country with the child in hopes of escaping child custody decision or to seek more sympathetic forum. The resulting situation can lead to endless research and prolonged litigation with emotional trauma that has a devastating effect on children and families.

There are different factors that may cause the surfacing of the risk international abduction of minors by their own parents. Creating a workable, healthy relationship between parents regarding the rearing of children is never an effortless undertaking. An infinite numbering of reasons can lead a parent or a family member to take the drastic decision of abducting a child. Justification may range from desiring a child to be raised in a certain religious or cultural environment, to escaping domestic violence. Abducting parties largely claim to be acting in the best interest of the child, regardless of the justifications. However, it also happens that parties abduct children solely as means of revenge or inflicting emotional harm on the “left behind” parent<sup>3</sup>. The venom and the greed between parents over the best interest of their children can often lead to negative outcomes.

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<sup>1</sup> Lesh E., *Jurisdiction Friction and the Frustration of the Hague Convention*, Family court Review, 2011, vol. 49.

<sup>2</sup> Sapone A., *Children as Pawns in Their Parents' Fights for Control*, Women's Rights Law report Journal, 2000, n° 129.

<sup>3</sup> Beaumont P., McEleavey P., *The Hague Convention on International Child Abduction*, Oxford, Oxford University Press, 1999.

Of these, child abductions are unfortunately a not uncommon occurrence when parents fail to reach an agreement. With the addition of a divorce settlement and children custody arrangement, a further strain in the parents' relationship may arise. Regrettably, for many people maintaining a civil discourse requires more than a modicum effort.

The emotional impact that international child abduction takes upon "left behind" parents has been well documented.<sup>4</sup> "The non-abducting parent often experience fear, pain, bewilderment, helplessness, despair, confusion, and disorientation"<sup>5</sup>. Compounding this is the toll that abduction takes upon the child. Removal of a child from the home and support structure can lead to both short-term and long-term emotional development issues.

Due to the serious ramifications resulting from international child abductions, there is a protracted history of government actions to curtail the practice. The first international response to protecting the rights of children came in 1959 with the UN Declaration of the Rights of the Child. While not acquiring the force of law, the declaration did create principles that would guide subsequent international child abduction instruments<sup>6</sup>. Great importance assumes the adoption of the "best interest of the child" standard by the declaration. The declaration states that "The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in condition of freedom dignity"<sup>7</sup>.

In the late 1970s, as a result of growing awareness of the phenomenon of child abduction by a parent, nations sought to address this issue through the creation of the 1980 Hague Convention on the Civil Aspects of the International Child Abduction. In 2016 more than ninety nations are parties to this treaty, which aims to "protect children from the harmful effects of abduction and retention across

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<sup>4</sup> Lowe N., *International Forum on Parental Child Abduction: Hague Convention Action Agenda*, National Centre for Missipi and Exploited Children, 1999.

<sup>5</sup> Willis. M., *Interpreting the Hague Convention on International Child abduction*, The Review of Litigation, 2006, n° 25.

<sup>6</sup> Sheer B., *The Maturation of International Child Abduction Law*, International Child Abduction Law (comment to), 2013, vol. 26.

<sup>7</sup> General Assembly Resolution 1386 (XIV), 1959.

international boundaries by providing a procedure to bring about their prompt return”<sup>8</sup>.

Almost thirty years later, by adopting the EC Regulation 2201/2003, the European legislator has enriched international procedural law in child matters by a further European dimension. The Brussels II bis Regulation, which contains provisions on jurisdiction, recognition and enforcement of judgments given by the courts of other Member States, implements the national and international rules and on the other hand, the Regulation also overrides them.

The unification of the procedural rules for cross-border child matters by EU legislation has entailed the great advantage that the CJEU can support Member State courts by interpreting the Brussels II bis Regulation through preliminary rulings and, hence, unlike the pertinent international conventions, the Regulation is applied uniformly throughout the EU, at least theoretically.

However, it is a common knowledge that in child matters the time is a remarkable factor: cross-border child disputes are a race against the time, as also the Brussels II bis Regulation stresses notably by requiring Member State courts to render a decision within six weeks in international child abduction cases<sup>9</sup>.

The European Convention on Recognition and Enforcement of Decision concerning Custody of Children adopted the May 20<sup>th</sup> 1980, also known as 1980 Luxemburg Convention, born thanks to the collaboration within the Council of Europe by a committee of governmental experts under the authority of the European Committee on Legal Co-operation, is an order based Convention. It in fact differs from the Hague Convention insofar as its object is based on the recognition and enforcement of decisions relating to custody and access.

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<sup>8</sup> Hague Conference on Private International Law, The Child Abduction Section, Elisa Pérez-Vera, *Preparatory Work*, 1980.

<sup>9</sup> Amendment of the Rules of Procedure of the Court of 15 January 2008, [2008] OJ L24/39; see also Council Decision of 20 December 2007 amending the Protocol on the Statute of the Court of Justice, [2008] OJ L24/42. The European legislator and the CJEU by amending the procedural rules of the Court have introduced an urgent procedure for preliminary rulings. The new *procédure préjudicielle d'urgence* allows the Court to answer questions in the area of freedom, security and justice, hence also references of Member State courts regarding the Brussels II bis Regulation, within much shorter time than under the general procedural rules for preliminary rulings.

Under the Hague Convention there is no need that a decision with regard to custody matters was made in the requesting State for the receiving State to have jurisdiction to ensure an order for the return of the child.

The European Convention provides for the enforcement of decisions relating to custody and for the return of children who had been improperly removed from a signatory State in breach of such a decision: “Les décisions relatives à la garde rendues dans un Etat contractant sont reconnues et, lorsqu'elles sont exécutoires dans l'Etat d'origine, elles sont mises à exécution dans tout autre Etat contractant.”<sup>10</sup>

The Convention aims to preserve the family's stability and the decision taken into consideration by the competent national authorities. Therefore, even a superficial comparison between the two international instruments shows that the Hague Convention considers a much wider category of national decisions as basis of the proceedings established under its own provisions. The rules of the Luxemburg Convention instead are based on the previous adoption of a judicial or administrative decision that deal with the custody rights of the parents.

The Hague Convention has also precedence on cases of wrongful removal or wrongful retention of children and on the application for their return.

## ***2. Deterring international child abduction and the best interest of the single child.***

Adair Dyer, the First Secretary to the Hague Conference on Private International Law at the time the Hague Convention on the Civil Aspects of International Child Abduction was adopted, claims that the Convention “has both a narrow focus and a wide focus in terms of children's rights”<sup>11</sup>.

In his view, the narrow focus is the creation of the international tort of child abduction and the wider focus is that the remedy is to restore a situation in which the child may have access to both parents. In the light of this comment it may be

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<sup>10</sup> Council of Europe, *European Convention on Recognition and Enforcement of Decision Concerning Custody of Children* 1980, 20 May 1980. Art 7. See also art. 14 “Tout Etat contractant applique à la reconnaissance et à l'exécution d'une décision relative à la garde une procédure simple et rapide. A cette fin, il veille à ce que la demande d'exequatur puisse être introduite sur simple requête”.

<sup>11</sup> Dyer A., *Childhood's Rights in Private International Law*, Australian Journal of Family Law, 1991, n°5.



rather surprising to find an eminent Israeli judge<sup>12</sup> claiming in one of the first prominent case after the Hague Convention was drafted in 1980 that in relation to certain matters, the Child Abduction Convention is not consistent with the UN Convention on the Rights of Child.

It is necessary to consider first how is possible for there to be inconsistencies between the two Conventions, particularly in the light of the comment of Adair Dyer quoted above and the apparent success of the 1980 Hague Convention.

The answer apparently lies in the dramatic change that occurred in the way in which lawyers and scholars perceive the legal status of children in the years between the two Conventions<sup>13</sup>.

The thinking of the drafters of the Child Abduction Convention was primarily in terms of the more traditional concepts of parental rights and welfare of the children, rather than the rights of the child. The main challenge for them was to find an appropriate reconciliation between the need to promote the wellbeing of the specific child and the need to promote the welfare of children generally by deterring abduction. In this circumstances they were undoubtedly influenced by their concern to uphold parental rights, to do justice between the parents, to uphold the rule of law and also by the Private International Law objective of ensuring that adjudication should take place in the *forum conveniens*<sup>14</sup>.

The Preamble of the Hague Convention explains that the rationale behind its objectives is the belief that the best interests of children are paramount in family and custody matters. The objective of prompt return is based on the precondition that the welfare of children is best promoted by reversing the effect of abductions as quickly as possible for three reasons. Firstly, this will reverse the harm often caused to children who are suddenly removed from their environment. Secondly, the knowledge that return will be ordered is likely to deter potential abductors. Thirdly, the child's interests can best be protected by litigation in the *forum conveniens*, which will usually be the place of the child's habitual residence.

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<sup>12</sup> Justice Rotlevi in *F.M.A. 70/97 Dagan v. Dagan*, District Court of Israel.

<sup>13</sup> Schuz R., *The Hague Child Abduction Convention and Children's Rights*, Journal of Transnational Law and Comparative Law Quarterly, 1995, vol. 44.

<sup>14</sup> Schuz R., *The Hague Child Abduction Convention: Family Law and Private International Law*, Journal of International and Comparative Law, 1995, vol. 44.

Whilst it is clear that the premise that prompt return promotes the child's welfare, that will not be true in every single case and any attempt to ascertain this automatically jeopardizes all cases.

Thus, the drafters believed that, since the premise was true in the vast majority of cases and that the exceptions provided adequate safeguards against real harm being caused, mandatory return was the most effective method of protecting most children. The second objective overlaps the first: in the most of cases prompt return will ensure also the respect for the rights of custody and access in the country of origin. However, it is in addition to the first one that it applies even where there has been no wrongful removal or retention.

Focusing on the child's rights gives the opportunity for a meaningful relationship with both parents, the right to maintain his cultural identity, the right to live in environment to which he or she belongs and the right to participate in the decisions concerning himself or herself<sup>15</sup>. However, a children's rights approach would marginalize the objective of deterring child abduction because of public interest, even where it is designed to protect children in general, it cannot justify the violation of the individual child's rights.

### ***3. The Hague Convention on the Civil Aspects on International Child Abduction: A Response for a Growing International Phenomenon.***

The Hague Convention was drafted in 1980 under the auspices of The Hague Conference on Private International Law. It was drafted against the backdrop of the growing phenomenon of the interstate child abduction, in an age when divorce is increasingly more common and the ease of international travels has lifted many impediments to interstate marriages.

The Hague Convention deals exclusively with the unilateral, wrongful removal or retention of children by parents, guardians or close family members. It demands that the children abducted by a parent from one signatory nation to another have to be returned to their home country, where the custody proceedings may take place, unless the abducting parent can successfully invoke one of the defences set forth in the Convention.

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<sup>15</sup> Kufeldt K., *Listening to Children: An Essential for Justice*, International Journal of Children Rights, 1993, n° 155.

The drafters of The Hague Convention sought to deal with this reality by creating a mechanism for cooperation between the judicial and administrative branches of the parties to the Convention, in order to promote the promptly return of children taken from their place of habitual residence. The Hague Convention mandates the judicial or administrative authorities in the state to which the child has been wrongfully removed or retained to order the immediate return of the abducted child to the state of his habitual residence prior to the abduction, unless is verified one of the narrow exceptions stated by the Convention.

This mechanism recognizes past decisions of local authorities in those jurisdictions regarding the custody and the future of abducted children. It also demonstrates mutual respect for the laws of the member States, and endeavours to deter those parents who may otherwise attempt to take the law into their own hands.

As its own title dictates, the 1980 Hague Convention on the Civil Aspects of International Child Abduction only addresses abduction that reach across borders and the civil, non-criminal, remedies available. Although the Convention does not expressly state in any provision the international nature of the situations envisaged, such a conclusion derives as much from its title as from its articles.

At the same time, the international nature of the Convention arises also out of a factual situation, that is to say the dispersal of members of a family among different countries. A situation which was purely internal to start with, can therefore come within the scope of the Convention through, for example, one of the members of the family going abroad with the child, or through a desire to exercise access rights in a country other than that in which the person who claims those rights lives.

On the other hand, the fact that the persons concerned hold different nationality does not necessarily mean that the internationality of the case to which the Convention applies automatically will arise, although it would clearly indicate the possibility of its becoming international in the sense described.

### ***3.1. Primary scope of the Convention: restoration of the status quo ante and the preventive level of the article 1.***

One of the primary scopes of the Child Abduction Convention, as said above, is to reinstate the *status quo ante*. At the article 1 the Convention states that “the objects of the present Convention are (a) to secure the prompt return of the children wrongfully removed to or retained in any Contracting States; (b) to ensure

that rights of custody and access under the law of the Contracting State are effectively respected in the other Contracting States”<sup>16</sup>.

The Convention deals with the removal of a minor from the place of his or her habitual residence<sup>17</sup> by one of his or her parents or a family member, but also with the refusal to restore a child to his/her own environment after a stay abroad to which the person exercising the right of custody had consented.

In both cases the child is taken out of the family and social environment in which his/her life had developed and the person who is responsible for his/her removal often hopes to obtain a right of custody from the authorities of the country to which the child has been taken.

The conduct described changes the family relationships which existed before, or after any judicial decision, by turning the child in an instrument and primary victim of the situation. However, the difficulties to establish within the framework of the Convention directly applicable jurisdictional rules resulted in the method of the prompt return being followed, which even as an indirect one will allow in most cases a final decision on custody taken by the authorities of the child’s habitual residence prior to his or her removal.

The second object at point (b) aims to ensure the respect of the parental rights between the contracting States, and even it has been designed by the drafters to stand by itself, it also has a teleological connection<sup>18</sup> with the necessity of the return of the child as required at point (a). While the prompt return of the child answers to the desire of re-establishing a situation unilaterally and forcibly altered by the abductor, the effective respect for the rights of custody and access belongs on the preventive level that the Convention wish to implement.

Close to the second point made in the article 1 is the general duty sets upon the Contracting States. It is a duty which, unlike obligations to achieve a result which are common occurrence in conventions, does not require actual results to be achieved but merely the adoption of the necessary attitude to reach the required

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<sup>16</sup> *Hague Convention on the Civil Aspects of International Child Abduction*, art 1, October 25, 1980, 1343 U.N.T.S. 89.

<sup>17</sup> Although the Abduction Convention does not specifically state that the return should be to the country of habitual residence, this is the interpretation that has generally been given. See also Schuz R., *Policy in the determining the Habitual Residence of a Child and the Relevance of Context*, *Journal of Transnational Law, Logistic and Policy*, 2001, vol. 11.

<sup>18</sup> *Supra* note 8.

accomplishment. Such behaviour required of the contracting States is expressed in the article 2 where it solicits the States to “take all the appropriate measures to secure within their territories the implementation of the objects of the Convention”<sup>19</sup>.

The Contracting States should draw from such rules the inspiration in resolving problems similar to those which the Convention usually deals, but which may not fall within the scope *ratione personae* or *ratione materiae*. The same attention should be lead in the examination of the Convention’s rules whenever a State decides to change its own internal law that may influence the rights of custody or access.

The last sentence of the article 2 - “For this purpose they shall use the most expeditious procedures available.”<sup>20</sup> - stress the necessity, in matters that may have repercussions on the rights and lifestyle of children, of speedy procedures even though it does not impose an obligation upon the States to develop new ones into their internal law.

In fact, while the prompt return of the child to the country of habitual residence does fulfil this objective in relation to the physical situation of the minor, this remedy alone does not put the minor himself and the left-behind parent in the position he or her was before the abduction. The discovery that the minor has been abducted, together with the uncertainty for the left-behind parent as to whether and when he will recover the child and the lack of or the reduced contact with the same, use to cause considerable financial expense and emotional distress to both the parent and the child<sup>21</sup>.

The fact that the main remedy under the Convention is the prompt return of the child to the country of habitual residence, as opposed to simple enforcement of the judgement as under traditional conventions, imposes on administrative and judicial authorities that speed is essential to guarantee the interest of the child and that the procedure must be summary.

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<sup>19</sup> *Supra* note 16, art 2.

<sup>20</sup> *Idem*.

<sup>21</sup> Schuz R., Shmueli B., *Between Tort Law, Contract Law, and Child Law*, Columbia Journal of Gender and Law, 2012, vol. 23.

The analysis of the best interest of the child requires a personalized research into the interests of every single child that may be subject to the application of the 1980 Hague Convention's rules.

However, the vague nature of such standard made its application by the competent authorities difficult. This analysis prolongs the proceedings which of course impact the children wellbeing as well as the courts' charges. Such individual determinations may also fail to ensure predictability and allows courts to "take almost any conceivable measure [...] often influenced by the moral or social values which prevail in the society in question"<sup>22</sup>.

At the same time, not all the countries choose to apply the best interest standard in family and children's custody matters, preferring to rely on traditional models which may be based on gender preferences.<sup>23</sup>

### ***3.2. The nature and the difficulties of the determination of habitual residence.***

While the Child Abduction Convention is explicit in its definition of certain terms, it has left some aspects quite undefined, such as the concept of habitual residence.

Even though the habitual residence is the basis on which the Convention's return mechanism is founded, it is custom for The Hague Conferences not to define the term. The importance of that notion has been underscored by the inclusion of the tem in many articles of the Convention.

First, the objective of any Child Abduction Convention is to return a wrongfully removed or retained child to his or her habitual residence<sup>24</sup>. In addition, a child must be habitually resident in a member state in order for a proceeding to fall under the Child Abduction Convention<sup>25</sup>. Finally, a child's habitual residence

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<sup>22</sup> *Supra* note 3.

<sup>23</sup> Vivatvaraphol T., *Back to Basics: Determining a Child's Habitual Residence in International Child Abduction Cases Under The Hague Convention*, Fordham Law Review, 2009, vol. 77.

<sup>24</sup> *Supra* note 16, Preamble.

<sup>25</sup> *Supra* note 16, art 4.

plays a critical role in determining whether a child was, in fact, wrongfully removed or retained under the Child Abduction Convention's definition<sup>26</sup>.

However, it is a considered widely established concept in the Hague Conferences that the habitual residence is different from the one of domicile<sup>27</sup>. The last one in fact requires an intent to reside in a country of choice permanently or indefinitely, as well as the actual physical presence in that country. One must have, in addition to an intent to reside in the country of new domicile, an intent to leave the country of previous domicile. Consideration of a person's intention to remain in a place is complex and courts must often make determinations of domicile without the guidance of concrete rules.

It has also been deemed essential to analyse the term habitual residence according to the ordinary and natural meaning of the two words. Residence implies something more than mere presence in a country. Habitual indicates a quality of residence, duration being only one relevant factor. Putting these words together, might mean a regular physical presence in the country which must endure for some time. The use of habitual residence as a legal standard results, first, from the fact that a test based on a domiciliary focus would be complicated to apply to children and, second, from its flexibility, as opposed to that of the concepts of domicile and nationality, in responding to the demands of our society<sup>28</sup>. This flexibility is also the reason why The Hague Conference and the Convention's drafters have traditionally found the need for definition futile<sup>29</sup>.

Despite its lack of definition, the concept of habitual residence has been "closely connected with the Hague Conference and for many years has been regarded as the primary connecting factor employed in initiatives undertaken by that body"<sup>30</sup>. While it was easy to believe that flexibility and ambiguity would allow

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<sup>26</sup> *Supra* note 16, art. 3. See also Beaumont P., McEleavy P., *supra* note 3, "The essential element in a wrongful removal is the fact that a child habitually resident in one contracting State is moved to another Contracting State".

<sup>27</sup> *Supra* note 8. The Pérez-Vera Report also states that habitual residence is a question of pure fact.

<sup>28</sup> *Supra* note 3.

<sup>29</sup> *Supra* note 22.

<sup>30</sup> *Supra* note 3.

judges to take the appropriate solution in most cases, the concept had yet to be applied by courts in international child abduction cases<sup>31</sup>.

It is although a matter of discussion whether the determination of the habitual residence of a child is a question of fact or a question of mixed fact and law<sup>32</sup>. On one hand the Official Report to both the International Child Abduction Convention and the Child Protection Convention state that the question of habitual residence is a question of fact. Indeed, the habitual residence is used to be a matter of fact so that there will be uniform interpretation in all the Member States. The concept was chosen to avoid the problems of connecting factors, such as domicile, which has different legal definition in each different country.

However, the more recent Report of the Special Commission on the Preliminary Draft Convention on Jurisdiction and Foreign Judgements in Civil and Commercial Matters does recognise that “even the notion of habitual residence is not purely factual and may be open to various interpretations”<sup>33</sup>.

### ***3.3. Scope rationae personae: the children’s right to be heard and the persons entitled of the custody rights.***

The scope *rationae personae* is maybe one of the point of the Convention which may arise more uncertainty from. According to the text of the article 4 “the Convention shall apply to any child” - of less than sixteen years of age - “who was habitually resident in a Contracting State immediately before any breach of custody or access rights”<sup>34</sup>.

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<sup>31</sup> Schuz R., *Policy Consideration in Determination the Habitual Residence of a Child and the Relevance of Context*, Journal of Transnational Law, Logistic and Policy, 2001, vol. 11.

<sup>32</sup> Justice Sarokin, *Comment in Feder v. Feder-Evans*, 63 F. 3d 217, 3rd Circumscription, 1995. “Federal and State courts have struggle over this precise issues, with some making findings of fact and other conclusions of law regarding a child’s habitual residence”. In this case the opinion of a question of mixed fact and law was favoured by the majority because the determination “is not purely factual, but requires the application of a legal standard which defines the concept of habitual residence, to historical and narrative facts”. However, Sarokin dissented, relying on the Pérev-Vera Report, the relevant legislation and the previews case-law, concluding that the determination should be characterized as one of “ultimate fact”.

<sup>33</sup> Special Commission on June 1997 on the Question of Jurisdiction, and Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, *Preliminary Document N° 7 of April 1997*.

<sup>34</sup> *Supra* note 16, art 4.



The matter of the age in the strict sense creates no disputes. However, it has been chosen to contain the physical subject of the Convention to the minors of sixteen years' old: indeed, a person over that said age has normally a mind of his own which cannot be easily ignored either by one or both of his/her parents or by the judge or administrative authority entitled of the case. For that reason, the strict concept of child is more restrictive than the intention of the drafters.

More problems arise from the situation of children under sixteen years old who have however the right to express their own preference regarding their place of residence. Generally, decisions on the matter of the place of residence of the minor are part of the right of custody which one of the parents is entitled of.

However, how also stated in the article 13 of the Convention the competent authorities may take into account the opinion of the children once he or her has reached an appropriate age and such level of maturity to express his/her own mind. That leaves it open to the judges and the administrative authorities the possibility to have regard to the opinion of the child, even if it should always be an element of the decision in the specific case.

On the same level the right of children to have their own views respected is ensured by the UN Convention on Children's Rights' article 12 (1) which provides "State Parties shall assure to the child who is capable of forming his own/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."

Is clear the importance given to this particular principle and the recognition of the child's right to participate in making decision that may concerns his own life. However, it may occur that it has limited value because it does not provide the relative weight that has to be ascribed to the preferences that the minor may have expressed, leaving considerable discretion to the individual judge<sup>35</sup>. Though the

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<sup>35</sup> Van Bueren argues that active participation should not be confused with self-determination. It is suggested that the difference is one of degree and not substance. Thus, in respect to certain types of matters, the weight to be given to the child's wishes is so great that in effect he or she has the right to decide for him or herself. Indeed, it may be argued that the spirit of the article and the Convention as a whole requires that where a child is old and mature enough to understand the implications of the decision, his views should be followed unless there are very good reasons to the contrary. See Van Bueren G., *The International Law on the Right of the Child*, 1995.

discretion is not unfettered because account has to be taken of both the child's age and the degree of maturity.

Different problems born about the holders of the custody and access rights and the identification of the potential abductor. As regards the access rights it is quite clear that the ones entitle of those rights are individuals whose identity will depend on the law which applies to the single case. These persons usually are close relatives of the child, normally the mother or the father.

On the other hand, legal persons can also hold the right of custody. Article 3 indeed envisages the possibility of custody being attributed to institution or other legal body. The expression is deliberately wide since could happened there are bodies other than administrative institutions with legal personality, or bodies that lack of separate legal personality but are an arm of the State, which may have children in their care<sup>36</sup>.

On the matter of the potential abductor the Convention does not contain an explicit provision *rationae personae*. Since the drafters did not attribute such status exclusively to one of the parents, the whole idea of family is quite open and does include the possibility that the wrongful removal is achieved by a grandparent or an adoptive parent.

On the other hand, it is quite difficult imagine the possibility of an institution or an administrative body acting as an abductor. However, if a child was entrusted in the care of such bodies by virtue of a judicial or administrative decision in the country of his/her habitual residence, the parents which may sought to obtain custody rights would have few chances to obtain those under the rules of Convention. Such bodies, in fact, would exercise the jurisdiction and the parents' claim would not come within the scope of the Convention because the custody would belong to the body in question<sup>37</sup>.

### ***3.4. Article 3: the juridical and factual elements of the custody rights.***

It is quite clear that the matter which the Convention has tried to regulate in any depth is the return of the minor wrongfully removed or retained. That is because the most distressing situations arise only after the unlawful retention of a child and

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<sup>36</sup> *Supra* note 8.

<sup>37</sup> *Supra* note 8.

they are situations which, while requiring quite urgent solutions, cannot be resolved unilaterally by any one of the legal systems concerned. Of course, is necessary to understand in all its perspectives when the duty of return of the child arises and in which extent. According to the article 3 it only arises when the removal or the retention of the child is wrongful in terms of the Convention.

“The removal or the retention of a child is to be considered wrongful where a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State”<sup>38</sup>.

It is obvious that for any unilateral change in the *status quo* to be considered wrongful according to the article 3 the focus has to be put on the relationships the Convention aims to protect. Those are based on the prior existence of a right of custody attributed by the State of habitual residence of the child - the juridical element - and the actual exercise - the factual element - of such custody before any removal action<sup>39</sup>.

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<sup>38</sup> *Supra* note 16, art 3.

<sup>39</sup> *Supra* note 8. "As for what could be termed the juridical element present in these situations, the Convention is intended to defend those relationships which are already protected, at any rate by virtue of an apparent right to custody in the State of the child's habitual residence, *i.e.* by virtue of the law of the State where the child's relationships developed prior to its removal." The art. 3 explains how it is the eventual breach of the custody law of the State of habitual residence of the minor that determines whether a removal or a retention is unjustified according to the Convention. Even only the breach of the access right of one of the parents may deeply change the equilibrium priory established by a judicial or administrative decisions. Following this point of view, the law of the State of habitual residence of the child is taken into consideration in widest possible sense, such as the word "decision" used by the drafters. It should not be forgotten that the numbers of cases in which the child is abducted prior any kind of legal decisions are adopted are quite recurring. In such perspective the juridical element acquires a really wide meaning which includes also the possibility that custody rights may arise also "by reason of an agreement having legal effect under the law of the State". The factual element that the Convention takes into account at the art. 3 envisages the necessity that any kind of custody rights attributed to the parent or authority entailed of those have to be actually exercised. One of the main objects of the drafters was protecting the rights of children to not have their own

Article 5 defines repeatedly in the draft terms as “rights of custody” and “rights of access”. A right of custody is any right relating to the care of children, particularly the right to determine a child's residence, whereas a right of access includes the right to take a child for a limited time away from the child's habitual residence. These rights represent “an identifiable legal link between an individual and a child. If either right is breached, the legally responsible individual who has been disadvantaged will be able to petition for its restoration”<sup>40</sup>. This enables a restoration of the status quo in the child's interests.

### ***3.5. Article 12: the duty to return the child and the well-settle defence.***

The article 12 fulfil one of the essential role of the Convention specifying those situations in which the judicial or administrative authorities of the State where the child is located have to order the return of the minor. That is the reason why it is appropriate to underline the fact that the compulsory return of the child depends, in terms of the Convention, on a decision taken by the competent authorities of the requested State. Consequently, the obligation to return a child is laid upon these authorities.

The article highlights two points: firstly, the duty of the authorities where a proceeding has begun within one year of the wrongful removal or retention of a child and, secondly, the conditions which attach to this duty where an application is submitted after the aforementioned time-limit.

The problem of determining the period during which the authorities concerned must order the return of the child is quite relevant since, in so far as the decision about the return is taken with regard of the interest of the minor, the proceeding and the order should take place as quickly as possible.

Regarding how to determine the date on which the one-year time-limit should begin to run, the article refers to the moment in which the wrongful removal or retention has taken place. The decisive date in cases of wrongful retention should be considered as that on which the child should have been returned to the person

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stability altered unless justified by the law or judicial decisions. Consequentially this condition requires that the applicant provides some preliminary evidences of the actual physical care of the child.

<sup>40</sup> *Supra* note 3.

which has the custody rights, or on which the holder of this right refused to agree to an extension of the child's stay in a place other than that of its habitual residence.

For the *terminus ad quem*, the article put the focus on the date on which proceedings started, instead of the date of decree, so that potential delays in acting on the part of the competent authorities will not harm the interests of parties protected by the Convention.

The second paragraph of the article 12 states “The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment”<sup>41</sup>.

It provides an affirmative defence that can be preferred by the abducting parent to prevent the return of the children to place of origin. The rationale behind the defence envisages that when a child has settled in a new context and environment, the forced return might cause further distress and affect the minor wellbeing, accentuating the damage produced by the previous relocation. Subsequently, it is clear that if a child has adjusted to his/her new environment after the removal, his or her return should take place only after the examination of the merits of the custody rights and the extent of the integration of the child.

The Convention however, does not provide any specification as to what constitutes the well-settled requirement, and judges have, in response, taken a variety of approaches in interpreting the defence. It is common opinion that “the definition should reflect the Convention's intention of providing a swift return of the child if possible, and to have custody matters decided in the sovereign with the strongest interest in the child's care and protection. At least one court has viewed the definition as a two-pronged analysis involving the physical element of being established in a new community and an emotional and psychological element projecting stability into the future”<sup>42</sup>.

The factors usually considered are many and different, and each case requires that different issues have to be addressed in the well-settle analysis. The courts commonly consider the age of the child, the stability of the new residence,

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<sup>41</sup> *Supra* note 16, art 12.

<sup>42</sup> Singer M., *Across the Border and Back Again: Immigration Status and the Article 12 “Well-Settle” Defence*, Fordham Law Review, 2012-2013, vol. 88.

the child's attendance at school or day care or a religious institution regularly, the stability of the abducting parent's employment, and the child's relationship with friends and relatives in the area. Courts may also consider the child's living environment, the involvement of the child's parents in his/her daily life, any active measures aimed at conceal the child's whereabouts and the possibility of prosecution for this reason.

Following this lead, the State Department of the United States has declared that a settle finding befits where “nothing less than substantial evidence of the child's significant connections to the new country is intended to suffice to meet the respondent's burden of proof”<sup>43</sup>.

Many courts, on the other hand, have adopted the different approach which consider that the well-settle requirement should be based on the child's future prospects. It is often taken into consideration in cases that involve undocumented immigrants and consequentially the favour or not that the legislation may offer the minors. Those kinds of protections may include the right to public education irrespective of the immigration status, as well as a variety of other public services available to undocumented immigrants such as emergency medical aid<sup>44</sup>.

To close the discussion on the matter it is also appropriate to deal briefly with the article 18 which states “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>45</sup>. It indicates that nothing limits the power of a judicial or administrative authority to order the return of the child at any time. This provision does not impose any duties and “underlines the non-exhaustive and complementary nature of the Convention”<sup>46</sup>. It does in fact allow the competent authorities to order the return of the minor by invoking more favourable provision to attain this outcome.

This happens particularly in the situations drawn in the second paragraph of article 12, where as a result of the application made by the authority after more than a year has elapsed since the wrongful removal, the return of the child may be refused if he or her has settled in his/her new social and family environment.

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<sup>43</sup> *Text and Legal Analysis of Hague International Child Abduction Convention*, Federal Regulation, March 29th 1986.

<sup>44</sup> *B. Del C.S.B.*, 559 F. 3<sup>rd</sup> 999, 1008, 9<sup>th</sup> Circuit, 2009.

<sup>45</sup> *Supra* note 16, art 18.

<sup>46</sup> *Supra* note 8.

### ***3.6. Possible exceptions to the return of the child provided by articles 13 and 20.***

With regard to the article 13, it states “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 a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that 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. In considering the circumstances referred to in this article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.”<sup>47</sup>

The introduction of the first paragraph imposes the burden of proving the facts states at the point a) and b) on the person, institution or organization who opposes the return of the minor, not necessarily that person being the abductor.

There are situations in which the person who has the care of the child does not exercise custody rights at the time of the removal or retention. The Convention has no definition of “actual exercise” but it is quite clear that it refers to the actual care of the minor and generally “when the custodian is concerned about the care of the child’s person”<sup>48</sup>, for example due to illness, education or the eventual case in which the child and his or her guardian do not live together. The actual exercise of the custody rights should be determined by the judge according to the law of habitual residence of the child and the same law should be considered in the widest possible sense to decide which party has custody rights.

However, the proof that the custody was not actually exercised does not fulfil the requirements for the exception if the designed guardian was not able to

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<sup>47</sup> *Supra* note 16, art. 13.

<sup>48</sup> *Supra* note 11.

exercise that his rights because of the actions of the abductor. At the same time, some demeanours of the guardian may also alter the abductor's action in case he has agreed to the removal which he now seeks to challenge. "This fact allowed the deletion of any reference to exercise of custody rights in good faith, and at the same time prevented the Convention from being used as a vehicle for possible bargaining between the parties"<sup>49</sup>.

The exception contained at the point b) of the article 13 deals with situations where there has been an international child abduction according to the provisions of the Convention, but the return of the child would be contrary to his/her own interests.

Because the "grave risk of harm" and the "intolerable situation" were not defined by the drafters in the Hague Convention, courts have always had problems to come up with uniform definitions in order to follow the intention of the drafters.

It is necessary to remember that the main scope of the Convention is to ensure the prompt return of the abducted children internationally without the judges have to deal with case-specific and often complicated custody matters<sup>50</sup>.

Indeed, the court considering the return petition still retains the discretion of whether or not grant the return order; this is enlightened when the drafters preferred to provide that "the requested State is not bound to order the return of the child" rather than a clause dictating that the State must not order the return of the child<sup>51</sup>. This discretionary language is not lost on courts, favouring return orders sometime even against the single child's own interest.

The last paragraph of the considered article contains two different provisions which have strictly procedural nature. Firstly, it allows the competent authorities to considers the child own will regarding the return to his/her previous residence, when his/her age and degree of maturity have shown a certain level of reliability.

Secondly, the paragraph contains another different provision which is in fact procedural in nature and tries to compensate for the burden of proof placed on the person who opposes the return of the minor, and to also increase the avail of

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<sup>49</sup> *Supra* note 8.

<sup>50</sup> *Idem*.

<sup>51</sup> *Supra* note 15, art. 13.



information supplied by the Central Authority or any other competent authorities of the State of the child's habitual residence.

Another possible exception to the return of the minor is provided by the article 20 of the Convention which declares that “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>52</sup>.

It is clearly the intent of the drafters to stress the exceptional nature of this provision. Even if the terminology used in this article is quite similar to those used in international instrument concerning the protection of human rights, the provision regards only the principles, of general international law, treaty law or internal law, accepted by the law of the State in question.

So as to refuse the return of a child due the text of the article 20, the opponent has to demonstrate that the fundamental principles and rights embraced by the requested State concerning the subject matters of the Convention do not allow it, being not sufficient to show that they are incompatible with an eventual order of return<sup>53</sup>. For this reason, courts have been extremely reluctant to allow the use of the defence introduced by the article 20. “Courts show more resistance to allowing this defence than any other. In fact, few courts, if any, have ever accepted the defence”<sup>54</sup>.

The strict unwillingness of any court to allow an article 20 defence has been the reason for the infrequency of cases in which courts decline to order a minor's return solely on the basis of a violation of human rights or fundamental freedoms. The courts that hold the return to be inappropriate due to such defence usually address circumstances of grossly inhumane behaviour by one or both parents, or

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<sup>52</sup> *Supra* note 15, art 20.

<sup>53</sup> *Supra* note 8.

<sup>54</sup> Weiner M. H., *International Child Abduction and the Escape from Domestic Violence*, Fordham Law Review, 2000, vol. 69. See also Walsh M. R., Savard S. W., *International Child Abduction and The Hague Convention*, Barry Law Review, 2006, n° 29. “[The article 20] defence to the Convention is rarely utilized and is rarely successful. At the present time, it has minimal doctrinal significance”.

situations outside the control of the parents causing extreme danger in the state requesting return<sup>55</sup>.

#### ***4. The Impact of the EU Regulation 2201/2003 on the Child Abduction Proceedings.***

The problem of international child abduction was already dealt with by the 1980 Hague Convention which all Member States of European Union have signed. The inclusion of the international abduction of children within the scope of the EU Regulation 2201/2003<sup>56</sup> was therefore object of deep discussion and resulted in compromise provisions.

The Convention remains in force between the Member States<sup>57</sup> and it is considered the legal basis for the proceeding regarding the prompt return of the minor. However, the Brussels II bis Regulation has precedence where its provisions alter those contained in The Hague Convention<sup>58</sup>. This creates a complex legal arrangement but the scope is to build on and develop the principles provided by the Convention.

Since The Hague Convention is applicable, at the moment, in 93 States, the need to avoid unilateral interpretations of the Convention by States Parties is quite pressing, because of the number and variety of the legal systems in which the Convention applies, the relevance of the matter regulated and the potential impairment of human rights of particularly fragile subjects<sup>59</sup>. Several factors favour unilateral interpretations, despite its prohibition by the Vienna Convention on the law of treaties<sup>60</sup>.

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<sup>55</sup> Piemonte C., *International Child Abduction and Courts' Evolving Considerations in Evaluating The Hague Convention's Defence to Return*, Tulane Journal of International and Comparative Law, 2013-2014, vol. 22.

<sup>56</sup> European Council, *Regulation (EC) No 2201/2003, Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, Repealing Regulation (EC) No 1347/2000*, 27 November 2003.

<sup>57</sup> *Idem*, art. 62.

<sup>58</sup> *Idem*, art. 60 (1)(e).

<sup>59</sup> Conforti B., *International Law and the Role of Domestic Legal System*, Dordrecht, 1993. Domestic Courts "must avoid a unilateral interpretation of the treaty, that is an interpretation either guided by nationalist concerns (political unilateralism), or corresponding exclusively to legal concept of its legal system (legal unilateralism).

<sup>60</sup> United Nation, *Vienna Convention on the Law of the Treaties*, 23 May 1969, No 18232. The prohibition of unilateral interpretations under public international law is derived from arts. 33 (3) and 33 (4) of the Vienna Convention on the Law of Treaties, stating that "3.

In the context of the Child Abduction Convention, nationalist concerns may lead judges to unfairly favour their nationals when they are involved in international proceedings. There is no need to say that such protection constitutes a clear example of discrimination grounded on nationality and it is thus contrary to the fundamental principles of the European Union.

The protection of citizens may induce a nationalist interpretation of the best interests of the child, leading to eventually place the residence of the minor within the territory of the forum. The European Court of Human Rights has recently stated, in a child abduction case, that the perception of a father of being discriminated in the mother's home country was legitimate<sup>61</sup>. The Court has also noted "the opinion of the President of [a Slovakian Court] which may be interpreted as implying that there is a systemic problem [in treating international child abduction proceedings], with the attendant effect of negating the object and purpose of The Hague Convention".

The same Explanatory Report of the 1980 Hague Convention on Child Abduction acknowledges the risk of nationalist interpretation, because it is no unusual for a judge shows particular cultural, social or anthropological attitudes derived from his/her national community and that this may result in the imposition of a subjective judgment, potentially preventing a uniform implementation of the Convention<sup>62</sup>.

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The terms of the treaty are presumed to have the same meaning in each authentic text. 4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted".

<sup>61</sup>ECHR, *Case of Manic v. Lithuania*, 13 January 2015, Application no. 46600/11. "In the light of the foregoing, and also taking into account the applicant's inability to obtain prompt and informative responses when communicating with the bailiff, who is a State official, and the State-appointed lawyer, both of whom were to act in good faith for the benefit of the applicant [...], as well as a certain lack of information from the Utena District Court about the proceedings that concerned him directly, it was to an extent legitimate for the applicant to feel that his interests had been neglected in Lithuania, which might explain his unwillingness to go there later. From the above considerations it also transpires that the applicant's contact with his son so that the boy would get to know his father "in the father's own environment" [...] was prevented by the Lithuanian authorities at precisely the initial stage when it was most important". The Court therefore considers that what happened after the Utena court decisions of 1 March and 27 April 2011 could not remedy the applicant's situation sufficiently satisfactorily.

<sup>62</sup> *Supra* note 8.

It is the position of the judge that necessarily reveals that of his/her own legal order and may be responsible for such bias<sup>63</sup>. The possibility of national bias dealing with child abduction cases is often admitted in legal tenet, stressing that mutual trust does not always exist in judicial practice.

In some cases, it is held to be true that the best interest of the child is best promoted within a court's national borders<sup>64</sup>. It should be taken into account by courts the common cultural gap between countries that may be involved in disputes regarding the residence of minors in international child abduction cases, as also the unequal welfare of EU Member States that influences the gap between parents' economic possibilities.

The provision of the Regulation, as well as those of the Hague Convention on the Civil Aspects of International Child Abduction, apply to those cases in which a parent requests the return of the child to the authorities of the Member State of the habitual residence of the minor at the moment of the illegal removal. However, the Convention is based for this purpose on the cooperation between the Central Authorities of Contracting States, while the Regulation relies on a strict repartition of jurisdiction between the State of origin and the State of enforcement<sup>65</sup>.

Unlike the former Regulation<sup>66</sup>, the Brussels II bis Regulation contains conflict-of- jurisdiction rules on matters of parental responsibility that apply to all children, including those born from non-married couples<sup>67</sup>, who are habitually resident in one of the Member States of the Union at the time the court is seized<sup>68</sup>.

The case-law of the European Court of Justice has primarily focused on the provisions of the Brussels II bis Regulation that lay down conflict-of-jurisdiction

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<sup>63</sup> Romano G. P., *Conflits entre parents et entre ordres juridiques en matière de responsabilité parentale, Enlèvement International d'enfants, Saisir le juge ou s'engager dans la médiation?* Neuchâtel, 2015.

<sup>64</sup> European Parliament, Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, Civil Liberties, Justice and Home Affairs, *Cross-border Parental Child Abduction in the European Union – Study*, Brussels, 2015.

<sup>65</sup> *Idem*.

<sup>66</sup> The Brussels II bis Regulation repeals the Regulation No 1347/2000, which had a more limited scope. See *Council regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses*, OJ [2000] L 160/19.

<sup>67</sup> *Recital 5*, Brussels II bis Regulation. "in order to ensure equality for all children, this Regulation covers all decision on parental responsibility, including measures for the protection of the child, independently of any link with a matrimonial proceeding".

<sup>68</sup> *Supra* note 55, art. 8.

rules on matters of parental responsibility<sup>69</sup>. Moreover, those cases have mostly been dealt with under either the accelerated preliminary reference procedure or the urgent preliminary reference procedure.

The Court has inferred that for cases involving children's right of custody time is, in a matter of fact, of essential importance. It has consistently recognised "the urgency of ruling in cases of child removal in particular where the separation of a child from the parent to whom [...] custody had previously been awarded, even if only provisionally, would be likely to bring about a deterioration of their relationship, or harm that relationship, and to cause psychological damage"<sup>70</sup>.

#### ***4.1. Return of the Child: Brussels II bis references and differences from 1980 Hague Convention.***

With regard to the return of the child, two notes should be made about the article 11 of the Brussels II bis Regulation. First the article 11 (2) prescribes that "When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity."

Doubts have been raised about the compulsory hearing of the minor, considering amongst other things the possibility that the child could be influenced by the parent with which he resides.

Another objection has a pragmatic character: "the hearing of the child may even harmful, whenever the court's decision contradicts his or her will, or because the parent not chosen may not take his/her child's view with maturity and responsibility. In other words, one should fear a childish reaction on the part of the not preferred parent"<sup>71</sup>.

Consequently, regarding the children's hearing and the possibly resulting objections, it appears necessary a case-by-case approach<sup>72</sup>. "Moreover, the

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<sup>69</sup> There are few cases where the ECJ was called upon to interpret the conflict-of-jurisdiction rules on matrimonial matters. See Case C-68/07 *Sundelind Lopez* [2007] ECR I-10403 and Cse C-168/08 *Hadadi* [2009] ECR I-6871.

<sup>70</sup> European Court of Justice, Case C-491/10 PPU *Aguirre Zarraga* [2010] ECR I-14247, para. 39.

<sup>71</sup> *Supra* note 6.

<sup>72</sup> ECHR, *Gajtani v. Switzerland*, Application n° 43730/07, 9 September 2014. In a return proceeding under The Hague Convention the ECHR held that there was no violation of the

compulsory hearing of the child in genuine and brutal kidnappings, where the circumstances of the case appear sufficient to the judge to order expedite and urgent return, interferes negatively and uselessly with the timeliness of the procedure”<sup>73</sup>.

Secondly, the article 11 (4) of the Regulation restricts the range of the article 13 (1-b) of The Hague Convention when it prescribes “A court cannot refuse to return a child on the basis of Article 13 (b) of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return”, despite therefor the existence of the grave risk as established under the provision of the Convention.

Another relevant deviation from the mechanism provided by the Convention derives from the paragraph 6, 7 and 8 of the article 11 of the Brussels II bis Regulation.

“6. If a court has issued an order on non-return pursuant to Article 13 of the 1980 Hague Convention, the court must immediately either directly or through its central authority, transmit a copy of the court order on non-return and of the relevant documents, in particular a transcript of the hearings before the court, to the court with jurisdiction or central authority in the Member State where the child was habitually resident immediately before the wrongful removal or retention, as determined by national law. The court shall receive all the mentioned documents within one month of the date of the non-return order.

7. Unless the courts in the Member State where the child was habitually resident immediately before the wrongful removal or retention have already been seized by one of the parties, the court or central authority that receives the information mentioned in paragraph 6 must notify it to the parties and invite them to make submissions to the court, in accordance with national law, within three months of the date of notification so that the court can examine the question of custody of the child.

Without prejudice to the rules on jurisdiction contained in this Regulation, the court shall close the case if no submissions have been received by the court within the time limit.

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art. 8 of the European Convention on Human Rights in a case where a national court had not taken into account the opinion of a 11 years old child opposing the return and not heard his five years old sister.

<sup>73</sup> *Supra* note 6.

8. Notwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention, any subsequent judgment which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable in accordance with Section 4 of Chapter III below in order to secure the return of the child.”

Those provisions imply that conflicting judgments between the competent courts of the Member States are not allowed under the EU legislation and they are solved granting the final decision on the issue to the judge of the habitual residence of the child immediately before the illegal removal or retention, unless the minor has acquired in the meantime the residence of the State where he has been transferred.

The decision of the court, as identified by the article 10 of the Regulation 2201/2003, are immediately enforceable within the EU because they are not subject to the exequatur procedure in the Member State where the enforcement is required. It is also not necessary a decision on the rights of custody, because of the procedural autonomy of the child abduction cases<sup>74</sup>.

However, the CJEU has also states that “the need to deter child abduction, and the child’s right to maintain on a regular basis a personal relationship and direct contact with both parents, take precedence over any disadvantages such as those caused to a child being moved needlessly”<sup>75</sup>.

Under the Regulation 2201/2003 it is not possible to avoid the enforcement of the foreign decision on the return of the minor, as also is excluded the possibility for the judge to exercise his/her jurisdictional functions.

“A judgment delivered subsequently by a court in the Member State of enforcement which awards provisional custody rights and is deemed to be enforceable under the law of that State cannot preclude enforcement of a certified judgment delivered previously by the court which has jurisdiction in the Member State of origin and ordering the return of the child”<sup>76</sup>.

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<sup>74</sup> CJEU, Case C-195/08 PPU, *Inga Rinau*, 11 July 2008. “Although intrinsically connected with other matters governed by the Regulation, in particular rights of custody, the enforceability of a judgment requiring the return of a child following a judgment of non-return enjoys procedural autonomy, so as not to delay the return of a child who has been wrongfully removed to or retained in a Member State other than that in which that child was habitually resident immediately before the wrongful removal or retention”.

<sup>75</sup> CJEU, Case C-211/10 PPU, *Doris Povse*, Mauro Alpagó, 1 July 2010.

<sup>76</sup> *Idem*.

In the same case the CJEU has also states that “enforcement of a certified judgment cannot be refused in the Member State of enforcement because, as a result of a subsequent change of circumstances, it might be seriously detrimental to the best interests of the child”.

The clear repartition of the jurisdiction always applies, even in case of an infringement of the article 24 of the European Chart of Fundamental Rights, since even a violation of the rights of the Charter may only be heard in the court of origin.

The CJEU has in fact declared in the case *Aguirre Zarraga* that “before a court of the Member State of origin can issue a certificate which accords with the requirements of Article 42 of Regulation No 2201/2003, that court must ensure that, having regard to the child’s best interests and all the circumstances of the individual case, the judgement to be certified was made with due regard to the child’s right freely to express his or her views and that a genuine and effective opportunity to express those views was offered to the child, taking into account the procedural means of national law and the instruments of international judicial cooperation.

However, [...], it is solely for the national courts of the Member State of origin to examine the lawfulness of that judgment with reference to the requirements imposed, in particular, by Article 24 of the Charter of Fundamental Rights and Article 42 of Regulation No 2201/2003”.

Different problems arise from the nature of the certification mentioned above and the Court of Justice of the European Union has emphasized regarding the authenticity of a certification that “any appeal against the issuing of a certificate pursuant to Article 42 of that regulation, other than an action seeking rectification within the meaning of Article 43(1) of the regulation, is excluded, even in the Member State of origin. [...] the first subparagraph of Article 42(2) in no way empowers the court of the Member State of enforcement to review the conditions for the issue of that certificate as stated therein”<sup>77</sup>.

To sum up, the mechanism of the Regulation is based on the need of deterrence. It provides that child abduction may only be counteracted by the rigid, systematic and rapid reaction of the States involved, in order to make child abduction totally useless.

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<sup>77</sup> ECJ, Case C-491/10 PPU, *Aguirre Zarraga*, 22 December 2010.



According to the CJEU, giving the least power of revision to the judge responsible for enforcement “could undermine the effectiveness of the system set up by Regulation No 2201/2003”<sup>78</sup>.

#### ***4.2. The Brussels II bis concept of habitual residence under the influence of the principle of the best interest of the child.***

It appears clear that the uniform interpretation of the provisions of the Community Law within the borders of the Member States is necessary to guarantee their uniform application. The meaning of habitual residence therefore has been given an independent definition for the purpose of the EC Regulation 2201/2003 applicable throughout the European Union.

The article 24 of the Brussels II *bis*<sup>79</sup> forbids the courts from reviewing the ground upon which the jurisdiction is determined in a specific case when they have to recognise a judgement. Uniform jurisdictional grounds are the basis for the simplified recognition and enforcement mechanism under the Regulation. Thanks to the uniform interpretation of the concept of the habitual residence, all Member States may assume the jurisdiction on the same basis.

The habitual residence is also a key element in international children abduction cases under the article 2 (1) of the Regulation. At the same time the uniform interpretation of the return remedy requires the uniform application of the habitual residence in all courts of the Member States. These aspects of Brussels II *bis* stress the need for an interpretation of habitual residence to ensure uniformity, encouraging trust between courts and the free movement of judgments<sup>80</sup>.

The Practice Guide<sup>81</sup> accompanying Brussels II *bis* states that the term habitual residence is not defined by the Regulation, but is a question of fact in each case that has to be interpreted in accordance with the objectives of the Regulation.

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<sup>78</sup>*Idem.*

<sup>79</sup> *Supra* note 56, art 24 “The jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in Articles 22(a) and 23(a) may not be applied to the rules relating to jurisdiction set out in Articles 3 to 14.”

<sup>80</sup> Lamot R., *Habitual Residence and the Brussels II bis: Developing Concepts for European Private International law*, Journal of Private International Law, 2007, vol 3, n° 2.

<sup>81</sup> European Commission, *The Practice Guide for the application of the new Brussels II Regulation* (Council Regulation (EC) No 2201/2003 of 27 November 2003), 12, 1 June 2005.

Therefore, a new interpretation of habitual residence could be developed under the provisions of the Brussels II *bis* to serve the new family law context.

That is the reason why the European Court of Justice was called in the case *A*<sup>82</sup> to define the concept of habitual residence and the Court in that case favoured both the principle of mutual recognition and the best interest of the child.

It has been underlined that, in the absence of any express reference to the law of the Member States, the term habitual residence is indeed an autonomous concept. If national laws were to define that concept, the free movement of judgments would be hindered as Member States might have different notions of habitual residence, each with a different scope and dimension<sup>83</sup>. This may lead to situations where several courts of different Member States claim jurisdiction on the same case, or where no court decide to assume it.

An autonomous interpretation of the habitual residence ensures the uniform application of article 8 (1) of the Brussels II *bis* regulation<sup>84</sup> throughout the union. Relying on recital 12 of the Brussels II *bis* regulation, the ECJ noted also that the concept of habitual residence must be shaped in light of the best interests of the child. This meant that the concept used in other EU instruments could not be applied, by analogy, to the Brussels II *bis* regulation<sup>85</sup>.

This also entails that a general and abstract rule defining the concept of habitual residence is not suitable, since that concept “must be established on the basis of all the circumstances specific to each individual case”<sup>86</sup>.

Consequently, the ECJ opted for a flexible idea of habitual residence. The mere physical presence of the child within the territory of a Member State is not enough to consider the minor a habitual resident of that State, but there are other factors which need to be taken into consideration. The ECJ has indeed specified in *A* that the concept “corresponds to the place which reflects some degree of integration by the child in a social and family environment”<sup>87</sup>.

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<sup>82</sup> Case C-523/07 *A* [2009] ECR I-2805.

<sup>83</sup> *Supra* note 80.

<sup>84</sup> *Supra* note 56, art 8 “The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seized”.

<sup>85</sup> *Supra* note 82.

<sup>86</sup> *Supra* note 82.

<sup>87</sup> *Idem*.

The European Court of Justice has repeatedly sets the non-exhaustive criteria that the courts should take into consideration interpreting the article 8 (1) of the Brussels II bis Regulation.

“The duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family’s move to that State, the child’s nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State”<sup>88</sup> are only an example of what the national courts should evaluate regarding the uniform interpretation and application of the concept of habitual residence.

It is worth noting that the interpretation adopted by the ECJ is respectful of the multilateral conventions containing rules on jurisdiction for decisions on custody, to which many or all of the Member States are parties, including both the 1980 and 1996 Hague Conventions. Even if the Court does not examine the relationship between the Brussels II *bis* and the above mentioned conventions, it implicitly takes them into account<sup>89</sup>.

From the ruling of the ECJ in *A* arises that the principle of legal certainty has to be accommodated with the best interests of the child, given that a strict rule defining habitual residence could not ensure that the concept would always point out the actual centre of life of the child concerned, which has to be verified by reference to all the relevant circumstances.

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<sup>88</sup> *Idem.*

<sup>89</sup> *Supra* note 80.

## **CHAPTER II**

### ***1. The historical debut of the best interest of the child's doctrine.***

The “best interests of the child’s” doctrine is usually identified as a guideline for both the legislators and the judges with the intent of suggest and recommend a juridical solution with regard to the disputes involving minors.

The best interest principle sends an important symbolic message to society regarding the significance and vulnerability of children. It ensures that an important group within society unable to advocate for their own rights is protected by the law.

The expression has been codified in the main relevant international law instruments regarding the protection of children rights, but it has also been accepted and embraced by an increasing number of different national legislations amongst the world on the subject and steadily quoted by the courts.

However, is not easy to identify a univocal and unambiguous meaning of the terms due to the wide and vague spirit of the expression. The term generally refers to the deliberation that courts undertake when deciding what type of services, actions, and orders will best serve a child as well as who is best suited to take care of a child.

Best interests determinations are generally made by considering a number of factors related to the child’s circumstances and the parent or caregiver’s circumstances and capacity to parent, with the child’s ultimate safety and well-being as the paramount concern.

It includes for examples the emotional ties and relationships between the child and his or her parents, siblings, family and household members, or other caregivers; the capacity of the parents to provide domestic stability, a safe home and adequate food, clothing, and medical care; both the mental and physical health of children and of parents; the children’s moral and material wellbeing and development; the and the respect of the minors’ maturity and personal inclinations; any kind of domestic violence in the home<sup>90</sup>.

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<sup>90</sup> Druant F., *Intérêt supérieur de l’enfant et dignité humaine: questions et définitions*, Bulletin, Défense des Enfants International, 2000, n° 6.

The judicial research of a conclusive definition of the best interest of the child is in open contrast with the relevance of other non juridical elements as the psychology and health of the minor, the relationship with its own parents and relatives. See also Chabert C., *L’intérêt*

Even if someone considers an advantage allowing the courts to decide according to not strictly juridical standards, it may also represent a limit conditioned and influenced by cultural, ethical and religious aspects which may cause a discriminatory approach in the case law and tenet.

The latter has influenced the drafters of the 1980 Hague Convention on the Civil Aspects of the International Child Abduction and the Explanatory Report states at the paragraph 21 “il a été à juste titre mis en relief que la norme juridique reposant sur «l'intérêt supérieur de l'enfant» est, à première vue, d'une telle imprécision qu'elle ressemble davantage à un paradigme social qu'à une norme juridique concrète. Comment étoffer cette notion pour décider quel est l'intérêt final de l'enfant sans faire des suppositions qui ne prennent leur source que dans le contexte moral d'une culture déterminée? En introduisant le mot «final» dans l'équation, on fait aussitôt naître de sérieux problèmes, puisque l'énoncé général de la norme ne permet pas de savoir clairement si «l'intérêt» de l'enfant qu'il faut protéger est celui qui suit immédiatement la décision, ou celui de son adolescence, de son existence de jeune adulte, de son âge mûr ou de sa vieillesse”<sup>91</sup>.

This criterion has been mainly used to justify and legitimize decisions on the matters of children's custody and access, and only with time it became the milestone of the contemporary international childhood protection.

The best interests of the child principle is considered in the family law a general clause designed by the legislator for the judges who deciding the real case may modify and conform the necessities and requirements to the minor's best interest. Therefore, it is a universal standard accepted in the national legislations and translate by the courts into the best solution for the child's wellbeing<sup>92</sup>.

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*de l'enfant et les conflits de lois*, Aix-en-Provence, 2001: “[...] sous un vêtement unitaire, la notion de l'intérêt supérieur de l'enfant est une notion plurale.”

<sup>91</sup> Hague Conference on Private International Law, The Child Abduction Section, Elisa Pérez-Vera, *Preparatory Work*, 1980.

<sup>92</sup> The *Black's Law Dictionary* defines the best interest of the child as “the emotional tie between the child and the parent or guardian, the ability of a parent to give the child love and guidance, the ability of a parent or a guardian to provide necessities, the established living arrangements between a parent or guardian and the child, the child's preference in making a custody award and a parent's ability to foster a healthy relationship between the child and the other parent”.

Historically the best interests doctrine was born in common law traditional countries at the end of the XIX century as a result of the judicial interpretation of the parental responsibility institution<sup>93</sup>.

For the first time was evaluated the best wellbeing of minors as established in the *Guardianship of Minors Act* enacted in 1886 in England. In the matter of children's education that law allowed the judges to take into account the wellness of the child, the parents' demeanour and both the mother and father wishes. It obliges the court to begin with a consideration of the child's best interest as a sole factor, and only then concern itself with the rights of any other parties involved.

As a matter of fact, this reference was not used as an autonomous factor but mainly to undermine the women's demands avoiding the acknowledgment of the mother's parental responsibility. To prevent any form of gender discrimination regarding the parents' custody and access rights the courts started to enhance the wellbeing, the needs and the true interest of the child, especially in situations of great disagreement between the parents with regard to the exercise of the parental responsibility and the right of custody.

Along these lines was enacted in England the *Guardianship of Infants Act* in 1925 which for the first time outlined the interest of the child as the preeminent factor and an independent value for the judicial decisions.

The general application of this principle was followed by heavy criticism especially in the United States, but also in Europe at the end of the 1970s. It was built on the uncertainty and unpredictability of that criterion and floated the necessity of reviewing or abolishing the use of the best interest of child's doctrine<sup>94</sup>.

There is not only, in fact, the problem of tracing valid and reliable information regarding the child's needs, the affective and educational capacities of the parents, the social and cultural integration, but the doctrine also gives the judges

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<sup>93</sup> Van Krieken R., *The Best Interest of the child and Parental Separation: on the Civilizing Parents*, *The Modern Law Review*, 2005, vol.68, n°1.

<sup>94</sup> Mnookin R. H., *Child Custody Adjudication, Judicial Functions in the Face of Indeterminacy*, *Law and Contemporary Problems*, 1975, n° 39; See also Kornhauser L., *Bargaining in the Shadow of the Law: The Case of Divorce*, *Yale Law Journal*, 1979, vol. 88; Maccoby E., *Dividing the Child: Social and Legal Dilemmas of Custody*, Harvard University Press, 1992.

an extremely wide manoeuvre margin undermining any attempt at reconciliation required by the national divorce legislations<sup>95</sup>.

The broad range of factors, genetic, financial, educational, environmental and relational, which science would recognise as capable of affecting the welfare of a child are narrowed by law to a small range of issues which fall directly under the influence of the judge, the social workers or the adult parties to the litigation process.

The consequence of this specific branch of doctrine was the idea of give back the ability of determining the particular interest of the minor to the parents, favouring the one with the closest psychological connection with the child.

Balancing both the interests of the children and those of the parents may ease the task of the judges who have to set the future wellbeing of the minors involved<sup>96</sup>. The best interests principle has, in fact, been also criticised for failing to provide adequate protection to the interests of other parties involved in the dispute, and it has been said that “the very ease of the welfare test encourages a laziness and unwillingness to pay proper attention to all the interests that are at stake”<sup>97</sup>. The courts will willingly interfere with the rights and interests of the parents when an overriding requirement to protect the child arises from the concrete circumstances<sup>98</sup>.

It is thus arguable that while some courts do seem to take into account the interests of the parents, this is only done on a superficial basis. The application of the welfare principle can, therefore, sometimes be seem to produce unfair results for the parents involved.

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<sup>95</sup> See also Melli M. S., *Toward a Restructuring Custody Decision-making at Divorce: An Alternative Approach to the Best Interests of the Child*, in Eekelaar J. and Sarcevic P., *Parenthood in Modern Society: Legal and Social Issues for the Twenty-First Century*, Dordrecht, 1993.

<sup>96</sup> See Elster J., *Solomonic Judgments. Studies in the Limitation of Rationality*, Cambridge, 1989.

<sup>97</sup> Eekelaar J., *Beyond the Welfare Principle*, *Child and Family Law Quarterly*, 2002, vol. 14.

<sup>98</sup> UK Supreme Court, *AN and another v ML (Scotland)*, 2012, UKSC 30; *HH v Deputy Prosecutor of the Italian Republic, Genoa*, *PH v Deputy Prosecutor of the Italian Republic, Genoa and FK (FC) v Polish Judicial Authority*, 2012, UKSC 25.

## ***2. The best interests principle and its international approach.***

The UN Declaration of the Rights of the Child was adopted unanimously by the United Nations General Assembly in Resolution 1386 (XIV) on 20 November 1959<sup>99</sup> and for the first time it asserted on an international level the doctrine of the “best interests of the child”.

The second principle states “The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration”<sup>100</sup>, while the second paragraph of the seventh principle declares “the best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents”<sup>101</sup>.

The principle itself has been only sporadically embraced by international law instruments until the adoption on 20 November 1989 of the UN Convention on the Rights of the Child<sup>102</sup>. The drafters according to the spirit of the Convention envisaged at the article 3 that “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”<sup>103</sup>.

In the French translation, however, the expression is singular and shows more emphasis than the English one, “dans toutes les décisions qui concernent les enfants, qu’elles soient le fait des institutions publiques ou privées de protection

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<sup>99</sup> UN General Assembly, *Declaration of the Rights of the Child*, Resolution 1386 (XIV), 20 November 1959, United Nations.

<sup>100</sup> *Idem*, Principle 2.

<sup>101</sup> *Idem*, Principle 7 (2).

<sup>102</sup> UN General Assembly, *Convention on the Rights of the Child*, Resolution 44/25, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3. See also UNHCHR, *Legislative History of the Convention on the Rights of the Child*, New York, Geneva, 2007.

<sup>103</sup> *Idem*, art. 3.



sociale, des tribunaux, des autorités administratives ou des organes législatifs, l'intérêt supérieur de l'enfant doit être une considération primordiale”<sup>104</sup>.

The norm has different meanings and the interpretations have emphasized both the procedural aspect and the substantial perspective<sup>105</sup>.

The intention of the Committee of the Convention on the Rights of the Child openly was to equally apply the obligation provided by the article 3 both to the individual child and to children “in masse”.

This position is easily confirmed by the General Comment N° 7 of the Committee on implementing child’s rights in early childhood “a) Best interests of individual children. All decision-making concerning a child’s care, health, education, etc. must take account of the best interests’ principle, including decisions by parents, professionals and others responsible for children. States parties are urged to make provisions for young children to be represented independently in all legal proceedings by someone who acts for the child’s interests, and for children to be heard in all cases where they are capable of expressing their opinions or preferences; and (b) Best interests of young children as a group or constituency. All law and policy development, administrative and judicial decision-making and service provision that affect children must take account of the best interests’ principle. This includes actions directly affecting children (e.g. related to health services, care systems, or schools), as well as actions that indirectly impact on young children (e.g., related to the environment, housing or transport)”<sup>106</sup>.

Based on these interpretations the rule has mainly two functions: it allows the proper control over the recognised rights of the children according to the article 6 and those following; but it also give the courts and judges discretion resolving the problems and conflicts with other norms of the Convention or filling any possible omissions.

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<sup>104</sup> Freeman M., *Article 3: The Best Interests of the Child*, in Alen A., Vande Lanotte J., Verhellen E., Ang F., Berghamns E. and Verheyde M., (eds.), *A Commentary on the United Nations Convention on the Rights of the Child*, Leiden, Boston, Martinus Nijhoff Publishers, 2007.

<sup>105</sup> Zermatten J., *The Best Interests of the Child Principle: Literal Analysis and Function*, International Journal of Children’s Rights, 2010.

<sup>106</sup> United Nations, *General Comment n° 7*, doc. CRC/C/GC/7/Rev. 1, Geneva, 2009

The article 3 is in fact considered, as much as the articles 2 and 5 which mandate general obligations regarding the fulfilment of the prescribed forms of protection of the children, a general rule of the Convention<sup>107</sup>.

The European Court of Human Rights has recognised the central role of the principle expressing its view in the framework of the protection of the right to respect for private and family life under the article 8 of the European Convention on Human Rights and Fundamental Rights, especially on violations of the rights of custody and access<sup>108</sup>.

The Inter-American Court of Human Rights has also stated the same value in the well-known 2002 advisory opinion on the legal status of minors<sup>109</sup> and the historical decision regarding the “Street Children”<sup>110</sup>.

The European Court of Justice has repeatedly brought up the best interests doctrine in those cases<sup>111</sup> concerning the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, but also its value acquired in the framework of the Brussels II *bis* Regulation and the discipline regarding international child abduction disputes<sup>112</sup>.

The legal doctrine has observed in the huge judicial practice the hard core of the “best interests doctrine” according to which serious violations of the children’s rights, such as physical punishment, mutilation of female genitals, any kind of discrimination based on gender or ethnic minorities, poverty, fall within the scope of the protection granted by the international instruments quoted above.

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<sup>107</sup> United Nations, *General Comment n° 12*, doc. CRC/C/GC/12, Geneva, 2009.

<sup>108</sup> Choudhry S., Herring J., *European Human Rights and Family Law*, Oxford, Portland, 2010.

<sup>109</sup> Inter-American Court of Human Rights, Advisory Opinion OC-17/2002 of August 28, 2002, requested by the Inter-American Commission on Human Rights, *Juridical Condition and Human Rights of the Child*. “[...] the phrase “best interests of the child”, set forth in article 3 of the Convention on the Rights of the Child, entails that children’s development and full enjoyment of their rights must be considered the guiding principles to establish and apply provisions pertaining to all aspects of children’s life”.

<sup>110</sup> Inter-American Court of Human Rights, *Case “Street Children”, Villagran-Morales et al. v. Guatemala*, Judgment of November 19, 1999.

<sup>111</sup> European Court of Justice, 11 July 2008, *Rinau*, C-195/08 PPU; ECJ, 1 July 2010, *Povse*, C-211/10 PPU; ECJ, 23 December 2009, *Deticek*, C-403/09 PPU; ECJ, *J. McB v. L. E.*, 22 September 2010, C-400/10; ECJ, *Zarraga*, 22 December 2010, C-491/10 PPU.

<sup>112</sup> Bareit N., *La Cour de Justice de l’Union Européenne artisan de la lutte contre les enlèvements d’enfants*, Revue Trimestrielle de Droit Européen, 2011.

### ***3. The ostensible mismatch on the application of the “best interests of the child doctrine”.***

As pointed out above, one of the most widely accepted principles of law in the western world is the principle that decisions relating to a child should be based on his best interests.

Thus, it may be assumed that the Child Abduction Convention is based on this principle. Sure enough, Professor Perez-Vera pointed out that in the Preamble's recital the signatories are “firmly convinced that the interests of children are of paramount importance in matters relating to their custody” and it reflects the philosophy of the Convention, which she defines as: “the struggle against the great increase in international child abductions must always be inspired by the desire to protect children and should be based upon an interpretation of their true interests”<sup>113</sup>.

However, among courts and legal scholars there are different opinions on the impact that the human rights may have on the international child abduction field.

In fact, human rights dispositions are often used to justify the rejection of return the minors wrongful abducted. There are, though, some courts that have refused to engage with certain human rights questions altogether on procedural grounds<sup>114</sup>.

On the other hand, a part of the case-law considers that the Hague Convention provides only a procedural mechanism, hence issues like the interests of the child are irrelevant to decisions on return. They are issues of substance that have to be considered in the child's place of habitual residence. Following this opinion, there are no conflicts between human rights and the Hague Convention because the latter applies in a human rights vacuum as a strictly a matter of procedure<sup>115</sup>.

However, this interpretation is in direct conflict with the article 3 of the UN Convention on the Rights of the Child, which obligates the contracting states and their courts to consider the best interests of the child “in all actions concerning

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<sup>113</sup> *Supra* note 91.

<sup>114</sup> High Court of Justice, Family Division, Royal Court of Justice, *S v. B & Y (Abduction and Human Rights)*, [2005] EWHC (Fam.) 733, London England.

<sup>115</sup> Sthoeger E., *International Child Abduction and Children's Rights: Two means to the Same End*, Michigan Journal of International Law, 2011, vol. 32, issue 3.

children” undertaken in courts of law. There is nothing that imply that the Hague Convention would be an exception to the requirement of the article 3 as a matter of *lex specialis* or otherwise.

The premise of both those who argue that the Hague Convention and its application infringes on human rights, and those who claim the opposite, is that both bodies of law bind the courts of a state which is a party to the UN Convention on Rights of the Child and the 1980 Hague Convention, when they adjudicate an application for return from another member state’s Central Authority.

Yet, one might advance the argument that the Hague Convention is *lex specialis* when it applies, rendering the *lex generalis* in the UN Convention inapplicable, and thus irrelevant to the return procedures under international law. However, this argument has no legal grounds. In such a situation, the usual methods of interpretation require the harmonization the two bodies of law to the further extent possible<sup>116</sup>.

The interaction between human rights and the disposition of the Hague Convention is addressed directly by other courts, concluding that the principles lying behind the Hague Convention prevail over the human rights questions even if the UN Convention continue to bind the judges<sup>117</sup>.

Because following the best interests of the child is only one of the purpose of the Hague Convention and its forcefulness relies on the fast return of the minors to their place of habitual residence, the children’s best interests may only be considered in a limited manner.

Is interesting to further point out the article 11 and article 35 of the Convention on the Rights of the Child which requests the member states to enter international agreements pertaining to the illicit transfer and abduction of children across borders<sup>118</sup>.

Many though see this as a mechanism that ensures respect for children’s rights at large but at the expense of the wellbeing of a specific child in often involved in a particular dispute. It is indeed correct to assert that the principles of the best interests of the child has an individual aspect to it aimed at protecting the

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<sup>116</sup> *Supra* note 102.

<sup>117</sup> House of Lords, *In re M and another*, (Children; Abduction: Rights of Custody), [2007] UKHL 55, [2008] 1 AC 1288, London England.

<sup>118</sup> *Supra* note 102.

interests of a specific child in a court of law.

Therefore, if the judges fail to take into account the best interest of the minor involved as a primary consideration, they will fail to meet the requirements imposed by the article 3 (1) of the UN Convention on the Rights of the Child on their own states.

### ***3.1. The weight of children's welfare within the scope of the Hague Convention on Civil Aspects of International Child Abduction.***

Based on this framework, some claim that the application of the Hague Convention violates the best interests of the child requirement enumerated in the UN Convention. As the argument goes, courts do this in light of the implicit recognition of the Hague Convention found in articles 11 and 35 of the other international instrument.

Opponents of this approach contend that the recognition of the need to fight child abduction does not indicate that the Hague Convention is necessarily in line with the requirements of the Convention on the Rights of the Child, nor that the important objects of the Hague Convention should absolutely override the rights of the child.

Moreover, it is argued that, while the mechanism provided under the Hague Convention is not aimed at deciding custody, a return may nevertheless impact the final decision over the child's custody when the court may consider preeminent the need for stability in the child's life and opt to leave the minor in the care of the local parent. In addition, the return itself might affect the welfare of the child in a way that cannot be remedied by the court deciding the custody issue later in time.

According to Ronna Schuz<sup>119</sup>, the assumption of the Hague Convention that the interests of the child are best protected in his/her place of habitual residence is not universally correct.

She contends in fact, that this assertion is valid only as long as the judges in the place of residence subsequently respect the best interests of the child, and, secondly, only when the place of the child's residence is the *forum conveniens* to hear the case.

Moreover, she asserts that even if the premise is true, it does not necessarily

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<sup>119</sup> Schuz R., *The Hague Child Abduction Convention and Children's Rights*, Transnational Law and Contemporary Problems, 2002, vol. 12.

entail that it is in the best interests of the child to actually reside in the place of residence pending the final settlement of custody rights.

Another contested underlying supposition of the Hague Convention is that a prompt return will serve the best interests of the child. However, the exemptions from the main rule of the prompt return are so narrowly outlined that they do not include all of the situations where the return might go against the best interests of that child.

Moreover, the general rationale of deterrence and the interests of children as a whole cannot suffice to justify a return that goes against the best interests of a specific abducted minor standing before the court.

Schuz offers what she terms as an alternative form of reconciliation or method of interpreting the two bodies of law. Under this scheme, a court must interpret the exceptions to return, in such a way that it will deny the return when that cannot be reconciled with the requirement to consider the best interests of the child as a primary consideration.

The argument relies on the assertion that the drafters of the Hague Convention originally envisioned situations where a father abducts the child from the mother who is the primary caretaker of the child. But nowadays, it is frequently that the mother and primary caretaker is the one who abducts the child and a forced return would not restore the *status quo* but rather create an entirely different situation for the child.

This reality makes it more difficult to define that a return to the hands of the non primary caretaker and father coincides with the best interests of the child as a primary reflection.

The intention of the drafters was not for courts to impose the return of children where this decision would jeopardize their safety, or where the mother is fleeing domestic violence. In such situations, Schuz is of the opinion that judges have ruled to return a child solely in order to avoid undermining the Hague Convention.

This would however be a too narrow reading of the objects and purposes of the Convention. Indeed, in recent years, judges applying different jurisprudences have express concern regarding the so called outdated assumptions underlying the

Convention<sup>120</sup>.

These concerns triggered the Swiss delegation to the Hague Conference on Private International Law to suggest an amendment to the Hague Convention. The delegation suggested that the Convention should deny return where the primary caretaker abducts a child and would not be in the child's best interests asking to return with the child to the place of habitual residence, or placing the child back with the left-behind parent or in foster care in the place of residence<sup>121</sup>.

The reasoning behind the failed Swiss proposal was that the too narrow current construction of the grave risk exception, and the courts should have expanded the notion of an intolerable situation found in article 13 (b) in order to deny return in a broader range of situations.

Thus, if with respect to the “best interests of the child doctrine” a child should not be returned when that will not promote his best interests nor will be of any real benefit to the child, these arguments ultimately call for a broader interpretation of the exception provided by the drafters, especially the grave risk one, by courts applying the Hague Convention, or for an amendment or protocol to the Hague Convention in order to reconcile the provisions of the two legal instruments.

### ***3.2. The issue of the single child as a subject of rights.***

It might be unexpectedly therefore that the phrase interests of children does not appear in the body of the Convention itself and that judges regularly reject pleas that an order for return is not in the best interests of the child on the basis that under the Convention this issue is not relevant.

This apparent dichotomy can be explained, however, by discerning between the best interests of the particular child in question and the best interests of children generally<sup>122</sup>.

In order to protect the best interests of each particular child, the judge should

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<sup>120</sup> Caldwell J., *Child Abduction Cases: Evaluating Risk to the Child and the Convention*, New Zealand University Law Review, 2008, n° 161.

<sup>121</sup> Weine M. H., *Intolerable Situations and Counsel for the Children: Following Switzerland's Example in Hague Abduction Cases*, American University Law Review, 2008.

<sup>122</sup> Schuz R., *The Hague Child Abduction Convention: Family Law and Private International Law*, International and Comparative Law Quarterly, 1995, vol. 44.

admit any evidence which shows that in the particular case the return to the place of habitual residence would not be in the child's best interests, as it is done in the cases which do not fall within the scope of the Convention.

However this is not the approach adopted by the drafters of Convention, which requires immediate return except for the narrow situations specified in article 13. When one of those exception is verified, the court can consider what is in the best interests of the child exercising its own discretion whether or not to order the return, provided that it also considers all the others purposes of the Convention.

Regarding the best interests of children in general, the basis of the Convention is that the adopted method of prompt return has the scope of safeguarding children generally in two main ways: the illegal effects of the abduction have to be reversed as quickly as possible by restoring the *status quo ante* without any specific investigation into the merits of the case; the need of deterring the abduction in the first place, knowing the abductor that he will have to return the child immediately without a hearing on the merit of the custody dispute and without the opportunity to change the *status quo* of the minor by settling him into a new environment.

The best interests of children generally approach seems to be supported by the Preamble of the Convention, which states that the signatories “desire to protect children internationally from the harmful effects of their wrongful removal or retention”<sup>123</sup>.

It may appear therefore that the best interests of a particular child may be sacrificed to the best interests of children in general. The courts risk sending a child back when it could be prejudicial to him or her in order to ensure that return is prompt in other cases and to deter child abduction generally.

The exceptions provided by the article 13 of the Hague Convention can be explained in terms of this perspective. In those situations, other aspects of the policy of protecting children generally may prevail on the policy of protecting them from the harmful effects of child abduction. Thus, the courts may decide discretionally whether or not to order the return.

The “grave risk of harm” defence is clearly the most common example of

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<sup>123</sup> *Hague Convention on the Civil Aspects of International Child Abduction*, art 1, October 25, 1980, 1343 U.N.T.S. 89. Preamble.



this policy<sup>124</sup>. The need to safeguard the minors from concrete harm will override the need to protect them from child abduction.

Children's best interests will not be fostered by prompt return where the effects of return are clearly worse than the illegal effects of the abduction itself. However, the courts require very clear evidences of the risk of harm and this defence is rarely admitted successful in most jurisdictions<sup>125</sup>.

The need to protect the children by giving them the right to have their views taken into consideration<sup>126</sup>, subject to the proper level of age and maturity, in relation to major decisions affecting them<sup>127</sup> may prevail on the need to protect minors in general from abduction. Provided that the views expressed by children are genuinely theirs owns and that abducting parents do not use this defence as a delaying tactic, then taking into account the views of the children involved is in accordance with the object of protecting children's interests generally.

The exceptions provided by the drafters of the Hague Convention may be evaluated in light of the interests and rights of the child involved in the particular case of wrongful removal.

The “lapse of time” defence according to the article 13 (b)<sup>128</sup> is justified on the basis that the interests of children not to have their life shredded once they have settled down in a new environment may override the need to protect them from abduction. In other words, it is recognised that after the period of one year it may be too late to return to the *status quo ante*.

On the other hand, refusing to order return in such a case may simply

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<sup>124</sup> *Idem*, Art. 13 (b). It provides an exception to mandatory return where “there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation”.

<sup>125</sup> Most courts seem to have taken seriously the warning made by Perez-Vera at paragraph 34 of the Explanatory Report that if the exceptions provided were not interpreted restrictively the Convention would become a dead letter.

<sup>126</sup> The art. 13 (b) states at the end that “The judicial or administrative authority may also refuse to order the return of the child if it finds that 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.” While it may appear to be a part of the “grave risk” defence, it is instead a separate defence itself which the courts have been more willing to accept.

<sup>127</sup> *Supra*, note 99. Art. 12 (1).

<sup>128</sup> *Supra* note 123. Art. 12 (b). The return may be refused where over one year has elapsed since the date of the wrongful removal if “it is demonstrated that the child is now settled in its new environment”.

encourage abductors to keep children hidden for longer periods. Thus, the two aspects of protection of children may clash and the court has to exercise its discretion in the light of the circumstances of each particular case.

The “fundamental freedoms” defence<sup>129</sup> may similarly be justifiable. In sporadic circumstances, it may happen that children generally have a greater interest in the recognising of other human rights and fundamental freedoms than in being protected from parental abduction<sup>130</sup>.

The “consent” defence<sup>131</sup> is perhaps the most problematic one to explain in given the necessity of protecting children. It may be asserted that, where one of the requirements for this defence is satisfied, there is no need to discourage abduction. While this argument may be true regarding the failure to exercise rights and consent, it creates more problems in relation to acquiescence, which occurs after the abduction, on the assumption that the innocent parent only acquiesces where he or she perceives that the child’s welfare does not requires reversal of the wrongful effects.

The potential contradiction of the acquiescence defence with the protecting children generally scope seems to have been undertaken by the wide interpretation of the concept of acquiescence given by the courts and the effect of a verdict thereof. The acquiescence defence should not, however, disturb the opinion that the rationale for the requirement of mandatory return is to promote the best interests of children generally by protecting them from the harmful effects of child abduction.

#### ***4. The improvement of the child’s protection and the possibility of a wider interpretation of the provisions of article 13.***

From the previous analysis of the condition limiting the return of the child established in the art. 13 of the Convention, is clear the need of a broad interpretation of those provisions with regard to both the moral and physical

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<sup>129</sup> *Idem.* Art. 20. It provides a defence where return would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedom.

<sup>130</sup> *Supra* note 122.

<sup>131</sup> *Supra* note 123. Art. 13 (a). The drafters provided a defence to mandatory return where “the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of the removal or retention, or had consented to or subsequently acquiesced in the removal or retention.”

wellbeing of the children involved.

Many others have instead suggested to expand the use of the exception included in the article 20 of the Hague Convention concerning the violation of fundamental right of children<sup>132</sup>.

Another part of the tenet has also recommended a more emphasised use of the international instrument of family mediation<sup>133</sup>.

The jurisprudence has mainly followed the first of the three solution above presented preferring the safety of the child against any other obligations established by the provision of the 1980 Hague Convention.

Indeed, the effects of this interpretation led to the attempts of improvement of the safe return of the minors under the Hague Convention and to the legal practices of the Undertakings, Safe Harbour Orders and Mirror Orders, corroborated also by the Brussels II *bis* Regulation<sup>134</sup>.

The consequent deny of return is not more considered by the courts and the doctrine as the decline of the system set up by the Hague Convention, but on the contrary as the improvement of the protection of the child.

This allow to focus on the only rule of the Convention provided by the article 13 (1) (b), which clearly refers to the best interests of the child and which also requires a deep evaluation of the minor's family environment before the wrongful removal and the whole respect of his/her safety and wellbeing.

Overtaken the "Summary Return Mechanism" of the 1980 Hague Convention on the Civil Aspects of International Child Abduction, the judges, as also in any other decisions concerning the protection of minors, have to trace all the available information regarding the case and deliver a child-oriented decision.

#### ***4.1. The Swiss proposal influence over the Hague abduction cases.***

Following the fifth meeting of the Special Commission of the Hague

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<sup>132</sup> Bruch C. S., *Religious Law, Specular Practices and Children's Human Rights in Child Abduction Cases Under the Hague Child Abduction Convention*, New York University Journal of International Law and Politics, 2000, vol 33.

<sup>133</sup> Alanen J., *When Human Rights Conflicts: Mediating International Parental Kidnapping Disputes Involving Domestic Violence Defence*, University of Miami Inter-American Law Review, 2008, vol. 40.

<sup>134</sup> Lowe N., Nicholls M., Everall Q. C., *International Movement of Children: Law Practice and Procedure*, Bristol, Family law, 2004.

Convention and the failure of the Swiss proposal as touched upon in the previous paragraph, the Switzerland took a crucial action to protect children who were being harmed by the application of the Hague Convention on the Civil Aspects of International Child Abduction.

It is in the prospective drawn above that its Parliament passed the Federal Act on International Child Abduction and the Hague Conventions on the Protection of Children and Adults (“Swiss Act”)<sup>135</sup>.

The Swiss Act gives a key and decisive guidance to Swiss courts about the phrase “intolerable situation” in article 13 (b) of the Hague Abduction Convention. It also instructs the courts to appoint representatives for the minors involved in international abduction proceedings.

Reformers in Switzerland became concerned about the application of the Hague Abduction Convention after witnessing what the children had to endure because of the custody dispute in the case of Russell Wood and Maya Wood-Hosig.

In the *Wood*<sup>136</sup> case, the mother took her two children from Australia to Switzerland. When she was discovered in Switzerland, her children were forcibly removed from her and institutionalized for a year until they could be returned to Australia. When the time finally came for the children to travel to Australia, the children had to be forced onto the plane.

The father was unable to care for the children, so upon arrival in Australia, the children could not be returned to him and were again placed in foster care. The mother did not return to Australia because she would face a criminal action there for the abduction.

Because it took some time for the Australian court to issue a custody decision, the children lived in several Australian foster homes. Eventually, the Australian court gave the mother custody and allowed the children to return to

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<sup>135</sup> Feuille Fédérale Suisse, [FF] 34 (2008), *Loi fédérale sur l’enlèvement international d’enfants et les Conventions de La Haye sur la protection des enfants et des adultes* [LF-EEA] [Federal Act on International Child Abduction and the Hague Conventions on the Protection of Children and of Adults], Dec. 21, 2007, [hereinafter Swiss Federal Act], translated in Andreas Bucher, *The New Swiss Federal Act on International Child Abduction*, 4 J. PRIV. INT’L L. 139, 161–65 (2008).

<sup>136</sup> Parliament of Western Australia, Legislative Assembly-Grievance, *Russell Wood & Maya Wood-Hosig*, August 24, 2006.

Switzerland<sup>137</sup>.

In short, the children ended up with exactly the same arrangement as before the Hague proceeding began; however, they suffered enormous moral and psychological distress as the process came to an end.

To address the problems made manifest by the *Wood* case, the Swiss delegation suggested that a new provision be added to the 1980 Hague Convention that would supplement article 13 (b)<sup>138</sup>.

At the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention, the Swiss delegates introduced the Working Document No. 2. Article 7 entitled “Return and best interest of the child”.

It would allow a court to refuse to return a child if the following criteria were met: (1) the placement with the applicant is manifestly not in the best interest of the child; (2) the [abducting parent] cannot care for the child in the child’s habitual residence (or cannot reasonably be required to do so); and (3) the placement in foster care is manifestly not in the best interest of the child.<sup>139</sup>

Despite vigorous advocacy by the Swiss, the proposal was rejected: “A clear majority of experts indicated that the Swiss proposal to amend the Convention, while raising important and timely issues for debate, should not be accepted”<sup>140</sup>

The Swiss proposal probably failed because of the language and terms used to draw the new provision. By describing the clause as an application of the “best

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<sup>137</sup>*Idem*. Although the father lodged an appeal, the judge allowed the children to return to Switzerland pending the resolution of the appeal. This was relevant for the mother’s case because an Australian law said that the judge does not have to return the minor if the child lives in Australia for two years. If the proceedings had taken another six months, this benchmark would have been reached.

<sup>138</sup> Switzerland proposed these changes because of “several distressing cases” that occurred in Switzerland. Special Common on the Civil Aspects of International Child Abduction, Working Doc. N° 1E, art. 3 (2006). See also *supra* note 45.

<sup>139</sup> Special Common on the Civil Aspects of International Child Abduction, Working Doc. N° 2E, art. 7 (2006). This was a refinement of Switzerland’s initial proposal, found in item 5 of Working Document 1.

<sup>140</sup> Hague Conference on Private International Law, October 30–November 9, 2006, *Report on the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Practical Implementation of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*, March 2007.

interests of the child” principle<sup>141</sup>, the provision looked as if it were the first step to a broader defence that would potentially prevent the return whenever the best interest of the child required it.

In fact, the Swiss delegation believed that decisions from the European Court of Human Rights require consideration of the child’s best interest in all cases<sup>142</sup>. The United States opposed the proposal, noting that the best interest of the child is typically achieved by returning the child<sup>143</sup>.

Even if the Working Document No. 2 was not adopted, has to be recognised the rule of Switzerland for bringing up the *Wood* case and the other similar problems to the world’s attention.

The proposal indeed demonstrated that the Hague Convention defences are interpreted too narrowly in various situations, resulting in severe outcomes for the minors involved.

#### ***4.2. United States’ courts orientation limiting “the intolerable situation defence”.***

The United States at first glance followed Switzerland’s example orienting U.S. courts to follow this lead if required in individual cases<sup>144</sup>. However, Courts

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<sup>141</sup> The Swiss argued that this change was timely due, given the worldwide adoption of the U.N. Convention on the Rights of the Child and “of the prominence given to the overriding interests of the child in everything that concerns it.” Working Doc. No. 1E, *supra* note 48, at remarks: point 5. Article 3(1) of the Convention on the Rights of the Child states: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” The Swiss also identified the issue that was to be addressed as follows: “Amending Art. 13, clause (b) so as to clarify the relationship between the principle of returning the abducted child and the interests of the child.” Working Doc. 1E, *supra* note 48, at Point 5.

<sup>142</sup> See *supra* note 139, noting that “[a] majority of experts [...] cautioned that the Swiss proposal created an additional ground for refusal, which would undermine the principle of comity by inviting courts in requested States to examine the best interests of the child”.

<sup>143</sup> See also *Notes of Proceedings for the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction and the First to Review the Practical Implementation of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children*, November 6, 2006 (comments of Professor Andreas Bucher) (on file with author).

<sup>144</sup> Weiner M. H., *Half-Truth, Mistakes, and Embarrassments: The United States Goes to the Fifth Meeting of the Special Commission to Review the Operation of the Hague*

in the United States have given virtually no attention to the term “intolerable situation”<sup>145</sup>.

A close review of cases decided by U. S. courts since the beginning of 2006 and a summary review of older cases indicate that courts regularly study the facts only under the “grave risk of physical or psychological harm” standard in article 13 (b). Courts either intentionally overlook the “intolerable situation” term or assume it as a part of the “grave risk of harm” terminology.

Courts in other countries sometimes exhibit a similar inaccurate interpretation<sup>146</sup>. It is clearly wrong since the language of the provision plainly says that return is not required if “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>147</sup>.

The failure to disaggregate the “grave risk of harm” and “intolerable situation” defences in article 13 (b) has unnecessarily limited the scope of the latter defence<sup>148</sup>.

A few U.S. relevant cases can be used to delineate the need for courts in the United States to follow Switzerland’s example.

The Swiss interpretation of “intolerable situation” might have indeed

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*Convention on the Civil Aspects of International Child Abduction*, Utah Law Review, 2008, n° 1.

<sup>145</sup> *Supra* note 120.

<sup>146</sup> *Supra* note 133. “Although the ‘grave risk’ relates to the separate components, namely, physical harm, psychological harm and placing the child in an intolerable situation, in practice they are rarely pleaded or treated as distinct exceptions.”

<sup>147</sup> *Supra* note 123, art 13.

<sup>148</sup> The aggregation of these concepts in the United States is probably due to a report by the U.S. State Department for the Senate Committee on Foreign Relations. This report merged the two provisions in art. 13(b) by using child sexual abuse as the example of an “intolerable situation.” Since child sexual abuse also poses a “grave risk of physical and psychological harm” to the child, the two concepts were made to look coterminous. See Department of State Public Notice 957, *Hague International Child Abduction Convention; Text and Legal Analysis*, 51 Fed. Reg., March 26, 1986. “Intolerable situation was not intended to encompass return to a home where money is in short supply, or where educational or other opportunities are more limited than in the requested State. An example of an “intolerable situation” is one in which a custodial parent sexually abuses the child. If the other parent removes or retains the child to safeguard [him or her] against further victimization, and the abusive parent then petitions for the child’s return under the Convention, the court may deny the petition. Such action would protect the child from being returned to an “intolerable situation” and subjected to a grave risk of psychological harm”.

changed the 2007 decisions of the federal district court in *Adan v. Avans*<sup>149</sup>. The Swiss approach to appointing counsel for children in Hague child abduction proceedings might also have influenced the decision regarding a 2008 federal district court case, *Mendez-Lynch v. Pizzutello*<sup>150</sup>.

After considering potential negative aspects to the Swiss reforms, the U.S. courts, as much as the other member states of the 1980 Hague Convention could easily increase their proficiency by incorporating the Swiss prospective into the adjudication of Hague cases.

Fortunately, courts in the United States are becoming increasingly more responsive to the pertinence and self-sufficiency of article 13 (b) “grave risk of harm” defence, although there is still considerable resistance.

The District Court’s opinions in *Adan v. Avans* show the still residual reluctance of some courts regarding domestic violence allegations as relevant to the “grave risk of harm” defence, and more notably for purposes of this article, their

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<sup>149</sup> United States District Court, District of New Jersey, *Adan v. Avans*, Civil Action N° 04-5155 (WHW), 2007 WL 2212711, July 30, 2007, reversed *In re Adan*, 554 F.3d 542 (3d Cir. 2008). The *Adan v. Avans* case came before the district court once in 2006 and twice in 2007. The case went up on appeal twice. The *Adan v. Avans* case was appealed to the Third Circuit in 2006 following the district court’s one-sentence order to return the child, and the Third Circuit vacated the district court’s order and remanded the case. See *In re Adan*, 437 F.3d 381 (3d Cir. 2006). On remand, the district court again ordered the child’s return. See *Adan v. Avans*, No. 04-5155 (WHW), 2007 WL 1850910 (D.N.J. June 25, 2007). A month later, the district court rejected motions for reconsideration and a stay while the case was appealed to the Third Circuit. See *Adan v. Avans*, No. 04-5155 (WHW), 2007 WL 2212711 (D.N.J. July 30, 2007). On appeal, both of the district court’s 2007 decisions were reversed, and the Third Circuit dismissed the Hague Convention petition. See *In re Adan*, 544 F.3d 542 (3d Cir. 2008). The text will discuss all of these decisions, but it is the 2007 trial court decisions that are the most illuminating for purposes of this Article.

<sup>150</sup> United States District Court, Middle District of Florida, *Mendez-Lynch v. Pizzutello*, Civil Action N° 2:08-CV-0008 (RWS), 2008 WL 416934, February 13, 2008. The case comes before the Court on Teofilo M. Mendez Lynch's Petition for the Return of Children. Petitioner alleged that his former wife and the mother of his two children, Cathleen M. Mendez Lynch, now known as Cathleen Mary Pizzutello wrongfully removed their two children from Argentina and has wrongfully retained them in the United States. The Petition was filed pursuant to the Hague Convention on the Civil Aspects of International Child Abduction as implemented by the International Child Abduction Remedies Act, 42 U.S.C. §§ 11601-11610 ("ICARA"). Respondent filed an Answer and Affirmative Defenses (Doc. # 11), and the Court conducted a non-jury trial on August 2002.



lack of any regard of the “intolerable situation” language.

The Swiss interpretation of the terminology above discussed seems appropriate for respondent and minors involved in situations like that pursued in *Adan v. Avans*.

#### **4.3. *Adan v. Avans***

The case involved a naturalized U.S. citizen mother, Elena Este Avans, who fled to the United States with her daughter. The father, Ariel Adan, had abused the mother in Argentina, who alleged that he had also abused their daughter, Arianna.

Avans claimed that the Argentinean police and courts did not protect her. The father invoked the Hague Convention to obtain the child’s, Arianna, return to Argentina.

At the initial hearing, the mother alleged very serious domestic violence, claiming that the father was violent to her over the course of their relationship. The district court issued a one-sentence order granting the father’s petition for his daughter’s return.

The court’s oral comments revealed that the court did not believe the allegations amounted to a “grave risk,” and even if they did, the child should be returned because “this matter is best determined by Argentinean courts because it is all interwoven with a struggle [...] for custody and determination of domestic abuse, which is not the purpose of the Convention”<sup>151</sup>.

On appeal, the U.S. Court of Appeals for the Third Circuit vacated the district court’s order and remanded the case. The Third Circuit believed that the allegations, if true, would support the defence of article 13 (b).

The appellate court could not determine, however, whether the evidence of child abuse was clear and convincing and whether the Argentinean courts were incapable or unwilling to give the child adequate protection. The Third Circuit criticized the district court for ignoring “large portions of [the mother’s] testimony” and adopting “an overly compartmentalized view of child abuse.”<sup>152</sup>

The Third Circuit instructed the district court to consider the totality of the circumstances on remand, for this approach might make “innocent” acts look more ominous.

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<sup>151</sup> *Supra* note 149.

<sup>152</sup> *Idem*.

The Third Circuit found also that the domestic violence allegations were independently significant, even without taking account of three pieces of evidence that Avans tried to use to supplement the record on appeal.

The appellate court noted the father's denials, but again commented that "he did not specifically deny particular acts of abuse"<sup>153</sup> at the hearing. The Third Circuit criticized the lower court for its lack of findings on specific allegations, such as "the allegations that Adan abused Avans and raped her in front of Arianna"<sup>154</sup>.

Also, the district court "did not reject Avans's testimony that she had been repeatedly abused, raped, and threatened with a gun."<sup>155</sup> The Third Circuit held that the evidence of domestic violence, standing alone, was sufficient to establish a "grave risk of harm" to Arianna<sup>156</sup>.

The Third Circuit also addressed Argentina's ability to protect the mother and child, on the theory that the availability of such protection defeats an article 13 (b) defence. The Third Circuit noted that the district court had not sufficiently analysed Argentina's ability to protect Avans and her daughter<sup>157</sup>.

On remand, Avans lost again. Judge Walls, the judge who initially ordered the return of the child, again ordered that the child had to be returned. This time, however, the court provided detailed findings of fact.

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<sup>153</sup> *Idem*.

<sup>154</sup> *Idem*.

<sup>155</sup> *Idem*.

<sup>156</sup> *Idem*. "The evidence of Adan's abuse of Avans is relevant to the District Court's determination of whether returning Arianna to Argentina would expose the child to a grave risk of harm. See, e.g., *Walsh v. Walsh*, 221 F.3d 204, 220 (1st Circuit) (holding that such evidence is relevant when considering whether a grave risk of harm to a child exists because "credible social science literature establishes that serial spousal abusers are also likely to be child abusers" and "both state and federal law have recognized that children are at increased risk of physical and psychological injury themselves when they are in contact with a spousal abuser"). By citing *Walsh*, the Third Circuit acknowledged that domestic violence poses risks to children in addition to the risk that the perpetrator will also abuse the child. *Walsh* cited state and federal laws and cases that explicitly discussed the potential for children to be physically harmed by violence that is directed at the adult victim, as well as the potential for emotional harm from witnessing the abuse.

<sup>157</sup> *Idem*. "Avans testified about her numerous experiences with Argentine law enforcement when police officers refused to offer her any assistance, and the fact that Adan violated a temporary restraining order issued by an Argentine court after the police refused to enforce it. Adan did not contest these allegations in his testimony, and the District Court did not discount Avans' testimony. [...] It therefore failed to consider and reject the majority of Avans's proof related to the inaction of Argentine courts and police."

Although the court believed that Adan committed domestic violence, it thought that Avans exaggerated the violence. It discounted Avans's allegations because she added new allegations of violence on remand and returned to Adan three times.

It also did not believe that the domestic violence made the allegations of child sexual abuse more probable; in fact, it found that Avans had not proven the alleged child abuse by clear and convincing evidence.

The court never considered whether the domestic violence alone created any risks to the child other than the alleged sexual abuse. The court also concluded that Avans failed to establish by clear and convincing evidence that "Argentine authorities are unable or unwilling to protect her and her child." The court believed that the particular judge scheduled to hear the matter in Argentina was not corrupt.

The Argentinean judge had assured the U.S. court that the child would not be returned to her father pending the hearing, but would be placed in foster care. Apparently, the child was to be taken into protective custody by a social worker upon arrival in Argentina, even though the mother might return to Argentina also.

The court denied Avans's request to reconsider its decision. Avans claimed the court "committed clear error in finding that the child had not been sexually abused without ordering an independent evaluation of [the child] to determine as much."

In response, the court chastised Avans for suggesting that it should have ordered an examination for the child, noting that the court had no obligation to *sua sponte* order an examination and that neither party had requested it.

The court also noted that Avans could have, but did not, put in her own evidence on this point. The court reiterated that even if sexual abuse were found, the Argentinean court system could protect the child.

Avans also wanted the court to consider post-hearing evidence that the petitioner was convicted of contempt for violating the restraining order. The court held that the contempt conviction was irrelevant because the event occurred after the hearing on remand. The court put an exclamation mark at the end of its decision: it refused to stay its decision pending appeal.

The Third Circuit did, however, grant a stay. The case was fully briefed and argued orally. Avans was permitted to supplement the appellate record with a psychological report detailing an examination of Arianna that was conducted after

the district court's order was issued.

On the day of oral argument, the Third Circuit, in an amazing show of resolve, ruled from the bench that there was a grave risk of harm as a matter of law.

It reversed the trial court and stated that a judgment order be entered "yesterday" denying the father's petition. The panel focused on a report from Department of Youth and Family Services that detailed the risks of physical and psychological harm that Arianna would face if she were returned, as well as other evidence.

The Court of Appeals expressed dismay that the district court gave no consideration to various pieces of evidence suggesting psychological and physical harm before making its ruling. It is unclear whether the Third Circuit will issue a written opinion, but hopefully one will be forthcoming because lower courts still need guidance on the "grave risk of harm" component of article 13(b).

It is easy to find fault with the district court's analysis of this case. Among other things, the judges' explanations reasoning that the mother exaggerated the domestic violence are subject to criticism.

However, for the purpose of the "intolerable situations" defence it would have been sufficient that only some of Avans's allegations were in fact true, as the district court found.

The court held "that Avans was the subject of domestic abuse from time to time by the Petitioner and that what she alleges, in the main, is plausible"<sup>158</sup>. It is also relevant to underline that the court never rejected Avans's testimony regarding police inaction and did not find that the police would act any differently if she or the child would have returned.

Based on these facts, the concept of "intolerable situation," as defined by the Swiss proposal, could have led the district court to a different verdict.

The first criterion is that "placement with the parent who filed the application is manifestly not in the child's best interests"<sup>159</sup>. The district court's decision suggests that it would have found this criterion satisfied. After all, the district court approved of the arrangement whereby the child would enter foster care upon her return to Argentina.

Judge Walls probably recognized that the mother's child abuse allegations

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<sup>158</sup> *Idem*.

<sup>159</sup> *Supra* note 135 and 138.

might be true, despite her inability to meet the high burden of clear and convincing evidences.

The facts of *Adan v. Avans* also satisfied the second Swiss criterion<sup>160</sup>. Avans “was not, given all of the circumstances, in a position to take care of the child in the State where the child was habitually resident immediately before the abduction or [...] this [could] not reasonably be required from this parent”.<sup>161</sup> Avans’s testimony about her inability to involve police protection in Argentina would make it both unfair and unwise to require her return to Argentina<sup>162</sup>.

It also would not be in child’s best interests to be placed in foster care pending the custody determination. It would be a misleading and disturbing experience for a young child<sup>163</sup>.

From the minors’ perspective, foster care means separation from his or her own family and a loving parent, and that is psychological unsettling. Even children who are moved into foster care because of serious abuse or neglect, almost uniformly describe missing their own families.

The *Wood* case is an example of the foster care instability even for children waiting a custody adjudication. Custody cases can be significantly delayed for a variety of reasons, including both courts requirements and the parties themselves.

Even if a custody case proceeds swiftly, so that the children only need to be place into foster care for a short period of time, placement instability may occur in any case. Placement changes happen for a wide variety of reasons, including for reasons that have nothing to do with the child such as administrative rules or foster family particularities.

It is impossible to predict whether or not the adoption of Swiss approach

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<sup>160</sup> *Idem*.

<sup>161</sup> *Idem*.

<sup>162</sup> *Supra* note 149. Again, it is useful for understanding the case point out that the father did not contest mother’s testimony inactivity of the Argentinean police officers providing her any assistance, and noting that the district court did not discount Avans’s testimony.

<sup>163</sup> Dallman P., *The Hague Convention on Parental Child Abduction: An Analysis of Emerging Trends in Enforcements by U.S. Courts*, International and Comparative Law Review, 1994, n° 160. “Ordering the child back to another country to be placed in a third party’s hands (which could be either a foster home or some type of foster-care institution) would only result in even more disruption in the short life of a young child, especially where the court has good reason to believe that the child has already experienced an emotionally traumatic family life.”.

could have lead the district court to a different interpretation of “intolerable situation” defence in *Adan v. Avans*. However, it certainly might have made a difference because the Swiss approach was meant for just such a case.

The Swiss formulation would have lead the court to the conclusion that the return of Arianna to Argentina would pose her in a grave risk. Likewise, the Swiss formulation should assist other courts in their assessment of whether a situation is “intolerable,” and thereby potentially change the results for some respondents and children whose cases evoke those features.

The analysis of the case reflects an evaluation of what moral struggles and privations society may expect from an individual child for the purposes of the greater good, generally the deterrence of international parental abduction.

The “intolerable situation” defence is draw so that the disadvantage faced by an individual child outbalances the potential benefits that all children may receive from deterring international abduction. The drafters intended to set a high enough threshold for intolerability so that courts would agree that the type and degree of adversity were not justified in a particular case.

The Swiss formulation of “intolerable situation” pinpoint a situation that most observers would find morally unbearable. It is a good formulation because the defence has as its high point the prerequisite that the child will be separated from his or her primary caregiver, an event that is likely to be strenuous, if not intolerable for the child and the parent involved, and that has recognizable risks for the minor.

Since arrangement with the left-behind parent also has to be openly not in the child’s best interests, the left-behind parent has less moral claim to the child’s return. The abductor has also to have a morally justifiable reason behind the abduction of the child.

Despite this, whether or not a grave risk of a morally “intolerable situation” exists in the end depends upon the particular situation of the case, and it is impossible to state categorically that all fact patterns satisfying the Swiss criteria would meet the requirements for the defence.

### ***5. The ECHR’s new evaluation of the “best interests of the child” and the Neulinger case.***

Recent case-law from the European Court of Human Rights (ECHR) and the European Court of Justice (ECJ) is inclining the balance and creating

discrepancies among the need of uniform interpretation of the Hague Convention on the Civil Aspects of International Child Abduction.

The ECHR is indeed placing more emphasis on the best interests of the child involved encouraging “an in depth-examination of the entire family situation”<sup>164</sup> in abduction proceedings.

On the other hand, the ECJ<sup>165</sup> is laying more reliability in the principle of mutual trust, not ensuring adequate protection for the best interests of minors.

Further, it would be wiser for these two major European courts to not proceed in complete isolation and be more aware of each other’s judgments. This is especially true now that there is potential for the European Union to accede to the European Convention on Human Rights<sup>166</sup>, which entails that the decisions of the ECJ could be subject to the review by the ECHR.

The *Neulinger* case represents the watershed in the evolution of the European case-law because for the first time the European Court of Human Rights lingered extensively on the role of the “best interests of the child” principle regarding the disputes of international parental child abduction.

Bestowing considerable interpretative significance to the principle of the best interests, the decision of the Grand Chamber of the ECHR registered the need of overstep the traditional planning of the 1980 Hague Convention, following the new legal doctrine that requires to adapt the international cooperation system to the demands of protection of children’s rights<sup>167</sup>.

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<sup>164</sup> European Court of Human Rights, Grand Chamber, *Neulinger and Shuruk v Switzerland*, Application N° 41615/07, [2011] 1 FLR 122, Strasbourg, 6 July 2010.

<sup>165</sup> Regarding the proceedings under the EC Regulation N° 2201/2003 which modifies the Abduction Convention between EU Member States.

<sup>166</sup> Consolidated Version of the Treaty on European Union, 2010 O.J. C 83/01. The art. 6 (2) and (3) states “2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties. 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.”

<sup>167</sup> See Bucher A., *L'intérêt de l'enfant pénètre la Convention sur l'Enlèvement*, in *Vers de nouveaux équilibres entre ordres juridiques*, Liber Amicoum, Hélène Gaudemet-Tallon, Paris 2008, pp. 683-701. Ripley P., *A Defence of the Established Approach to the Grave Risk Exception in the Hague Child Abduction Convention*, Journal of Private International Law, 2008, vol. 4, Issue 3.

The new meaning of the principle is due to inspire the national case-law which is known to use openly the best interests of the children to justify decisions on the matter of the protection of family life and after the *Neulinger* case to explain the judgments on international child abduction.

Analysing the details of the case<sup>168</sup>, Mrs Isabelle Neulinger, a Swiss and Belgian national, emigrated from Switzerland to Israel in 1999. In 2001 she married Shai Shuruk, an Israeli citizen, and they lived in Tel Aviv. Both were Jewish but apparently, neither was particularly religious at the time of the marriage. Later Mr. Shuruk became affiliated with the ultra-orthodox Lubavitch community.

The parties' child, Noam, was born in 2003 in Israel. Shortly thereafter, because the mothers feared that the father would take the child overseas for "religious indoctrination" in a "Lubavitch-Habad" religious Jewish community, the Tel Aviv Family Court issued a *ne exeat* order that barred the child's removal from Israel. The court also granted the interim custody to the mother, parental responsibility to both parents jointly and access rights to the father.

In the meantime, the Israeli social services issued a report required by the Family Court stating that the father had created an atmosphere of verbal aggression and threats that had terrorized the mother in their home. The mother also alleged an incident of assault. Consequently, the Tel Aviv court severely restricted the father's contact rights.

The parents were then divorced in Israel. In March 2005, the Tel Aviv Family Court denied the mother's application to vacate the *ne exeat* order, finding that there was a serious risk that the mother would not return with the child to Israel after visiting her family abroad.

In June 2005, the mother clandestinely removed the child from Israel in violation of Israeli law and hid him in Switzerland<sup>169</sup>. The father promptly reported the abduction to the Israeli authorities but it was not until May 2006 that Interpol reported that the child had been found in Lausanne, Switzerland.

Due to the father's application, the Tel Aviv Family Court ruled that the mother had wrongfully removed the child from his habitual residence in Israel

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<sup>168</sup> *Supra* note 164.

<sup>169</sup> The father claimed that Mrs Neulinger smuggled the minor through the Sinai desert under the dashboard of a car. The mother later stated in an interview that she hired a smuggler for the sum of 30.000 USD to take her and the child to Sharm El-Sheik after they crossed the border from Israel into the Egyptian Sinai Peninsula.



within the meaning of article 3 of the 1980 Child Abduction Hague Convention.

The father promptly issued a petition to the competent justice of the peace for the district of Lausanne for his son's return under the provisions of Hague Convention.

However, the mother successfully asserted the grave risk of harm exception, arguing that the Israeli court had restricted the father's access to two hours a week under social services' supervision; the father had very limited income and was living with a roommate in a small apartment; she could not return to Israel because she would be arrested for criminal abduction; and the child would be in the hands of the Lubavitch "religious cult" if returned to Israel.

On the father's appeal, the Vaud Cantonal Court appointed a paediatrician and child psychiatrist to evaluate the risks of a potential return. His report, issued after a seven months delay, stated that the child's return to Israel with his mother would indeed expose the minor to a risk of psychological harm whose intensity could not be assessed without verifying the conditions of that return, and that keeping the *status quo* would also create a long-term risk of major psychological harm.

In May 2007, the Cantonal Court dismissed the father's appeal, based on the expert's report and on the period of time that the child had now been settled in Switzerland. It ascribed great significance to the expert's conclusion that "the possibility of the mother's return to Israel with Noam, even for a short period, is totally out of the question for the mother"<sup>170</sup>. It also found that returning the child without his mother would represent a serious risk for him.

On a further appeal by the father, in August 2007 the Swiss Federal Court reversed the decision of the courts below and ordered the child's return to Israel. It found that there was not enough basis for a finding of grave risk of harm. It ruled that the trial court had not sufficiently investigated the issue of the mother's refusal to return to Israel.

In particular, there was no evidence that she would be imprisoned if she returned and the Israeli Central Authority had stated that if she cooperated with further court orders she would not be<sup>171</sup>.

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<sup>170</sup> *Supra* note 164.

<sup>171</sup> The Israeli Central Authority, in response to requests from its Swiss counterpart and the father's lawyer, ensured that the Israeli courts would guarantee the mother substantial

There was also no evidence that the father had not abided by the Israeli court's order of limited supervised visitation and the supervising social worker had reported that the father had fully done so.

The Court ruled that the article 13 exceptions should be applied according a "restrictively" interpretation and that an abductor should not be permitted to take advantage of her unlawful conduct.

Having exhausted her efforts in the Swiss courts the mother and child petitioned the ECHR. Her main argument was the violation of the article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>172</sup> by the Swiss courts.

Entitled "Right to respect for private and family life" the article provides that "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

The mother asked the ECHR to request the Swiss Government to grant an interim stay of the child's return to Israel pending the European Court's review of the case and also forwarded a medical certificate claiming that an "abrupt return to Israel without his mother would constitute a significant trauma and a serious psychological disturbance for this child"<sup>173</sup>. The ECHR promptly granted the application and the Swiss Government complied with its request.

On January 8 2009 the ECHR issued its first judgment in the case<sup>174</sup>. It stated by a 4/3 majority that the Swiss court's decision did not violate the European

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protection if she returned the child. It also complained of the long delays in the case, reported that the mother would face criminal charges in Israel only in "very exceptional circumstances" and represented that if she returned the child and complied with further court orders the Authority would "positively consider" instructing the Israeli police to close their file.

<sup>172</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols N° 11 and 14, 4 November 1950, ETS 5.

<sup>173</sup> *Supra* note 164.

<sup>174</sup> European Court of Human Rights, *Neulinger and Shuruk v Switzerland*, Application N° 41615/07, Strasbourg, 8 January 2010.

Convention on Human Rights. It in fact ruled that the parents had joint parental authority over the child under Israeli law, including the right to determine his residence; his removal from Israel rendered the father's access rights illusory since he lived in Israel; returning the child to Israel complied with the Hague Convention, and would also ensure the rights and freedoms of the child and his father; the mother's claims concerning the father's alleged "threatening and fanatical" conduct were effectively contested by evidences that the Israeli authorities had taken valid and efficient measures to limit his access to the child; her claim that she could not return to Israel because she would be arrested was without substance; her assertion that the child would be entrusted into the hands of orthodox Jewish religious fanatics was without merit due to the joint parental authority; furthermore the Swiss order had ensured a fair balance between the competing interests and had taken into account the child's best interests.

However, the minority opinions were notable for showing judicial ignorance of or disregard for the Hague jurisprudence, and contempt for and prejudice towards non-European religious orthodoxy.

For example, Judge Spielmann stated incorrectly that the father had no Hague Convention right of custody because joint decision-making concerning a child did not create such a right. Judge Steiner insisted that the child should not be returned because a rabbinical court would decide the case, even when the civil courts had exclusively heard the case in Israel, and that the "the religious ultra-Orthodox movement" of Judaism was neither democratic nor European<sup>175</sup>.

The mother then appealed to the Grand Chamber of the ECHR. This caused another 18-month delay for the child's settlement. Finally, the Grand Chamber ruled in June 2010, by 16 to 1, that the Swiss' return order respected the Hague Convention but that the Court "was not convinced that it would be in the child's best interests for to return to Israel"; that the mother "would sustain a disproportionate interference with her right to respect for her family life if she were forced to return to Israel"; consequently, that the child should not be returned to Israel and that Switzerland must pay 15,000 Euros to the mother for costs and expenses.

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<sup>175</sup> *Idem*, Dissenting Opinion of Judges Spielmann and Steiner. See *contra*, Schuz R., *The Relevance of Religious Law and Cultural Considerations in International Child Abduction Disputes*, Journal of Law and Family Studies, 2010, vol. 12.

Regarding the father, the Court stated that his capacity to provide care was dubious, in view of his past behaviour and limited financial resources, but because he had never lived alone with the child and had not seen him since 2005<sup>176</sup>.

Overturning the previous decision of the Chamber, the Grand Chamber of the ECHR has interpreted the provisions of the Hague Convention on the Civil Aspects of the International Child Abduction with main regard to the “best interests of the child” principle.

It stated that the concept is one of the fundamental principles of human rights that has been highly valued in many international instruments, including the Convention on the Rights of the Child of 20 November 1989, the Declaration on the Rights of the Child of 20 November 1959, the Convention on the Elimination of All Forms of Discrimination against Women and the European Union's Charter of Fundamental Rights.

The Convention has to be indeed interpreted in harmony with the general principles of international law and the concerning issue is to ensure a fair balance of the competing interests of the child, of the two parents and public order, within the margin of appreciation given to states in such matters, but keeping in mind that the child's best interests must remain the primary consideration.

The Grand Chamber also reckoned that there is a broad international consensus that in all decisions concerning minors and family matters related, their best interests must be paramount and may override those of the parents, even if the parents' interests, especially in having regular contact with their child, nevertheless are an important element.

It also affirmed that the child's interest includes two sides. On the one hand, the child's family ties must be maintained and should be severed only in very exceptional circumstances, unless the family has proved exceedingly inadequate, with the purpose of preserving personal relations and, if appropriate, to restore the family.

On the other hand, the child's interest is to ensure his or her development in a safe and bracing environment, and article 8 of the European Convention on Human Rights prevents a parent from taking actions that would harm the child's health and development.

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<sup>176</sup> European Court of Human Rights, Grand Chamber, *Neulinger and Shuruk v Switzerland*, Application N° 41615/07, [2011] 1 FLR 122, Strasbourg, 6 July 2010.

The same belief lays in the Hague Convention, which in principle requires the prompt return of an abducted child unless there is a grave risk of physical or psychological harm or of placing the child in an intolerable situation.

“In other words, the concept of the child's best interests is also an underlying principle of the Hague Convention.” Thus, “the Court takes the view that Article 13 should be interpreted in conformity with the [European] Convention”<sup>177</sup>.

The Gran Chamber then stated that article 8 of the European Convention would exclude a minor's return being ordered “automatically or mechanically when the Hague Convention is applicable” and that the child's best interests will be valued thanks to a variety of individual circumstances, including his/her age and level of maturity, the presence and involvement of his or her parents, his/her environment and experiences.

“For that reason,” the Court also affirmed “those best interests must be assessed in each individual case. That task is primarily one for the domestic authorities, which often have the benefit of direct contact with the persons concerned”<sup>178</sup>.

The ECHR afterward insisted that it “must ensure that the decision-making process leading to the adoption of the impugned measures by the domestic court was fair and allowed those concerned to present their case.”

In this regard it had to verify whether or not the national courts had “conducted an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person, with a constant concern for determining what the best solution would be for the abducted child in the context of an application for his return to his country of origin”<sup>179</sup>.

All in all, balancing the psychological and emotional turmoil of the child due to the return and change of residence and the eventual and virtual benefits, the Grand Chamber preferred to not require Noam to leave the country where he has settled<sup>180</sup>.

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<sup>177</sup> *Idem*.

<sup>178</sup> *Idem*.

<sup>179</sup> *Idem*.

<sup>180</sup> *Idem*. Mrs. Neulinger had enrolled her son both in a Jewish and in a nonreligious school, still granting the cultural and religious ties with Noam's place of origin. The Gran

### ***5.1. The Neulinger case influence on international and domestic jurisdiction.***

The decision taken with regard of the case *Neulinger* has been confirmed by few others sentences of the European Court of Human Rights in the following months.

In *Raban v. Romania*<sup>181</sup> the ECHR, reiterating the preeminent remark of the “best interests of the child” principle in the disputes concerning international child abduction, considered the solution adopted by Bucharest Court of Appeal in compliance with the article 8 of the European Convention on Human Rights<sup>182</sup>.

According to the ECHR, the Romanian judges had deeply considered the decision, evaluating both the overall family situation of the child and the minor’s settlement in the new place of residence.

The Court considered that the retention was not wrongful under article 3 of the Hague Convention because “the first applicant had given his consent for the children’s removal to and retention in Romania until the improvement of his financial situation, which rendered Article 3 of the Hague Convention inapplicable

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Chamber conveniently stated “Even though he is at an age where he still has a certain capacity for adaptation, the fact of being uprooted again from his habitual environment would probably have serious consequences for him. [...] His return to Israel cannot therefore be regarded as beneficial”.

<sup>181</sup> European Court of Human Rights, *Raban v Romania*, Application N° 25437/08, Strasbourg, 26 October 2010. In *Raban* the children were two and three years old and were living at the family home with both their parents in Israel. It was agreed that the mother and the two children would visit their maternal family in Romania for a period of six months because the family were having financial difficulties in Israel. They left for Romania on 27 April 2006 and were due to return on 24 October 2006.<sup>11</sup> On 3 November 2006 the mother informed the father that they would remain in Romania. He subsequently began proceedings under the Abduction Convention on 8 November 2006. A final decision was given by the Bucharest Court of Appeal on 7 January 2008. It was held that the children should not return because the retention was not wrongful, so article 3 of the Hague Convention did not apply. It was also considered that if the removal had been wrongful, then article 13(b) would apply due to the possible terrorist threats in Israel. The ECHR did agree with this analysis.

<sup>182</sup> *Supra* note 82. Article 8: “Right to respect for private and family life. 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.

in such circumstances”<sup>183</sup>.

However, part of the legal doctrine considers that since the article 3 does not explicitly refers to consent, it should not be dealt with under this article<sup>184</sup>. Article 3 is intended to deal with whether the removal or retention is in breach of the custody rights of the applicants. According to those, since in this case the applicant had custody rights at the time of the retention, the correct interpretation and application of the Child Abduction Convention should suggest that article 3 did apply and that the retention was indeed wrongful.

It would be preferable to consider consent separately under article 13 (a), because it usually reverses the burden of proof. This requires the abductor to prove that consent was established.

It also means that even if consent is established under article 13, the court has still discretion considering the return application to return the child where that is in the child’s best interests.

However, although it is considered that dealing with consent only in the context of article 13 is the correct application of the Convention, there is not complete agreement in the national and international courts decisions in this area, as demonstrated by the ECHR verdict regarding the *Raban* case.

The ECHR also took into account that the Romanian court had emanated a decision that gave “particular consideration to the principle of the paramount interests of the children”.

Although a return should never be ordered if it is considered that there is a grave risk that would “expose the child to physical or psychological harm or otherwise place the child in an intolerable situation”<sup>185</sup>, decisions under the Abduction Convention are intended to resume the *status quo ante*.

The Convention is not openly designed to examine the paramount interests of the children in any particular case. The ECHR, for this reason, referred to the Grand Chamber’s reasoning in *Neulinger* asserting that there should be “an in-depth examination of the entire family situation”.

In *Raban* it is indeed contemplated by the Court that this “in-depth

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<sup>183</sup> *Supra* note 180.

<sup>184</sup> Beaumont P., Walker L., *Shifting The Balance Achieved by the Abduction Convention: The Contrasting Approaches of the European Court of Human Rights and the European Court of Justice*, Journal of private International Law, 2011, vol. 7, n° 2.

<sup>185</sup> *Supra* note 33, art. 13 (b).

examination” should be one of the general principles of law in disputes relating to the Child Abduction Convention, granting consequently that in those cases the best interests of the child are suitably evaluated<sup>186</sup>.

The position adopted by the ECHR in those cases has been followed also by the House of Lords in England case-law. In *Re E* the court noted that the swift, summary procedure for return promotes the interests of children generally by acting as a deterrent to potential abductors, also ensuring that the unilateral action of one parent does not influence irretrievably the outcome of any dispute over the upbringing of the child, allowing the case to be heard in the State of habitual residence which is assumed to have better access to the evidence and information; and quickly restoring a child to his familiar surroundings.

The fact that the return mechanism does not expressly consider the best interests of the child “does not mean that they are not at the forefront of the whole exercise”<sup>187</sup>.

In this case the children, two girls of 7 and 4 years old, were both born in Norway from Norwegian national parents. The mother however moved to England following the whereabouts of another daughter from a previous relationship, who always had helped her mother raising her half-sisters.

The mother alleged the violent disposition of the father as justification of her decision of moving abroad, while the latter asserted the addictive use of alcohol and drugs of the mother of the children.

A psychiatric evaluation required by the Court observed that the mother suffered from Adjustment Disorder, a serious form of depression caused by stress and emotional vulnerability, which could have worsened, close to the risk of suicide, in case of return to Norway.

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<sup>186</sup> See also European Court of Human Rights, *Lipkowsky and McCormack v. Germany*, Application N° 26755/10, Strasbourg, 18 January 2011. European Court of Human Rights, *X. v. Latvia*, Application N° 27853/09, Strasbourg, 13 December 2011. See also European Court of Human Rights, *Karrer v. Romania*, Application N° 16965/10, Strasbourg, 21 February 2012. See also European Court of Human Rights, *B. v. Belgium*, Application N° 4320/11, Strasbourg, 10 July 2012. In all those cases the ECHR had applied the same solution adopted for the the case *Neulinger and Raban*, considering the eventual return of the child to the place of origin in contrast with the art. 8 of the European Convention on Human Rights and Fundamental Freedoms and with the best psychological and moral interests of the children involved.

<sup>187</sup> House of Lords, Appellate Committee, *In Re E (Children)*, (AP) Northern Ireland, [2008] UKHL 66, 19 June 2008.



The judges first ordered the return of the children, stating that the Norwegian authorities had ensured valid and efficient measures of protection and that were not met the indispensable requirements to reject the father's demand. The Court of Appeal had also confirmed that decision considering the *In Re E* "a very standard Hague case".

The House of Lords, instead, had underlined how difficult and problematic the case was because of the psychological and moral consequences, also involving the older daughter<sup>188</sup>.

It also decided to linger on the relationship between the 1980 Hague Convention, the 1989 Convention on the Rights of the Child and the European Convention of Human Rights and Fundamental Freedoms.

The House of Lords also pointed out the deep change in the situations leading to the cases of international child abduction. More often is the parents who can boast the rights of custody that remove the minor from the habitual place of residence, not the one who is granted of the rights of access.

The bearing of domestic violence is also an unavoidable element of the courts evaluation of those cases, and the resistance of some judges to recognise such incidence should be condemned.

Furthermore, the significance of the principle of the "best interests of the child" in the framework of the Child Abduction Convention and in the light of the *Neuliger* sentence of the ECHR has been reaffirmed by the judges of the House of Lords<sup>189</sup>.

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<sup>188</sup> *Supra*. The judges showed great respect towards the parents' authorities: "We start from the proposition that all parents love their children and want what is best for them. Even if the parents fall out with one other, they should be able to work out what would be best for the children. They should be able to see their children's interests separately from their own. They should be able to negotiate the least detrimental solution for them, with the help of a skilled mediator if they needed it. But they will only be able to do this if they are prepared to accord one another equal respect. Mediation will not work if one party is allowed to dominate or bully the other. That is why it usually thought unsuitable in case of alleged domestic violence or abuse. Whatever the rights and wrongs between the parents, this is a mother who will need a great deal of understanding and support. But we continue to hope that, once the trauma of these proceedings is behind them, these parents can be helped – whether through the good offices of our colleagues in family justice system in Norway or in some other way – to reach a sensible and practical solution for the good of the whole family".

<sup>189</sup> Lowe N., Stephens V., *Children's Welfare and Human Rights Under the 1980 Hague Abduction Convention – The Ruling in Re E*, Journal of Social Welfare and Family Law, March 2012, vol. 34, n° 1.

They had clarified that if in the past the case-law regarding the positive obligations under article 8 of the European Convention of Human Rights and the requirements of the Hague Convention moved forward “hand in hand”, now they both have to respect the principle of the “best interests of the child”.

The exam of this jurisprudential approach lead to gather that the best interests of the minor and the whole family situation preliminary evaluation may enhance the development of the domestic jurisprudence with regard to international child abduction disputes.

Without prejudicing the cooperating mechanism provided by the Hague Convention, the protection of the children and other parties involved could be implemented by the judicial intervention waiting for the update of the actual system provided by the Hague instrument. The need to respect the postulate of the Convention cannot result into the lack of protection of the weak parties.

### ***6. The ECJ approach and the Aguirre Zarraga case.***

The most recent case-law of the European Court of Human Rights in relation to child abduction such as *Neulinger* and *Raban* discussed above shows that the Court is placing great emphasis on the “best interests of the child”.

The European Court of Justice, on the other hand, is in extreme contrast determined to adhere to a strict analysis of the dispositions of the Brussels II *bis* Regulation.

The ECJ insists that the correct application of the Regulation and the principle of mutual trust are sufficient to protect the best interests of the child, but the *Aguirre Zarraga* case display resistance on the part of the Court to ensure the protection of the single child’s human rights.

In *Aguirre Zarraga*<sup>190</sup> a custody order was issued in favour of the Spanish father and a certificate was released by the Spanish authorities under article 42 of the Regulation<sup>191</sup>.

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<sup>190</sup> European Court of Justice, Case C-491/10 PPU *Aguirre Zarraga*, [2010] ECR I-14247, 22 December 2010.

<sup>191</sup> European Council, *Regulation (EC) No 2201/2003, Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, Repealing Regulation (EC) No 1347/2000*, 27 November 2003. The art. 42 states: “1. The return of a child entailed by an enforceable judgment given in a Member State shall be recognised and enforceable in another Member State without the

This is to oblige the return of the child even though the German Appeal Court had decided previously in the Hague return proceedings that the child should not be returned based on article 13 (2) of the Hague Convention, on the basis of the views of the child. The mother applied for non-recognition of the Spanish custody order before the German courts.

Initially, divorce and custody proceedings were held in Spain and provisional custody was ensured to the father. The mother moved later to Germany. Their daughter Andrea visited her mother in Germany for the school holidays in August 2008. She has remained in Germany ever since.

Following the retention of Andrea in Germany the Spanish courts issued a new decision prohibiting the child from leaving Spanish territory with her mother and removing the latter right of access.

The custody proceedings were resumed before the Spanish courts in July 2009 when the German courts had rejected the father's Hague return application at second and last instance.

At this stage, it was considered that should have been granted an expert opinion and the hearing of the minor by the court.

However, the Spanish court rejected Ms Pelz's application to be allowed to leave Spanish territory with her daughter after the findings were given, and her alternative request that the court hear Andrea and herself by video conference.

In effect these custody proceedings were therefore defective since it was

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need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with paragraph 2. Even if national law does not provide for enforceability by operation of law, notwithstanding any appeal, of a judgment requiring the return of the child mentioned in Article 11(b)(8), the court of origin may declare the judgment enforceable.

2. The judge of origin who delivered the judgment referred to in Article 40(1)(b) shall issue the certificate referred to in paragraph 1 only if: (a) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity; (b) the parties were given an opportunity to be heard; and (c) the court has taken into account in issuing its judgment the reasons for and evidence underlying the order issued pursuant to Article 13 of the 1980 Hague Convention. In the event that the court or any other authority takes measures to ensure the protection of the child after its return to the State of habitual residence, the certificate shall contain details of such measures.

The judge of origin shall of his or her own motion issue that certificate using the standard form in Annex IV (certificate concerning return of the child(ren)).

The certificate shall be completed in the language of the judgment."

unlikely that an accurate assessment of child best interests could have been made due to lack of relevant information at that time.

In December 2009, the Spanish court awarded sole rights of custody to the father. Mrs Pelz appealed the judgment and applied for permission to present new evidence at the appeal stage by requesting that Andrea would be heard by video conference, but her appeal on this latter point was refused in April 2010 because an appeal in such circumstances was not permitted by the Spanish procedure.

While these proceedings were ongoing in Spain, proceedings under the Abduction Convention were happening also in Germany. In January 2009, the local court held that Andrea should be returned under provisions of the Convention.

The court had heard Andrea in person and considered her objections against a return to Spain but did not find her mature enough for her will to be conclusive.

However, on appeal it was held that Andrea should not return based on article 13 (2) of the Convention. This is because “it had been shown that she was resolutely opposed to the return requested by her father; she refused categorically to return to Spain”<sup>192</sup>. An expert confirmed after the hearing that “Andrea’s opinion should be taken into account in light of both her age and her maturity”<sup>193</sup>.

The child was nine and a half years old and if this had been an international Hague Convention case, then this would have concluded the proceedings and Andrea could have remained in Germany.

However, in the context of Europe, Regulation N° 2201/2003 shifted the balance in favour of the courts in the state of origin with the introduction of article 42.

This allows the authorities in the state of origin to make a custody order in favour of the left-behind parent and issue a certificate requesting that the child be returned in any case. Decisions accompanied by such certificates should be automatically enforced in the state of refuge and the child must be returned.

The ECJ has thus far been determined to maintain a strict interpretation of article 42, and has insisted that any decision accompanied by such certificate is automatically enforced no matter what the circumstances<sup>194</sup>.

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<sup>192</sup> *Supra* note 190.

<sup>193</sup> *Idem*. See also ECJ, Case C-195/08 PPU *Rinau*, 11 July 2008; C-211/10 PPU *Povse v Alpago*, 3 May 2010.

<sup>194</sup> *Supra* note 190.

This is extremely unfortunate in cases such as *Aguirre Zarraga*, where a final custody decision was given by the state of origin after making no effort to hear the child, especially when that child was old enough and mature enough for her opinion to be taken into account by the German appeal court.

The hearing of the child by the Spanish court would have been clearly desirable when the decision not to return the child by the German court was made purely on the basis of that child's views.

The German court was understandably reluctant to enforce the decision accompanied certificate required by the article 42. On 28 April 2010, the local court in Germany stated that the decision of the Spanish court was not to be recognised or enforced because "the Spanish court had not heard Andrea before handing down its judgment"<sup>195</sup>.

On 18 June 2010 Mr Aguirre Zarraga appealed that decision. It is from this appeal that the preliminary reference has arisen. The German court considered that even if it had no power to review the certificate should be granted an exception "where there is a particularly serious infringement of a fundamental right"<sup>196</sup>.

The German court was also concerned about the validity of the certificate as it "contains a declaration which is manifestly false"<sup>197</sup>. This is because it affirmed that Andrea was heard by the Spanish authorities when she was not. Furthermore, the court referred the questions above for consideration by the ECJ.

The ECJ did not agree with the approach of the Advocate General Bot<sup>198</sup>. A fundamental rights' assessment in the requested court is done under article 20 of the Abduction Convention.

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<sup>195</sup> *Supra* note 190.

<sup>196</sup> *Idem*.

<sup>197</sup> *Idem*.

<sup>198</sup> *Idem*. Advocate General Bot asserted that there had been no violation of Andrea's fundamental right to be heard. He considered that it was sufficient that the German court had heard Andrea and that the Spanish court took into account her views. He also considered that the court in Bilbao was entitled to conclude that "the hearing of a child as young as Andrea by videoconference was inappropriate". It is considered, from the facts available, that Andrea was old enough and mature enough to be heard in this way. However, if she was not, then the Spanish authorities had the duty to find another suitable means for hearing Andrea under the taking of evidence Regulation. The Advocate General also states that Brussels II bis goes further than the Abduction Convention because "it provides a way out of the deadlocks that may be created by divergent assessments of the child's best interests where that assessment is carried out by the court of origin and by the requested court in light of their own fundamental rights."

If a court refuses to return a child based on article 20 of the Child Abduction Convention, then that has to be taken into consideration.

A certificate can only be issued under article 42 of Brussels II *bis* in relation to a refusal to return an abducted child under article 13 of the Abduction Convention, so in the context of article 20 circumstances, the Regulation makes no difference to the operation of the Convention.

Consequently, if states of origin insist on issuing certificates in cases without protecting the child, it may instigate a trend for states of refuge to begin ordering non-returns based on article 20 rather than article 13.

However, the Court did not explicitly state that there has been a breach of Andrea's right to be heard. The ECJ considered that there should be no derogation from article 42 if the circumstances referred to by the German court arose.

It stated that it is clear from article 42 that a decision accompanied by a certificate "is to be recognised and is to be automatically enforceable in another Member State there being no possibility of opposing its recognition"<sup>199</sup>. Therefore, the Member State of enforcement can simply declare that "a judgment thus certified is enforceable", no matter what the circumstances are.

Any questions concerning the lawfulness of the judgment can only be "raised before the courts of the Member State of origin".

The introduction of the certificate required by article 42 has completely changed the balance in favour of the state of origin. The introduction of this mechanism by the European legislature was a step too far and maybe not necessary.

The system established by the Abduction Convention has worked well in the vast majority of cases and the additional power given to the Member State of origin in the Regulation is too severe. The certificate is only meant to be used where strictly indispensable and the forcefulness and efficacy of the procedure is based on the principle of mutual trust<sup>200</sup>.

It is clear that the ECJ is eager to maintain a strict interpretation of the Regulation in all cases. However, this is questionable in this case as it is uncertain whether the mother and child will be able to contest the decision in the state of origin.

It is also regrettable that due to the framework of the preliminary ruling

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<sup>199</sup> *Supra* note 190. See also note 191.

<sup>200</sup> *Supra* note 184.

procedure under article 267 of the Treaty on the Functioning of the European Union, the ECJ could only remark regarding to the specific questions asked in relation to what the German court could have done referring the case, and not what the Spanish courts could or should have done in any possible appeal in Spain.

The Court has repeatedly observed that it will give a ruling on what strictly necessary for the referring court to decide the case before that court and not on any other hypothetical doubts.

However, if the father would appeal before the Spanish courts, then they could reference to the ECJ on the case from the Spanish courts' perspective. This unfortunately will abnormally slow down the sensitive proceedings on family and children matters.

The Court envisioned that it was possible to entrust the review the judgment to Member State of origin. This is because the system for recognition and enforcement established by the Brussels II *bis* Regulation is based on "the principle of mutual trust between Member States in the fact that their respective national legal systems are capable of providing an equivalent and effective protection of fundamental rights, recognised at European Union level"<sup>201</sup>.

It is considered that where the state of origin has already revealed an omission to provide protection of human rights, as has happened in the case in question, the ECJ should be able to override the certificate based on human rights considerations.

It is clear from the previous analysis that the Spanish authorities have violated the right of Andrea to be heard and also breached Andrea and her mother's right to a fair trial.

This was clear both from the custody proceedings and the emission of the certificate. The fact that the Spanish authorities have not heard Andrea for over two years but can in any case take a decision and issue a certificate that is automatically enforceable is unreasonable.

This is even more ludicrous because the non-return was ordered by the German judges solely on the basis of article 13 (2) concerning the views of the child. The ECJ should have recognised that there is a major deficiency with the article 42 certificate and rectified it.

At the moment *Aguirre Zarraga* is considered an isolated case; however,

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<sup>201</sup> *Supra* note 190.

the inclination of the ECJ to rely on the principle of mutual trust may create a bad custom in the future cases. If Member States of origin begin regularly to issue article 42 certificates without a proper analysis of the evidences, this may cause the article 13 exceptions to return provided by the Hague Convention to become pointless.

This will not be in the best interests of children. The exceptions were drawn by the drafters of the Abduction Convention for good reasons protecting the weak party of children abduction disputes.

Setting aside this principle would result in an automatic return of children in all cases. The approach of the ECJ lay clearly in the opposite direction of the ECHR *Neulinger* and *Raban* cases.

The two major European courts are worlds apart with regard to abduction proceedings. The European Court of Human Rights is stretching the approach and the interpretation of the exceptions drawn by the drafters of the 1980 Child Hague Abduction Convention framework and its established jurisprudence by encouraging at first glance full custody proceedings in the state of refuge.

The European Court of Justice is instead relying far too much on the principle of mutual trust, omitting to rectify human rights violations when necessary in child abduction disputes.

Each approach is extreme and both have the potential of severely harming the rights of the children and the family in cases of wrongful removal and retention.



### **CHAPTER III**

#### ***1. The model originally designed by the Hague Conference and the secondary role of the “best interests of the child” principle.***

Taking into consideration the case-law interpretations analysed in the previous chapter, the best interests of the child wrongfully removed from the place of his habitual residence by one of his parents, usually classified as international parental kidnapping, coincides with need to respect and protect his or her identity and dignity of child and also of son or daughter.

As a child, the minor considering also his/her own age and level of maturity, is entitled to independently and knowingly develop and strengthen his or her own personality in a specific cultural environment, but he/she also needs to benefit from the fundamental rights and freedoms which he or she is entitled to.

This is the reasoning behind the New York Convention on the Rights of the Child of 1989 and the value acknowledged in article 3 of the same Convention<sup>202</sup>.

As a son or daughter, the child longs for steady and caring relationships with both his or her parents, recognising the difference of role of the mother and the father after their eventual divorce or legal separation.

When a case of international child abduction arises, imposing sudden and remarkable changes in the life habit of the minor, his/her best interests acquire a different meaning. Under the apparent uniform notion, the principle of best interests of the child shows a wide concept.

In the original background of the Child Abduction Convention which largely aims to foster the judicial cooperation between the involved States and lessen the differences between national legal systems in matters of custody and access rights, the prevailing need to safeguard the physical, moral and psychological welfare of the minor clashed with the requirement of resolute solution against the phenomenon of “international parental kidnapping”<sup>203</sup>.

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<sup>202</sup> Jayme E., *Identité culturelle et intégration : le droit international privé postmoderne*, Recueil de Cours, 1995, vol. 251.

<sup>203</sup> Coester-Waltjen D., *The Future of the Hague Child Abduction Convention: The Rise of Domestic and International Tensions – The European Perspective*, New York International Journal of Law and Policy, 2000.

The system drawn within the framework of the Hague Conference deduced its success from the deterrent function provided by the mechanism of the Convention, in particular when the abducting party was the parent entitled of the right of access. In those cases, the interest of the child was usually identified with the urge of restoration of the *status quo*.

The general rule provided by the 1980 Hague Convention and implemented by the Brussels II *bis* Regulation in Europe, impose to respect the balance of family relationships as established by the authorities of the State of residence before the wrongful removal or retention occurred.

When the model originally designed ceased to exemplify the normal situation to which the Convention should apply, it became essential to straighten out the best interests of the children involved in those circumstances.

The international instruments provided by the 1980 Hague and Luxembourg Conventions drawn the principle of the best interests of the child wrongfully removed or retained abroad in perfect harmony with the solution offered by the private international law under the auspices of the Hague Conference.

The constant reference to the law of State of habitual residence of the minor described by the article 3 of the Hague Convention on the Civil Aspects of the International Child Abduction and established as a rule of jurisdiction by the EU Regulation 2201/2003 responds to the purpose of the private international law<sup>204</sup>.

The Hague Conference purposely declines the one of the primary traditional provision of international cooperation: countries' recognition and enforcement of each other's judgments.

Instead, the Child Abduction Convention poses its attention on returning the child to his place of habitual residence allowing the courts in that state to handle the matter entirely.

Preferring to encouraging administrative cooperation rather than the recognition of another state's judicial determination, the 1980 Hague Convention sought the prompt return of the child.

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<sup>204</sup> Hammje P., *L'intérêt de l'enfant face aux sources internationales du droit international privé*, Le droit international privé : esprit et méthodes. Mélanges en l'honneur d'international privé, Paris, 2005.

The prompt return of the child should also prevent the minor from becoming too integrated into his/her new environment, avoiding more complicated circumstances for competent courts.

Is quite relevant to highlight that the Hague Convention embraces habitual residence principle with regard to the competent jurisdiction criterion.

How designed originally by those international instruments, the situation in need of protection is the one legally established in place of habitual residence of the child, without any specific references regarding the moral and physical wellbeing and interests of the minor involved.

This is a consequence of the letter of the article 3 in conjunction with the article 14 of the Hague Convention, where the first one use the expression the “law of the State in which the child was habitual resident immediately before the removal or retention”, and the latter envisages that, deciding if has occurred an abduction according the article 3, “the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable”<sup>205</sup>.

It quite obvious infers that the drafters seemed to prefer to settle the objective of protection provided by the Child Abduction Convention in the moment when the wrongful removal or retention abroad happens.

The legal situation effectively taking place in the competent jurisdiction is intended to follow the relocation and illicit sequence of events involving the child due to the operation of one of the parents, consequently fulfilling the precondition of the Hague mechanism.

In the framework of the Brussels II bis Regulation, whom provisions prevail on the disposition of the 1980 Hague Convention with regard to the cases of children’s abduction within the European Union, the habitual residence criterion has lost part of its wide value discerned above and has been relegated to a common rule of jurisdiction and connecting factor<sup>206</sup>.

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<sup>205</sup> *Hague Convention on the Civil Aspects of International Child Abduction*, art 1, October 25, 1980, 1343 U.N.T.S. 89. Art. 3 and 14.

<sup>206</sup> Lowe N., *EU Family Law and Children’s Rights: A better alternative to the Hague Conference or the Council of Europe?*, in *For the Children and the European Union: Legal, Political and Research Prospective Conference*, Liverpool, 21 April 2009. See also Lowe

The legal systems of the Member States of the European Union mainly consider the law of the State of habitual residence of the child as general principle, in a coherent manner with the solutions embraced by the Hague Conference, taking into account also the disposition of 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.

Nevertheless, it does not reach the primary outcome that the reference to the competent jurisdiction may ensure.

It cannot avoid situations that the legal scholars have defined “*boiteuses*” and whom the criterion of the competent jurisdiction tried to prevent in case of conflicting custody and parental responsibility decisions, conferring upon the actual exercise of the custody and access rights the primary worth that the article 3 of the Child Abduction Convention intended to underline.

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N., *A Review of the Application of Article 11 of the Revised Brussels II Regulation*, International Family Law, 2009. Greiner J., *La protection des enfants dans la cadre d'enlèvements internationaux d'enfants: les solutions de la Hague*, in Venturini G., Bariatti S. (a cura di), *Nuovi strumenti del diritto internazionale privato*, Liber Fausto Pocar, Milano, Giuffrè, 2009. McEleavy P., *The Brussels II Regulation: How the European Community Has Moved into Family Law*, The International and Comparative Law Quarterly, 2002, Vol. 51, N° 4. McEleavy P., *The new child abduction regime in the European Union: symbiotic relationship or forced partnership?*, Journal of Private International Law, 2005, Vol. 1, N° 1. Ancel B., Muir-Watt H., *L'intérêt supérieur de l'enfant dans le concert des juridictions : le règlement Bruxelles II*, Revue critique de droit international privé, 2005 Vol. 94, N° 4. Stalford H., *Brussels II and Beyond: A Better Deal for Children in the European Union?*, in Boele-Woelki K. and Commission for European Family Law (eds.), *Perspectives for the Unification and Harmonisation of Family Law in Europe*, Cambridge, 2003.

This is made clear by the ECHR in the case *Sneersone and Kampanella v. Italy*<sup>207</sup> where the Court condemned the decision taken by the Italian Court in Rome in accordance with the article 11 paragraph 8 of the Brussels II bis Regulation<sup>208</sup>.

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<sup>207</sup> European Court of Human Rights, *Sneersone and Kampanella v. Italy*, Application N° 14737/09, Strasbourg, 12 July 2011. In this case the *Neulinger* principles were reformulated in full: “(i) The Convention cannot be interpreted in a vacuum, but, in accordance with Article 31 § 3 (c) of the Vienna Convention on the Law of Treaties (1969), account is to be taken of any relevant rules of international law applicable to the Contracting Parties. (ii) The positive obligations that Article 8 of the Convention imposes on States with respect to reuniting parents with their children must therefore be interpreted in the light of the UN Convention and the Hague Convention. (iii) The Court is competent to review the procedure followed by the domestic courts, in particular to ascertain whether those courts, in applying and interpreting the provisions of the Hague Convention, have secured the guarantees of the Convention and especially those of Article 8. (iv) In this area the decisive issue is whether a fair balance between the competing interests at stake – those of the child, of the two parents, and of public order – has been struck, within the margin of appreciation afforded to States in such matters, bearing in mind, however, that the child’s best interests must be the primary consideration. (v) “The child’s interests” are primarily considered to be the following two: to have his or her ties with his or her family maintained, unless it is proved that such ties are undesirable, and to be allowed to develop in a sound environment. The child’s best interests, from a personal development perspective, will depend on a variety of individual circumstances, in particular his age and level of maturity, the presence or absence of his parents and his environment and experiences. (vi) A child’s return cannot be ordered automatically or mechanically when the Hague Convention is applicable, as is indicated by the recognition in that instrument of a number of exceptions to the obligation to return the child (see, in particular, Articles 12, 13 and 20), based on considerations concerning the actual person of the child and his environment, thus showing that it is for the court hearing the case to adopt an in concrete approach to it. (vii) The task to assess those best interests in each individual case is thus primarily one for the domestic authorities, which often have the benefit of direct contact with the persons concerned. To that end they enjoy a certain margin of appreciation, which remains subject, however, to European supervision whereby the Court reviews under the Convention the decisions that those authorities have taken in the exercise of that power. (viii) In addition, the Court must ensure that the decision-making process leading to the adoption of the impugned measures by the domestic court was fair and allowed those concerned to present their case fully. To that end the Court must ascertain whether the domestic courts conducted an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person, with constant concern for determining what the best solution would be for the abducted child in the context of an application for his return to his country of origin.”

<sup>208</sup> *Idem*, “Even if the Court accepted the Italian courts’ theory that their role was limited by Article 11 (4) of the Regulation to assessing whether adequate arrangements had been made to secure [the child’s] protection after his return to Italy from any identified risks within the meaning of Article 13 (b) of the Hague Convention”, it cannot fail to observe that the Italian courts in their decisions failed to address any risks that had been identified

Due to the many different and conflicting judicial decision and many others provisional measures granted, according to the Italian judges, in the child's best interest, the European Court on Human Rights had interpreted the dispositions of the European Convention of Human Rights in the light of the Hague legislation, supporting the best interests of the minor in a more suitable way than the approach of the Italian Courts which however had strictly followed the provision of the Regulation.

This example reveal the weight of the juridical solutions adopted within the European Union in matters of parental responsibility, which ones, even if inspired by the necessity of judicial cooperation in civil matters in the area of freedom security and justice provided by the European Union, may bring up the international responsibility of the Member States from breach of positive obligations under the European Convention on Human Rights, with particular attention to the article 8, and create confusion in the domestic application of those provisions by the national courts.

“Taking human rights seriously requires that the Hague Convention operates not only in the best interests of children and the long-term, general objective of preventing international child abduction, but also in the short-term, best interests of each individual child who is subject to Hague return proceedings. Justice for children, even summary and provisional justice, can only be done with a view to the entirety of the very tangible case at hand, i.e. of the actual circumstances of each child involved. Only an in-depth or “effective” evaluation of the child's situation in the specific context of the return application can provide such justice. In layman's terms, Neulinger and Shuruk is alive and well. It was and remains a decision laying down valid legal principles, not an ephemeral and capricious act of “judicial compassion”<sup>209</sup>.

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by the Latvian authorities. Thus, for example, the conclusions contained in the Rīga Custody Court's report (see above, paragraph 18), the expert psychologist's report and the Rīga City Vidzeme District Court's decision of 11 April 2007 were not explicitly mentioned in either of the two decisions. It is therefore necessary to verify whether the arrangements for [the child's] protection listed in the Italian courts' decisions can be in any case considered to have reasonably been taken into account his best interests”.

<sup>209</sup> Judge Pinto De Albuquerque, Concurring Opinion, ECHR, *X v. Latvia*, Application no. 27853/09, 26 November 2013.

The European Court of Justice in *J. McB*<sup>210</sup> did not divert the solidified case-law of the ECHR and did not condemn the potential discriminatory Irish legislation in the matter of parental responsibility of single parents, but followed a mild interpretation of the articles 7 and 24 of Charter of Fundamental Rights of the European Union.<sup>211</sup>

This provision could have limited the “*boiteuses*” situations which the application of the 2201/2003 Regulation may entail, granting a more concrete protection of the minors and of the parental rights of custody and access, preventing also any gender discrimination.

The unrestrained increase of particularly difficult international child abduction cases, which not coincide with the traditional model drawn by the drafter of the 1980 Hague Convention, requests a wider and more comprehensive consideration of the wellbeing of the child before restoring the previous situation or maintaining the one following the removal or retention.

The new course of interpretation introduced both by domestic and international case-law understand and stress the substantial value of the best interests of the child, bringing the principle in the more practical aspect of the real life of the parties involved.

The principle is seen often like a bulwark against situations different from the ones traced by the international instrument aiming to avoid undermining the physical and psychological wellbeing of the minors.

There are different dispositions the drafters of Convention provided for example in the articles 12, 13 and 20 preventing intolerable and mechanical decision conflicting with the welfare of children.

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<sup>210</sup> European Court of Justice, 5 October 2010, *J. McB*, Case C-400/10, PPU.

<sup>211</sup> European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02. Art 7: “Respect for private and family life. Everyone has the right to respect for his or her private and family life, home and communications”. Art. 24: “The right 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”.

The Convention indeed required, when were designed the exceptions of the article above mentioned, the close examination of the family situation and of the healthy and safe growth and development of the minor.

In order to avoid cases of double abduction or re-abduction, which are usually perceived by the child as a double abandonment first from one and then from the other parent, both international and national courts should prefer solutions that would grant the minor an immediate steady and serene family environment without planning long term solutions which probably would not correspond with the current benefit of the child<sup>212</sup>.

In situations where is the parent entitle of the right of custody or that has mainly exercised the custody who has removed or retained the child from his place of habitual residence, the judges should take into consideration the entire family circumstances, balancing the stance of both parents and safeguarding the minor from the risk of further and upsetting changes regarding his or her life environment.

Solutions clearly oriented forward a more pressing role of the adults influencing and biasing children's education and personal development are not always in compliance with the "best interests of the child" doctrine<sup>213</sup>.

Furthermore, in this analysis, the "inchoate custody rights" doctrine is exactly collocated in this framework. Maintaining the emotional relationship established with primary caretaker *a fortiori* after one of the parents disappeared, died or ceased the effective exercise of custody rights contributes to realize in its entirely the best interest of the child<sup>214</sup>.

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<sup>212</sup> United Kingdom, England and Wales Court of Appeal, *Re C (Abduction: Grave Risk of Physical and Psychological Harm)*, [1999] 2 FLR 478, 12 February 1999. See also United Kingdom, Scotland Outer House of the Courts, *McCarthy v. McCarthy*, [1994] SLT 743, 17 November 1993.

<sup>213</sup> Harper T., *The Limitations of the Hague Convention and Alternative Remedies*, Emory International Law Review, 1995, vol. 9. See also Caldwell J., *Child Welfare Defence in Child Abduction Cases – Some Recent Developments*, Child and Family Law Quarterly, 2001, vol. 13. LeGette C., *International Child Abduction and the Hague Convention: Emerging Practice and Interpretation of the Discretionary Exception*, Texas Journal of International Law, 1990.

<sup>214</sup> Dekar C., *J.Mc.B v. L.E.: The Intersection of European Union Law and Private International Law in Intra-European Union Child Abduction*, Fordham International Law Review, 2011, vol. 34, Article 11.



A uniform key of interpretation of the international instruments which deal the phenomenon of the “international parental kidnapping” is not enough to ensure the welfare of the minors after their parents’ divorce or legal separation.

The best interests of children involved in legal wrangling in matters of custody rights should always pervade the international and domestic judges’ dispositions with a particular attention toward the singular needs on each child.

## ***2. The need for future amendment or implementation of the Convention and current position of domestic and international judges.***

Waiting for an eventual future amendment and implementation of the current international instruments provided by the Child Abduction Hague Convention in conjunction with the dispositions of the Brussels II *bis* Regulation and of the European Convention on Human Rights and New York Convention on the Rights of the Child, the judges are the figures entitled of settling the complex framework composed by rights, interests, values and feelings which drag the children unwilling in trying situations.

Indeed, both the application and interpretation of the welfare principle of the children involves several unknowns.

Often the facts of the case cannot be completely identified and there can only be discordant and dissenting evidences provided by the parents.

Even when all the information has been disclosed, it is difficult to predict where the wellbeing and best interest of the child lies. The uncertainty resulting from the abstractness of this principle can make more difficult recognise the situations in which the private interest overrides the public one and the legal dispositions.

The best interest principle is not consequentially without criticism, yet it remains rooted within both domestic law and international concepts. Despite its flaws and problems, without the application of this doctrine, the interests of the child could easily be misplaced or not given due attention.

Furthermore, it has been asserted that while uncertainty and inconsistency can be the greatest weakness of the best interest principle, they can also be its greatest strength, as they provide the flexibility and versatility necessary to deal with individual facts and concerns of the minors involved.

Despite the criticisms associated with the application of the best interest principle by the ECJ and national courts, its approach remains superior in light of the one taken by the ECHR, and allows this principle to continue to retain considerable value.

This is because the principle is assessed as paramount, regarding all other considerations as subsidiary. Domestic family law should always require the judges to start from the premise that the child's welfare will be the sole forethought and the rights of other parties will be taken into consideration only in so far as they contribute to fostering the child's best interests.

This is to be considered as a relished change as the vulnerability of children requires that the best interests principle should be given more prominence for serving as “one of the few unquestionable moral assertions”<sup>215</sup> that exists in society today.

Whether parents are separating from each other or adopting a child, the welfare principle sends a powerful message: “forget about your own rights; put the interests of your children first”<sup>216</sup>.

As this analysis indicates, the social context of the Childs Abduction Convention has changed over time and a new concern arises about the children's welfare when return is required from the competent jurisdiction.

However, so as to maintain the prompt return objective of the Convention while concurrently assuring the safety of the child upon return, the role of safe and cautious return orders needs careful reasoning and creative implementation.

A new protocol to the Convention could create the suitable mechanisms, whether they would be orders issued by the court hearing the Hague application and made enforceable in the court of the State to which the child is to be returned, or the introduction of procedures aimed at Member States cooperation facilitating the issue of mirror orders in both the requested and requesting States.

A second issue that has the potential to undermine the application of the 1980 Hague Convention is the possibility to deny return if the child objects to return according to the disposal of the article 13.

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<sup>215</sup> Ribbens McCarthy J., Edwards R., Gillies V., *Making Families: Moral Tales of Parenting and Step-Parenting*, London, UK: Sociology Press, 2003.

<sup>216</sup> Herring J., *Family Law*, Oxford, Longman Law Series, 2011.

In some cases, courts have mistakenly considered the child's views on the ultimate custody disputes, but the appropriate question is whether there is a legitimate basis for the child's objection to return for further proceedings in the state of habitual residence.

As originally conceived, this exception was designed for mature adolescents just below the sixteen-year-old limit of the article 4, and the recent orientation that takes into consideration the views of children much younger is a move in the wrong direction. Again, a protocol could provide more explicit criteria and better guidance<sup>217</sup>.

The lack of a contempt remedy in civil law countries has also meant that even when there is an order of return issued abroad, many orders are not enforced. Stronger mechanisms are necessary, including an express obligation that could be included in a new protocol.

It is explicit that a new protocol will not be a panacea for all of the flaws of the 1980 Abduction Convention. But past experiences with the Convention have provided new ideas for improving its operation, and domestic legislation introduced in single countries may offer alternatives for rethinking aspects of its implementation.

### ***3. Time consuming proceedings and the introduction of new options of disputes resolution under the framework of the Child Abduction Convention.***

Children's future and development clearly depends on the quality of their rearing. The role of the family in a minor's life and the steady presence of both parents is of paramount importance in the delineation of his best interests.

The divorce of the parents usually brings about strenuous challenges in the upbringing of their children, should be given more options regarding the resolution

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<sup>217</sup> Fourth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction *Conclusions and Recommendations*, 22-28 March 2001. See also McMillan R., *Current International and Domestic Issues Affecting Children: Getting Them Back - The Disappointing Reality of Return Orders Under the Hague Convention on the Civil Aspects of International Child Abduction*, Journal of the American Academy of Matrimonial Lawyers, 1997, vol. 14.

of the rising custody disputes and to help them handle their conflicting responsibilities<sup>218</sup>.

Children, as the most vulnerable members of society, are even more affected by international custody disputes and deserve even more consideration; the parents face multilateral endeavours in two or more legal systems exposing the children to difficult and prolonged definition of the trial and its enforcement.

Stability and restoration of the *status quo* have a paramount value especially in the early stages of children development. Consequently, time is of the essence because the life of minors cannot be wasted on years in courtrooms.

Multinational disputes, like those analysed in the previous paragraphs, based on the Hague Convention mechanism and the orders issued by different national courts point out serious problems regarding custody litigations and children are too often forced to experience long and burdensome trials in both home and foreign courts.

Unfortunately, the outcomes of the traditional application of the provisions of the Child Abduction Convention indicate that those have been unable to grant prompt and effective utility for the parties involved in custody disputes and often have exposed the children to unnecessarily long and adverse legal battles because they entail formalities and procedures.

Taking into consideration the dramatic increasing number of international family disputes in both domestic and international courts, the resolution instruments considered needs to be increased.

Due to the complexity of the modern international society and its trans borders issues, the creation of a better mechanisms is highly necessary to compose all the sides' interests.

It has been demonstrated that custody and access rights cases and their resolutions could be more swift, harmless, and economical when the parties are initially persuaded to follow mediation, arbitration, and other forms of alternative disputes resolution (ADR) thanks to private experts and also domestic and international institutions.

The existing structure of Hague Convention and the models of the proceedings drawn by the drafters is unfortunately time consuming, burdensome,

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<sup>218</sup> Schepard A., *Children, Courts and Custody – Interdisciplinary Models for Divorcing Families*, Cambridge University Press, 2004.

and emotionally draining for the parties. The introduction of alternative disputes resolution methods in the Convention would solve many of these conflicts outside of the tribunals.

The intention illustrated in the article 7 (c) of the Hague Convention, which requires cooperation among the Central Authorities “to secure the voluntary return of the child or to bring about an amicable resolution of the issues”, has not yet been embraced by the member States.

Forms of ADR should have been explicitly included, regulated and followed by procedural guidelines.

Provisions concerning the choice of the process model, including mediation and arbitration, should be taken into consideration with regards a future implementation of the 1980 Hague Convention. The main objective of such dispositions should be to propose and encourage more amiable composition of family litigations.

Due to the well-documented and substantiated experience, legitimacy, recognition and stability of the Hague Convention on the Civil Aspects of International Child Abduction, it is within this mechanisms that ADR should be introduced to dim the complexity of international child custody matters.

ADR introduced as part of a new protocol of the Convention would grant the international legal actors to adopt well-established and verified options of disputes resolution from previous experiences of national models, allowing more successful conciliation of dissenting interests involved in transnational custody cases.

The Permanent Bureau of the Hague Conference, which is responsible for administrative matters of the Child Abduction Hague Convention, recently overviewed the disappointing facts and statistics regarding international child custody and pertaining litigation, and initiated actions to implement ADR, especially mediation, into the procedural framework of the existing treaty<sup>219</sup>.

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<sup>219</sup> Permanent Bureau of the Hague Conference, *Preliminary Document No 5 of October 2006 for the attention of the Fifth meeting of the Special Commission to review the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, (edietd by Sarah Vigers).

The Permanent Bureau also provided also a *Guide to Good Practice* that points out the benefits that mediation and other forms of ADR would bring to the structure of the 1980 Hague Convention<sup>220</sup>.

### ***3.1. Expedience of an Alternative Disputes Resolution protocol.***

The main aims of the 1980 Hague Convention are to supply juridical guidance to protect children from the detrimental effects of abduction and retention across international boundaries by providing procedures to ensure minors' prompt return, as well as to secure parents' protection for rights of access to children.

The treaty drafted under the auspices of Hague Conference reflects the well-established codification of the basic principles of international comity and reciprocity.

However, one of the major objectives of the Hague Convention is to limit parents' temptation to abduct a child during a custody dispute, maybe hoping to get a more favourable custody decision before a different national family court.

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<sup>220</sup> The Hague Conference on Private International Law Permanent Bureau, *Guide to Good Practice Under the Hague Convention 25 October 1980 on the Civil Aspects of International Child Abduction – Mediation*, 2012. Under the Context section it exemplifies "Some typical factual situations [that] may illustrate the usefulness of mediation in international family disputes concerning children under the 1980 Hague Child Abduction Convention. In the context of international child abduction, mediation between the left-behind parent and the taking parent may facilitate the voluntary return of the child or some other agreed outcome. Mediation may also contribute to a return order based on the consent of the parties or to some other settlement before the court.

Mediation may also be helpful where, in a case of international child abduction, the left-behind parent is, in principle, willing to agree to a relocation of the child, provided that his/her contact rights are sufficiently secured. Here, an agreed solution can avoid the child being returned to the State of habitual residence prior to a possible subsequent relocation. In the course of Hague return proceedings, mediation may be used to establish a less conflictual framework and make it easier to facilitate contact between the left-behind parent and the child during the proceedings. Following a return order, mediation between the parents may assist in facilitating the speedy and safe return of the child. At a very early stage in a family dispute concerning children, mediation can be of assistance in preventing abduction. Where the relationship of the parents breaks down and one of the parents' wishes to leave the country with the child, mediation can assist the parents in considering relocation and its alternatives, and help them to find an agreed solution.

But it has been observed that, in general, trying to achieve this goal, the “best interests of the child are not taken into account because the judge rules only on the jurisdictional issue”<sup>221</sup>.

The best interests anyway are in many cases only assessed when an article 13 defence is taken into account. It is often too late in the legal process to save the child and the family from the unnecessary extent of disputes and exposure to emotional distress.

Alternative Dispute Resolution may represent a useful deterrent to the temptation of wrongful removal and retention. The provision of ADR would offer the possibility to evaluate the child’s best interests and, subsequently, it should be offered as soon as a request has been submitted<sup>222</sup>.

Under the Hague Convention, Central Authorities are empowered as the administrative and representative organs of the signatory states.

Their function and placement within the national governmental structure may vary, but in general, they are designed as an active facilitator. Central Authorities have the main responsibility for processing the application of wrongfully retained or abducted children and may act as independent, quasi-judicial figures whose function is to give confidential advices to the judges, assist the courts and represent the interests of those under legal ability.

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<sup>221</sup> June Starr, *The Global Battlefield: Culture and International Child Custody Disputes at Century’s End*, Arizona Journal of International & Comparative Law, 1998, vol. 15.

<sup>222</sup> *Supra* note 220. “Consideration of the interests and welfare of the child. Given that the outcome of mediation in parental conflicts on custody and contact directly affects the child concerned, mediation needs to take the interests and welfare of the child into account. Of course, mediation is not a directive process; the mediator only facilitates communication between the parties, enabling them to find a self-accountable solution to their conflict. However, the mediator: ‘should have a special concern for the welfare and best interests of the children, should encourage parents to focus on the needs of children and should remind parents of their prime responsibility relating to the welfare of their children and the need for them to inform and consult their children’. Also, the Principles for the Establishment of Mediation Structures in the context of the Malta Process recognise the importance of this point by stating that parents should be assisted with reaching an agreement ‘that takes into consideration the interests and welfare of the child’. Taking into account the interests and welfare of the child concerned does not only give due importance to the rights of the child, but may also be decisive when it comes to giving legal effect to the mediated agreement. In many States, parental agreements relating to parental responsibility will need to be approved by the court ensuring that the agreement is compatible with the best interests of the child concerned.”

Their position allows them to exercise the capacity for cooperative and collaborative actions with each other, and they should be considered as suitable starting point and driving force for the implementation of ADR in Hague cases.

For the purpose of providing uniformity and stability, the administrative body of the Hague Convention, the Permanent Bureau, has released a Guide to Good Practice for the use of Central Authorities<sup>223</sup> which outlines the model practice of these organs, explains the formation of applicable rules concerning child custody policy, and directs countries to adopt certain uniform provisions.

It does not, however, mention anything about ADR and it is precisely where ADR needs to be implemented.

There is a “great deal of uncertainty concerning the process, as well as the potential for competing jurisdictions”<sup>224</sup>.

The lack of sufficient specificity regarding the treaty interpretation is caused mainly by this insecurity; each Central Authority may read the Hague Convention differently, coming to a different result in the determination of a “habitual residence” of a child and a standardized methodology concerning the creation of appropriate contact orders. This insecurity could be lessened by a consistent application of ADR.

Also, because the Hague Convention only ponders jurisdictional facts but not best interest facts, many cases could be addressed to the wrong forum.

While significant progress has been made in the matter of international child abduction, the jurisdictional selection process needs considerable improvement.

Factors such as domestic violence, the hostility of the environment to which the child is returned, and discriminatory practices of the national courts are usually not considered in the determination of jurisdiction, but would be under an ADR model.

The Hague proceedings often do not offer closure or permit the child to lead a healthy life in a stable arrangement. Some of the most crucial aspects of a young life are undermined by lack of steadiness and balance in the current legal processes.

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<sup>223</sup> The Hague Conference on Private International Law Permanent Bureau, *Guide to Good Practice Child Abduction Convention: Part I – Central Authority Practice*, 2003.

<sup>224</sup> The Hague Conference, Practical Operation Documents, *Transfrontier Access/Contact and the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. A Preliminary Report*, Preliminary Doc. N° 4, February 2001.



The Hague Convention does not contain measures that could deal with the most common difficulties of custody disputes and favour healthy and responsible parties relations.

### ***3.2. Practical considerations on the prospect of an ADR protocol.***

The implementation of an ADR protocol would be best achieved by developing on the current structures of international law, especially the Hague Convention.

The introduction of ADR should be voiced at the discussion tables of the Hague Conference, which among other activities, produces legal international instruments like the Child Abduction Convention.

It should encourage and facilitate an ADR initiative because it maintains close contact with the governments of the signatory states.

Following the mandatory negotiations among government representatives and the necessary preparatory research performed by the Secretariat, the efforts should be directed to draft and implement an ADR protocol.

A special commission consisting of governmental experts could represent the best solution to prepare preliminary drafts of this ADR protocol.

“The promotion of ADR is also the responsibility of the government delegates of the signatories States of the Child Abduction Convention; after all, they should be aware of the success that ADR has had on the domestic level. The governmental experts who participate in the creation of legal instruments in the special commissions should be attentive to the lessons from the national and regional examples. Additionally, the previously mentioned Guide to Good Practice should include a significant section concerning ADR, urging the members to implement mediation and arbitration systems under Hague Convention proceedings. Likewise, Central Authorities should be more active as educators for judges and practitioners, particularly in the early years after ratification, for example, by distributed expert literature and providing training sessions”<sup>225</sup>.

Using the Hague Conference drafting and implementation method, an ADR protocol concerning child custody should be added to the Hague Convention, be presented to the Central Authorities, and adopted by signatory states.

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<sup>225</sup> Pawlowski R., *Alternative Dispute Resolution for Hague Convention Child Custody Disputes*, Family Court Review, 2007, vol.45, n° 2.

A protocol procedure, which is a standard means of implementation of proposals at the Hague Conventions, should be directly incorporated into the articles of the present text of the Convention and appended in an elaborated format as a separate instrument.

This appendix should comprehensively define ADR by listing the various methods of dispute resolution, as well as state the purposes it aims to achieve.

It should also include detailed and flexible *modus operandi* and a set of rules of procedure, among which the priority of non-judicial conciliatory settlements is stressed. These provisions should incorporate clear language to the effect that mediation and/or arbitration are mandatory forms of dispute resolution.

Another way to include ADR options is to add a separate article to the text of the Hague Convention.

It should refer parties to a special ADR guide to be attached to the Hague Convention, which would spell out the details of the mediation and arbitration mechanisms, such as procedure, selection of mediators, payment of expenses, and other intricacies.

This instrument does not need to forego of the well-established court adjudication measures and jurisdictional directive that the Hague Convention provides; ADR, in the international child custody context, should function in synergy with court adjudication on a selective basis.

It should be strongly recommended as a solution of first resort and provide incentives to parties for its use. Before the child is exposed to courts, a good faith attempt must be made in the direction of amicable resolution.

The placement of authority within the Hague Convention will give this extrajudicial dispute resolution arrangement the requisite legitimacy because this ADR protocol must function under a *bona fide* authority in order for countries to be willing to relinquish the rights of parties to have disputes heard in their domestic courts and give deference to such private processes.

The Hague Convention is the ideal channel to bring forth the adaptation of ADR across borders. Moreover, an ADR protocol will further the spirit of cooperation with countries outside of this treaty.

Mediator and arbitrator codes of selection and ethics can subsequently be drafted and implemented to monitor the work of third party neutrals. Mediators and arbitrators can be selected and scrutinized just like on the domestic levels. In fact,

there are several model sets of rules that can be applied, some of them particularly adaptable to family disputes.

The human costs must be the principal consideration in this matter. They unquestionably outweigh the financial or re-organizational sacrifice, which, in the long run, on a scale of the social aggregation, will fall anyway.

All post-divorce international child custody disputes share common themes: prolonged legal proceedings caused by the novelty of the issues presented at the national courts which are more adapt at adjudicating domestic cases, inflexible and unyielding custody orders with poor visitation plans, unnecessary emotional burdens on the child and the parties, and extensive non-compliance to court orders.

In order to escape these conditions, Hague Convention ADR processes must be made available to the claimants of parental rights.

As in the examples of domestic systems, ADR processes are often more efficient, flexible, less expensive, and allow more party control.

They foster cooperation and harmony by allowing the parties to work together with a neutral third party to resolve the dispute and mutually agree to a remedy. Most importantly, participants have reported a high degree of satisfaction with extrajudicial settlement because they save precious time in the life a child.

Signatories of the Hague Convention should adopt the abovementioned qualities of the national systems.

In particular, the applications of mediation and arbitration in the United States should be embodied in the international ADR<sup>226</sup>.

The European cooperation on all levels is also illustrative of how the Hague Convention signatories should collaborate to create ADR processes especially

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<sup>226</sup> Over the last two decades, American courts have increasingly adopted rehabilitative methods, in child custody disputes by incorporating coordinated interventions involving non judicial personnel and using therapeutic justice to promote positive change in an era of mass divorce. Simultaneously, it can clearly observe a trend of successful implementation of effective ADR practices and methods in child dispute cases. Various ADR processes, most notably mediation and arbitration, have been employed to ameliorate the transformations that families go through after divorce. Recently, a new invention of psychologist parent coordinators, who function as a combination of mediator, arbitrator, and educator, has been gaining popularity. These ADR processes also facilitate the adoption of Differentiated Case Management Plans, which are indented to intervene early in contested domestic cases so that parties are given multiple opportunities to avoid litigation.

because European efforts have already given rise to many bilateral and multilateral agreements that include ADR provisions<sup>227</sup>.

All of these lessons need to be incorporated into an ADR protocol which, when issued by the Hague Conference and adopted by signatory states, can have a major impact on the practice of nations in resolving child custody disputes.

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<sup>227</sup> At the EU level, the European Council and the European Commission have worked to harmonize policies and encourage EU member states to adopt common family law standards and programs. In 2002, the European Commission adopted a Green Paper on ADR which makes a significant distinction between ADR conducted by the court or entrusted by the court to a third party and emphasizes the function of ADR “as a means of achieving social harmony and its political priority.” The EU has also sought, through the enactment of the different Brussels Regulations, to create ADR based on a system of cooperation between Central Authorities which can be called upon to play an active role when it comes to guaranteeing the effective exercise of parental responsibility, including through the promotion of ADR. Other ADR developments followed, like the creation of a European Code of Conduct for Mediators.

## ***CONCLUSION***

The analysis developed in the previous chapters offers different point for a further consideration of the protection of the best interests of the child subject of an international child abduction.

The combined analysis of the international instrument available and the case-law of both domestic and international courts has showed a system that has some remarkable flaws which may undermine the effectiveness of the protection of the welfare and well-being of the minors involved.

The international idea of family and parenthood, caused by the increasing mobility and trans-border entanglements of the existing global society, has drawn a different concept of “best interests of the child”.

When a child is abducted or retained abroad by one of the primary carer, whatever is the decision taken or the proceeding applied in this regard, the wrongful and undeserved consequences for the physical and psychological development of the minor involved are often unresolvable *ex post*.

If the return is issued the child is again eradicated from the place where he has settled down in the meantime with the possibility of losing any future relationship the parent abductor, while if the request of prompt return is rejected the illicit situation created by the wrongful removal or retention become permanent.

The explicit disagreement and conflict between the parents during what are usually draining and exhausting legal disputes also affects the life and rearing of the child.

The flaws and blanks of the legislation and existing international instruments create complications and difficulties with regards to the protection of the fundamental rights or the children.

Considering the efficiency of the Convention, it is generally recognised its importance and usefulness.

A considerable proportion of the doctrine nevertheless advance a number of points of concern in respect of the functioning of the “return mechanism” scheme<sup>228</sup>.

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<sup>228</sup> Kruger T., *International Child Abduction: The Inadequacies of the Law*, Oxford, Hart Publishing, 2011. Trimmings K., *Child Abduction within the European Union*, Oxford, Hart Publishing, 2013.

Profound criticisms are moved against the approach mainly adopted by the Hague Convention, and *a fortiori* by the Brussels II *bis* Regulation, and concern the scarce attention paid by the regimes in force to the letter and spirit of the United Nations Convention on the Rights of the Child<sup>229</sup>.

The circumstance that violations of article 8 of the European Convention on Human Rights are claimed both by abductors and by left-behind parents reveals the weaknesses and flaws of the current “prompt return” mechanism.

In particular, it has been pointed out that the sole technical approach, based on private international law, may not represent an adequate instrument of protecting the best interests of the child involved.

Also, it seems unfitting to force judges to abide to merely procedural reasoning, i.e. the return of the child on grounds of a certificate, in cases where the judge could have access to information encouraging him/her to go beyond the mere procedural issue of the return and to protect the best interests of the child.

Furthermore, as observed *supra*, this mechanism presupposes that there is trust and cooperation between the two judges seized of the case, which is not always true in concrete situations.

An amendment and implementation of the 1980 Hague Convention itself, clarifying and amplifying the enforcement mechanism and instruments available, would be beneficial to avoid further decisions which often do not take into account non-procedural aspects that may directly involve the welfare and wellbeing of children.

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<sup>229</sup> Dutoit B., *Le droit international privé de la famille et les droits fondamentaux de l'enfant: le choc qui fait chic?*, in Permanent Bureau of the Hague Conference on Private International Law (ed), *A Commitment to Private International Law/ Un engagement au service du droit international privé*. Mélanges en l'honneur de Hans van Loon, Cambridge, Intersentia, 2013. Bucher A., *L'intérêt de l'enfant pénètre la Convention sur l'enlèvement, in Vers de nouveaux équilibres entre ordres juridiques*, Liber Amicorum, Hélène Gaudemet-Tallon, Paris, Dalloz, 2008. See also Schuz R., *The Hague Child Abduction Convention and Children's Rights*, Transnational Law & Contemporary Problems, 2002, vol. 12.

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## ***SUMMARY***

In our increasingly mobile world, family relationships and problems often span national borders. These trans-border entanglements pose challenges both for individuals and legal regimes. A more global integrated society has led to an increasing number of binational marriages than ever before. The result is children born to couple with potentially divergent ethos when it comes to child rearing and a disparate dual citizenship to match.

When binational marriages dissolve, or a different dissolution of the household of two adults, one parent may decide to leave the country with the child in hopes of escaping child custody decision or to seek more sympathetic forum. The resulting situation can lead to endless research and prolonged litigation with emotional trauma that has a devastating effect on children and families.

There are different factors that may cause the surfacing of the risk international abduction of minors by their own parents. Creating a workable, healthy relationship between parents regarding the rearing of children is never an effortless undertaking. An infinite numbering of reasons can lead a parent or a family member to take the drastic decision of abducting a child.

The venom and the greed between parents over the best interest of their children can often lead to negative outcomes. Of these, child abductions are unfortunately a not uncommon occurrence when parents fail to reach an agreement. With the addition of a divorce settlement and children custody arrangement, a further strain in the parents' relationship may arise.

Due to the serious ramifications resulting from international child abductions, there is a protracted history of government actions to curtail the practice. The first international response to protecting the rights of children came in 1959 with the UN Declaration of the Rights of the Child. While not acquiring the force of law, the declaration did create principles that would guide subsequent international child abduction instruments. Great importance assumes the adoption of the "best interest of the child" standard by the declaration. The declaration states that "The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally,



morally, spiritually and socially in a healthy and normal manner and in condition of freedom dignity”<sup>230</sup>.

In the late 1970s, as a result of growing awareness of the phenomenon of child abduction by a parent, nations sought to address this issue through the creation of the 1980 Hague Convention on the Civil Aspects of the International Child Abduction. In 2016 more than ninety nations are parties to this treaty, which aims to “protect children from the harmful effects of abduction and retention across international boundaries by providing a procedure to bring about their prompt return”<sup>231</sup>.

Almost thirty years later, by adopting the EC Regulation 2201/2003, the European legislator has enriched international procedural law in child matters by a further European dimension. The Brussels II bis Regulation, which contains provisions on jurisdiction, recognition and enforcement of judgments given by the courts of other Member States, implements the national and international rules and on the other hand, the Regulation also overrides them.

The unification of the procedural rules for cross-border child matters by EU legislation has entailed the great advantage that the CJEU can support Member State courts by interpreting the Brussels II bis Regulation through preliminary rulings and, hence, unlike the pertinent international conventions, the Regulation is applied uniformly throughout the EU, at least theoretically.

However, it is a common knowledge that in child matters the time is a remarkable factor: cross-border child disputes are a race against the time, as also the Brussels II bis Regulation stresses notably by requiring Member State courts to render a decision within six weeks in international child abduction cases.

The European Convention on Recognition and Enforcement of Decision concerning Custody of Children adopted the May 20<sup>th</sup> 1980, also known as 1980 Luxemburg Convention, born thanks to the collaboration within the Council of Europe by a committee of governmental experts under the authority of the European Committee on Legal Co-operation, is an order based Convention. It in fact differs

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<sup>230</sup> General Assembly Resolution 1386 (XIV), 1959.

<sup>231</sup> Hague Conference on Private International Law, The Child Abduction Section, Elisa Pérez-Vera, *Preparatory Work*, 1980.

from the Hague Convention insofar as its object is based on the recognition and enforcement of decisions relating to custody and access.

Under the Hague Convention there is no need that a decision with regard to custody matters was made in the requesting State for the receiving State to have jurisdiction to ensure an order for the return of the child.

The Convention aims to preserve the family's stability and the decision taken into consideration by the competent national authorities. Therefore, even a superficial comparison between the two international instruments shows that the Hague Convention considers a much wider category of national decisions as basis of the proceedings established under its own provisions. The rules of the Luxemburg Convention instead are based on the previous adoption of a judicial or administrative decision that deal with the custody rights of the parents.

The Hague Convention has also precedence on cases of wrongful removal or wrongful retention of children and on the application for their return.

The thinking of the drafters of the Child Abduction Convention has always been primarily in terms of the more traditional concepts of parental rights and welfare of the children, rather than the rights of the child. The main challenge for them was to find an appropriate reconciliation between the need to promote the wellbeing of the specific child and the need to promote the welfare of children generally by deterring abduction. In this circumstances they were undoubtedly influenced by their concern to uphold parental rights, to do justice between the parents, to uphold the rule of law and also by the Private International Law objective of ensuring that adjudication should take place in the *forum conveniens*.

The Preamble of the Hague Convention explains that the rationale behind its objectives is the belief that the best interests of children are paramount in family and custody matters. The objective of prompt return is based on the precondition that the welfare of children is best promoted by reversing the effect of abductions as quickly as possible for three reasons. Firstly, this will reverse the harm often caused to children who are suddenly removed from their environment. Secondly, the knowledge that return will be ordered is likely to deter potential abductors. Thirdly, the child's interests can best be protected by litigation in the *forum conveniens*, which will usually be the place of the child's habitual residence.

Whilst it is clear that the premise that prompt return promotes the child's welfare, that will not be true in every single case and any attempt to ascertain this automatically jeopardizes all cases.

Thus, the drafters believed that, since the premise was true in the vast majority of cases and that the exceptions provided adequate safeguards against real harm being caused, mandatory return was the most effective method of protecting most children. The second objective overlaps the first: in the most of cases prompt return will ensure also the respect for the rights of custody and access in the country of origin. However, it is in addition to the first one that it applies even where there has been no wrongful removal or retention.

Focusing on the child's rights gives the opportunity for a meaningful relationship with both parents, the right to maintain his cultural identity, the right to live in environment to which he or she belongs and the right to participate in the decisions concerning himself or herself. However, a children's rights approach would marginalize the objective of deterring child abduction because of public interest, even where it is designed to protect children in general, it cannot justify the violation of the individual child's rights.

The drafters of The Hague Convention sought to deal with this reality by creating a mechanism for cooperation between the judicial and administrative branches of the parties to the Convention, in order to promote the promptly return of children taken from their place of habitual residence. The Hague Convention mandates the judicial or administrative authorities in the state to which the child has been wrongfully removed or retained to order the immediate return of the abducted child to the state of his habitual residence prior to the abduction, unless is verified one of the narrow exceptions stated by the Convention.

This mechanism recognizes past decisions of local authorities in those jurisdictions regarding the custody and the future of abducted children. It also demonstrates mutual respect for the laws of the member States, and endeavours to deter those parents who may otherwise attempt to take the law into their own hands.

As its own title dictates, the 1980 Hague Convention on the Civil Aspects of International Child Abduction only addresses abduction that reach across borders and the civil, non-criminal, remedies available. Although the Convention does not expressly state in any provision the international nature of the situations envisaged, such a conclusion derives as much from its title as from its articles.

The Convention deals with the removal of a minor from the place of his or her habitual residence<sup>232</sup> by one of his or her parents or a family member, but also with the refusal to restore a child to his/her own environment after a stay abroad to which the person exercising the right of custody had consented.

In both cases the child is taken out of the family and social environment in which his/her life had developed and the person who is responsible for his/her removal often hopes to obtain a right of custody from the authorities of the country to which the child has been taken.

The conduct described changes the family relationships which existed before, or after any judicial decision, by turning the child in an instrument and primary victim of the situation. However, the difficulties in establishing within the framework of the Convention directly applicable jurisdictional rules resulted in the method of the prompt return being followed, which even as an indirect one will allow in most cases a final decision on custody taken by the authorities of the child's habitual residence prior to his or her removal.

While the prompt return of the child answers to the desire of re-establishing a situation unilaterally and forcibly altered by the abductor, the effective respect for the rights of custody and access belongs on the preventive level that the Convention wish to implement.

Close to the second point made in the article 1 is the general duty sets upon the Contracting States. It is a duty which, unlike obligations to achieve a result which are common occurrence in conventions, does not require actual results to be achieved but merely the adoption of the necessary attitude to reach the required accomplishment. Such behaviour required of the contracting States is expressed in the article 2 where it solicits the States to "take all the appropriate measures to secure within their territories the implementation of the objects of the Convention".

The Contracting States should draw from such rules the inspiration in resolving problems similar to those which the Convention usually deals, but which may not fall within the scope *ratione personae* or *ratione materiae*. The same attention should be lead in the examination of the Convention's rules whenever a

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<sup>232</sup> Although the Abduction Convention does not specifically state that the return should be to the country of habitual residence, this is the interpretation that has generally been given. See also Schuz R., *Policy in the determining the Habitual Residence of a Child and the Relevance of Context*, Journal of Transnational Law, Logistic and Policy, 2001, vol. 11.

State decides to change its own internal law that may influence the rights of custody or access.

The last sentence of the article 2 - “For this purpose they shall use the most expeditious procedures available.”- stress the necessity, in matters that may have repercussions on the rights and lifestyle of children, of speedy procedures even though it does not impose an obligation upon the States to develop new ones into their internal law.

The analysis of the best interest of the child requires a personalized research into the interests of every single child that may be subject to the application of the 1980 Hague Convention’s rules.

It is quite clear that the matter which the Convention has tried to regulate in any depth is the return of the minor wrongfully removed or retained. That is because the most distressing situations arise only after the unlawful retention of a child and they are situations which, while requiring quite urgent solutions, cannot be resolved unilaterally by any one of the legal systems concerned. Of course, is necessary to understand in all its perspectives when the duty of return of the child arises and in which extent. According to the article 3 it only arises when the removal or the retention of the child is wrongful in terms of the Convention.

It is obvious that for any unilateral change in the *status quo* to be considered wrongful according to the article 3 the focus has to be put on the relationships the Convention aims to protect. Those are based on the prior existence of a right of custody attributed by the State of habitual residence of the child - the juridical element - and the actual exercise - the factual element - of such custody before any removal action.

Article 5 defines repeatedly in the draft terms as “rights of custody” and “rights of access”. A right of custody is any right relating to the care of children, particularly the right to determine a child's residence, whereas a right of access includes the right to take a child for a limited time away from the child's habitual residence. These rights represent “an identifiable legal link between an individual and a child. If either right is breached, the legally responsible individual who has been disadvantaged will be able to petition for its restoration”<sup>233</sup>. This enables a restoration of the status quo in the child's interests.

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<sup>233</sup> Beaumont P., McEleavey P., *The Hague Convention on International Child Abduction*, Oxford, Oxford University Press, 1999.

The article 12 fulfil one of the essential role of the Convention specifying those situations in which the judicial or administrative authorities of the State where the child is located have to order the return of the minor. That is the reason why it is appropriate to underline the fact that the compulsory return of the child depends, in terms of the Convention, on a decision taken by the competent authorities of the requested State. Consequently, the obligation to return a child is laid upon these authorities.

The second paragraph of the article 12 states “The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment”.

It provides an affirmative defence that can be preferred by the abducting parent to prevent the return of the children to place of origin. The rationale behind the defence envisages that when a child has settled in a new context and environment, the forced return might cause further distress and affect the minor wellbeing, accentuating the damage produced by the previous relocation. Subsequently, it is clear that if a child has adjusted to his/her new environment after the removal, his or her return should take place only after the examination of the merits of the custody rights and the extent of the integration of the child.

With regard to the article 13, it states “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 a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that 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. In considering the circumstances referred to in this article, the judicial and administrative authorities shall take into account the information relating to the

social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.”<sup>234</sup>

The introduction of the first paragraph imposes the burden of proving the facts states at the point a) and b) on the person, institution or organization who opposes the return of the minor, not necessarily that person being the abductor.

However, the proof that the custody was not actually exercised does not fulfil the requirements for the exception if the designed guardian was not able to exercise that his rights because of the actions of the abductor. At the same time, some demeanours of the guardian may also alter the abductor's action in case he has agreed to the removal which he now seeks to challenge.

The exception contained at the point b) of the article 13 deals with situations where there has been an international child abduction according to the provisions of the Convention, but the return of the child would be contrary to his/her own interests.

Because the “grave risk of harm” and the “intolerable situation” were not defined by the drafters in the Hague Convention, courts have always had problems to come up with uniform definitions in order to follow the intention of the drafters.

Indeed, the court considering the return petition still retains the discretion of whether or not grant the return order; this is enlightened when the drafters preferred to provide that “the requested State is not bound to order the return of the child” rather than a clause dictating that the State must not order the return of the child. This discretionary language is not lost on courts, favouring return orders sometime even against the single child's own interest.

Another possible exception to the return of the minor is provided by the article 20 of the Convention which declares that “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”.

The problem of international child abduction was already dealt with by the 1980 Hague Convention which all Member States of European Union have signed. The inclusion of the international abduction of children within the scope of the EU Regulation 2201/2003 was therefore object of deep discussion and resulted in compromise provisions.

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<sup>234</sup> *Supra* note 16, art. 13.

The Convention remains in force between the Member States and it is considered the legal basis for the proceeding regarding the prompt return of the minor. However, the Brussels II bis Regulation has precedence where its provisions alter those contained in The Hague Convention<sup>235</sup>. This creates a complex legal arrangement but the scope is to build on and develop the principles provided by the Convention.

The provision of the Regulation, as well as those of the Hague Convention on the Civil Aspects of International Child Abduction, apply to those cases in which a parent requests the return of the child to the authorities of the Member State of the habitual residence of the minor at the moment of the illegal removal. However, the Convention is based for this purpose on the cooperation between the Central Authorities of Contracting States, while the Regulation relies on a strict repartition of jurisdiction between the State of origin and the State of enforcement.

Unlike the former Regulation<sup>236</sup>, the Brussels II bis Regulation contains conflict-of- jurisdiction rules on matters of parental responsibility that apply to all children, including those born from non-married couples, who are habitually resident in one of the Member States of the Union at the time the court is seized.

The mechanism of the Regulation is based on the need of deterrence. It provides that child abduction may only be counteracted by the rigid, systematic and rapid reaction of the States involved, in order to make child abduction totally useless.

The “best interests of the child’s” doctrine is usually identified as a guideline for both the legislators and the judges with the intent of suggest and recommend a juridical solution with regard to the disputes involving minors.

The best interests principle sends an important symbolic message to society regarding the significance and vulnerability of children. It ensures that an important group within society unable to advocate for their own rights is protected by the law.

However, is not easy to identify a univocal and unambiguous meaning of the terms due to the wide and vague spirit of the expression. The term generally refers to the deliberation that courts undertake when deciding what type of services,

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<sup>235</sup> *Idem*, art. 60 (1)(e).

<sup>236</sup> The Brussels II bis Regulation repeals the Regulation No 1347/2000, which had a more limited scope. See *Council regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses*, OJ [2000] L 160/19.



actions, and orders will best serve a child as well as who is best suited to take care of a child.

Best interests determinations are generally made by considering a number of factors related to the child's circumstances and the parent or caregiver's circumstances and capacity to parent, with the child's ultimate safety and wellbeing as the paramount concern.

Even if someone considers an advantage allowing the courts to decide according to not strictly juridical standards, it may also represent a limit conditioned and influenced by cultural, ethical and religious aspects which may cause a discriminatory approach in the case law and tenet.

The best interests of the child principle is considered in the family law a general clause designed by the legislator for the judges who deciding the real case may modify and conform the necessities and requirements to the minor's best interest. Therefore, it is a universal standard accepted in the national legislations and translate by the courts into the best solution for the child's wellbeing.

Professor Perez-Vera pointed out that in the Preamble's recital the signatories are "firmly convinced that the interests of children are of paramount importance in matters relating to their custody" and it reflects the philosophy of the Convention, which she defines as: "the struggle against the great increase in international child abductions must always be inspired by the desire to protect children and should be based upon an interpretation of their true interests".

Recent case-law from the European Court of Human Rights (ECHR) and the European Court of Justice (ECJ) is inclining the balance and creating discrepancies among the need of uniform interpretation of the Hague Convention on the Civil Aspects of International Child Abduction.

The ECHR is indeed placing more emphasis on the best interests of the child involved encouraging "an in depth-examination of the entire family situation" in abduction proceedings.

On the other hand, the ECJ is laying more reliability in the principle of mutual trust, not ensuring adequate protection for the best interests of minors.

Further, it would be wiser for these two major European courts to not proceed in complete isolation and be more aware of each other's judgments. This is especially true now that there is potential for the European Union to accede to the European Convention on Human Rights, which entails that the decisions of the

ECJ could be subject to the review by the ECHR.

The two major European courts are worlds apart with regard to abduction proceedings. The European Court of Human Rights is stretching the approach and the interpretation of the exceptions drawn by the drafters of the 1980 Child Hague Abduction Convention framework and its established jurisprudence by encouraging at first glance full custody proceedings in the state of refuge.

The European Court of Justice is instead relying far too much on the principle of mutual trust, omitting to rectify human rights violations when necessary in child abduction disputes.

Each approach is extreme and both have the potential of severely harming the rights of the children and the family in cases of wrongful removal and retention.