

Cross-Border Parental Child Abduction in the European Union: Hearing the Child's Voice

Elodie Fernandes

Master Thesis

Tutor: Ana Quiñones Escámez

LL.M European and Global Law - Universitat Pompeu Fabra

2021-2022



As international parental abduction cases are often reported in the press and media, society tends to empathise with the victimised parent. Although the left-behind parent suffers the consequences, the child remains the main victim of parental abduction. This paper addresses cross-border parental child abduction within the European Union from the perspective of the child. The aim is to develop the way in which the child's opinion is gathered during the procedure before assessing its consideration by the judge.

TABLE OF CONTENT:

ABREVIATIONS	5
INTRODUCTION	6
1. A child victim in the middle of a conflict between an abducting parent and a parent deprived of his/her rights	6
2. Notion of abduction.....	7
2.1. Civil and Criminal aspects.....	8
2.2. Wrongful removal and retention.....	9
3. Figures on International Parental Child Abductions	10
4. Research question and methodology	11
CHAPTER 1: LEGAL FRAMEWORK OF CROSS-BORDER PARENTAL CHILD ABDUCTION	13
1. Legal norms prioritizing the return of the child to his or her country of habitual residence	13
1.1. Hague Convention of 25 October 1980.....	13
1.2. Brussels II Regulation	15
2. Legal standards prioritizing the best interest of the child	17
2.1. United Nations Convention on the Rights of the Child of 1989 (UNCRC)	17
2.2. European Court of Human Rights	18
3. The best interest of the child and speed of the procedure: a difficult articulation	20
CHAPTER 2: PLACE OF THE CHILD WITHIN THE PROCEDURE OF CROSS-BORDER PARENTAL CHILD ABDUCTION	23
1. The rights of the child in civil proceedings concerning him/her.....	23
1.1. Right to be heard.....	23
1.1.1. Specific standards regulating International Parental Child Abduction.....	23
1.1.2. General standards relating to fundamental rights and freedoms.....	24
1.2. Rights of the child arising from the right to be heard.....	25
1.2.1. Right to be informed	26
1.2.2. Right to protection and respect for privacy	26
1.2.3. Right to non-discrimination	27
2. The different legal representations of the child in civil proceedings in the EU countries	28
2.1. Parental representation	29
2.2. A specially appointed representative.....	30
2.3. A child's advocate.....	31
CHAPTER 3: IMPACT OF THE CHILD'S OPPOSITION IN THE NON-RETURN DECISION.....	33
1. The refusal of the child: an exception to his return to his country of habitual residence	33
1.1. Article 13 paragraph 2 of the Hague Convention.....	33
1.1.1. Age.....	34
1.1.2. Maturity	35
2. The child's view and effectiveness of the return mechanism	36
2.1. European Court of Human Rights: an inconsistent jurisprudence	37
2.1.1. X. c. Latvia prism	37
2.1.2. Neulinger and Shuruk v. Switzerland prism	38
2.2. European Court of Justice: promotion of the principle of mutual trust.....	39
3. Mediation: a tool to strengthen the child's voice.....	41

<i>CONCLUSIONS</i>	<i>44</i>
<i>BIBLIOGRAPHY</i>	<i>47</i>

ABBREVIATIONS

IPCA	International Parental Child Abduction
Hague Convention	Hague Convention on the Civil Aspects of International Child Abduction
ECHR	European Convention on Human Rights
EU	European Union
ECtHR	European Court of Human Rights
UNCRC	United Nations Convention on the Rights of the Child
CRC	Committee on the Rights of the Child
FRA	European Union Agency for Fundamental Rights
ECJ	European Court of Justice

INTRODUCTION

1. A child victim in the middle of a conflict between an abducting parent and a parent deprived of his/her rights

International Parental Child Abduction (IPCA) is a tragedy added to an already complex family situation. Apart from being a tragedy for the parent who sees his child being abducted to another country, the main victim of IPCA is the child caught in a conflict between his two parents.

An IPCA always precedes a divorce, where the question of child custody may already be the subject of tension. At that moment, the child is already torn into a '*loyal conflict*'¹ between his two parents. This situation is similar to all family situations where both parents separate. However, when *bi-national* couples separate or when one parent of a couple of the same nationality decides to move to another country, the situation is even more conflictual. Certain factors specific to *international couples*² aggravate the conflict, such as cultural and religious differences, communication in a non-native language, and fear of being geographically distant from the child.

It is in this conflictual environment that both parents must resolve the issue of child custody. This issue may be resolved judicially or informally by the parents. In both cases, one parent may find himself unsatisfied with the custody decision and then decide to take the child away from the other parent. This is the most frequent cause of international parental child abduction.³ At the time of the discovery of the child's abduction, a legal conflict will be superimposed on the intra-family conflict. Two parties will then confront each other thinking they are acting in the best interests of the child. On the one hand, there is the abducting parent who is convinced that taking the child away from the other parent was the best solution for the

¹ Perdrille, S. (2012). Conflit parental et conflit de loyauté : pour un usage raisonné de l'audition de l'enfant. *Enfances & Psy*, 56, 70-78. <https://doi.org/10.3917/ep.056.0070>

² Ganancia, D., & Dahan, J. (2007). *La médiation familiale internationale : LA DIPLOMATIE DU COEUR DANS LES ENLEVEMENTS D'ENFANTS (Trajets)* (French Edition). Eres.

³ Spilman, S. K. (2006). Child Abduction, Parents' Distress, and Social Support. *Violence and Victims*, 21(2), 149-165. <https://doi.org/10.1891/vivi.21.2.149>

child. On the other hand, there is the parent who has been betrayed and deprived of his custody rights and who will do everything possible to ensure that the child returns to him. The psychological impact on the left-behind parent is quite significant. They will experience ‘feelings of rage, loss, helplessness, and anxiety’⁴. This pattern of the abducting parent being the guilty party and the other parent being the victim needs to be tempered in cases of domestic violence. In a minority of parental abduction cases, a parent decides to remove the child from an abusive parent.⁵ Parental child abduction, therefore, remains a delicate subject to deal with, where it is necessary to go beyond the Manichean schema where there would be the abducting parent acting for the harm of the child and the victim parent acting for the good of the child.

However, in all cases of international child abduction, the primary victim is the child. The separation from one of his parents is brutal. The child may feel neglected by the other parent who is geographically far away, while the abducting parent is the one who takes care of him every day. Furthermore, the child loses all his reference points when he is taken to another country. The only landmark left is the abducting parent. Even when the abduction ends because of a court order or the abducting parent's will, the reunion with the victim parent and the child remains complicated.⁶ IPCA will leave its mark on the child as enters adulthood. The child will probably have relationship problems, especially with his children.⁷ Finally, the child suffers the consequences of the abduction at every stage of his life: at the time of the abduction, at the time of the reunion with the victim's parent, and afterward in his adult life. For all the consequences on the child that IPCA entails, my paper will address this subject from the point of view of the child's interests.

2. Notion of abduction

⁴ Abduction of Children by Their Parents: A Survey of the Problem. (1991). *Social Work*. <https://doi.org/10.1093/sw/36.5.421>

⁵ Lowe, & Stephens, V. (2018). Global Trends in the Operation of the 1980 Hague Abduction Convention: The 2015 Statistics. *Family Law Quarterly*, 52(2), 349–384.

⁶ Tavares, A., Crespo, C., Ferreira, L., & Ribeiro, M. T. (2021). Left behind parents : A qualitative study on the experience of parental abduction of a child in Portugal. *Journal of Marital and Family Therapy*, 47(3), 595-613. <https://doi.org/10.1111/jmft.12478>

⁷ Bannon, C. M. (2011). The Hague Convention on the Civil Aspects of International Child Abduction : The Need for Mechanisms to Address Noncompliance. *Boston College Third World Law Journal*, 31(1), 129-162.

Abduction is a field of criminal law, but parental abduction is mostly regulated by civil law because it involves the question of custody rights. Two situations may qualify as parental child abduction: a wrongful removal or retention.

2.1. Civil and Criminal aspects

Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 provides a civil and not a criminal legal response to IPCA⁸. There are no provisions in the Convention for criminal remedies and sanctions. The exclusion of criminal provisions is primarily due to the purpose of the Convention. The drafters of the Convention intended to protect the child when he is a victim of IPCA⁹. The Preamble to the Convention thus states *‘Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence’*¹⁰. Therefore, the criminal conviction of the abducting parent is not an issue addressed in the Convention.

Nevertheless, the criminal aspect of the IPCA should not be ignored. In the case where the child is taken to a non-Contracting State to the Hague Convention, national criminal proceedings remain the only solution to obtain the return of the child. An international arrest warrant may then be issued against the abducting parent. Criminal proceedings can also be initiated when the IPCA involves a Contracting State to the Hague Convention. Initiating criminal proceedings will involve the police who will facilitate the location of the child and the abducting parent.

The articulation between civil and criminal proceedings may raise questions. The Hague Convention aims at having the child returned to the State of habitual residence. If the abducting parent knows that he may be criminally charged, he may be tempted to hide with the child. In addition, the extradition of the abducting parent is not so easy to obtain. Indeed, parental child

⁸ Hague Conference on Private International Law, Hague Convention on the Civil Aspects of International Child Abduction, 25 October 1980, Hague XXVIII

⁹ Donyale N. Leslie, *A Difficult Situation Made Harder: A Parent's Choice Between Civil Remedies and Criminal Charges in International Child Abduction*, 36 Ga. J. Int'l & Comp. L. 381 (2008). Available at: <https://digitalcommons.law.uga.edu/gjicl/vol36/iss2/4>

¹⁰ Hague Convention, Preamble

abduction must be a crime in the State where criminal charges are brought against the abducting parent and in the State where he has taken refuge. Since states may have different concepts of family, parental abduction is sometimes not considered a crime. It may therefore be preferable for the left-behind parent to initiate civil proceedings if the State of refuge and the State of the child's habitual residence are parties to the Hague Convention. In the event that the child cannot be located, criminal proceedings may be used as an additional measure. Above all, whilst the Hague Convention considers the best interests of the child, the criminal procedure will seek to punish the abducting parent. My paper focusing on the consideration of the child's interests will therefore concentrate on the civil procedure concerning the IPCA.

2.2. Wrongful removal and retention

The Hague Convention is the most appropriate text to provide a better understanding of the definition of an IPCA. Under this convention, parental child abduction can be established in two situations: in cases of wrongful removal or wrongful retention. The text refrains from defining the removal and retention. Article 3 of the Convention simply provides a definition of the wrongfulness of removal and retention. The term IPCA can only be used when the removal or retention of the child is wrongful.

The distinction between detention and removal remains only factual since article 3 establishes the same conditions of illegality. First, for removal or retention to be considered wrongful, there must be custody rights granted to the left-behind parent and violated by the abducting parent: *'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'*¹¹. This right of custody must be obtained before the removal or retention of the child and be based on a decision of the State of habitual residence of the child. For the victim parent, this condition can be difficult to obtain when the abducting parent takes the child just after the separation and consequently no judicial decision has yet been made to settle custody of the child.¹² Furthermore, article 3) b) adds that this right of custody must be *'actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention'*¹³ The victim parent must therefore also prove that

¹¹ Article 3, Hague Convention

¹² *Redmond v. Redmond*, 126 A.D.3d 1476, 6 N.Y.S.3d 355, 2015 N.Y. Slip Op. 2598 (N.Y. App. Div. 2015)

¹³ Article 3, Hague Convention

he is exercising custody rights over the child in order to invoke an IPCA under the Hague Convention.

Although article 3 sets out the same conditions for declaring a removal or retention unlawful, the unlawfulness does not occur at the same time. In the case of wrongful removal, a parent is guilty of abduction when he takes the child away from the State of habitual residence. In the case of wrongful retention, the parent takes the child out of his State of habitual residence lawfully. It is at the time of returning the child that the parent is guilty of abduction.

3. Figures on International Parental Child Abductions

Figures on IPCA provide a more comprehensive understanding of the phenomenon. The Hague Conference on Private International Law and the non-government organization *International Centre for missing and exploited children* have produced a report in 2015.¹⁴ This report presents the common characteristics of each international parental abduction and thus helps to identify risk factors.

Abductor is primarily the mother: 73% of abductors are mothers and 24% are fathers. IPCA in its terminology refers to the word '*parent*'. However, the abductor may be someone other than the child's parent in the meaning of the Hague Convention. In reality, IPCA concerns mostly parents in the strict sense of the word, since only 3% of abductors are other relatives (grandparents or tutor). In 80% of the cases, the abductor was *the primary carer* or the *joint primary carer* of the child. In 58% of the cases, the abducting parent takes the child to the country where he/she is a national. Concerning the profile of the abducted child: there is no gender difference since as many girls as boys are abducted. In 70% of cases, the IPCA concerns an only child. In 2015, the average age of a child victim of IPCA was 6.8 years. About the return procedure provided for by the Hague Convention, the report shows that in 2015 only 45% of the procedures resulted in the return of the child.

¹⁴ Professor Nigel Lowe And Victoria Stephens. (2017). *The Seventh Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention – October 2017* (Hague Conference on International Private Law, Ed.). Hague Conference on International Private Law

In 2015, of the 2,270 applications involving the Hague Convention, 1,161 came from a European Union State, of which 830 concerned proceedings between two Member States. At first glance, it is not surprising to see many IPCA cases within the European Union. Since the European Union encourages mobility within its member states, there is a significant number of *cross-border couples*.¹⁵ The European Union has thus developed complementary tools to the Hague Convention in order to regulate the issue of IPCA. Since addressing the broad topic of IPCA requires a geographical delimitation, I will only mention the cases of cross-border parental child abduction within the European Union.

4. Research question and methodology

My research will seek to respect the above-mentioned delimitations: dealing with the civil aspects of cross-border parental child abduction involving two Member States of the European Union. Considering these limitations, my aim will be to approach the IPCA procedure from the child's perspective. My research question is therefore the following: Are the views of the child taken into account in return decisions in parental child abduction proceedings?

The first part of my thesis is devoted to the international and European standards regulating cross-border child abduction. On the one hand, I will refer to the rules of international private law: the Hague Convention on the Civil Aspects of Parental Child Abduction and the Brussels II Regulations. On the other hand, I will discuss the fundamental human rights standards that cross-border child abduction proceedings must respect. In particular, I will look at the Convention on the Rights of the Child (UNCRC) and the case-law of the European Court of Human Rights.

The second part of my paper will focus on the place of the child within the IPCA procedure. Before asking what weight to give to the child's opinion in IPCA decisions, it is necessary to question how it is collected. I will therefore focus on the rights of the child in civil proceedings. In order for these rights to be protected and invoked before the judge, the child must be accompanied by an adult. Consequently, I will discuss the different forms of representation of the child in civil proceedings. As there are no international or European

¹⁵ Unmarried couples (cohabitation) – rights/obligations across Europe. (2022, 4 février). Your Europe. https://europa.eu/youreurope/citizens/family/couple/de-facto-unions/index_en.htm

standards regulating this issue, I will examine the different methods of legal representation of the child in the different Member States.

Finally, in the third part, I will examine whether the child's refusal to return to the left-behind parent can have an impact on the return decision. I will study the interpretation of the exceptions to the return provided by the Hague Convention based on the case-law of the European Court of Human Rights but also of the European Court of Justice.

CHAPTER 1: LEGAL FRAMEWORK OF CROSS-BORDER PARENTAL CHILD ABDUCTION

1. Legal norms prioritizing the return of the child to his or her country of habitual residence

In the late 1980s, States decided to cooperate to prevent IPCA. Before the ratification of the Hague Convention of 25 October 1980, preventive or repressive solutions adopted unilaterally or multilaterally were ineffective.¹⁶ At the time of signing the Hague Convention, the States agreed on one main objective: to promote the return of the child to his State of habitual residence. The objective of this treaty was then reinforced by the European Union through the implementation of successive regulations.

1.1. Hague Convention of 25 October 1980

A Special Commission organized by the Hague Conference on Private International Law brought together twenty-three states to address the issue of IPCA in November 1979. At this stage of the construction of the Convention, States could not agree on the recognition and enforcement of custody judgments. Some States wanted to keep a margin of appreciation in the assessment of a foreign decision on child custody.¹⁷ The lack of consensus on this issue did not stop the elaboration of the text. On 25 October 1980, the Convention on the Civil Aspects of International Parental Child Abduction was signed. The objectives of the Convention are: ‘*a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State and b) to ensure that rights of custody and access under the law of one Contracting State are effectively respected in the other Contracting States*’¹⁸.

To achieve the objective of returning the child to the left-behind parent, the Hague Convention sets up an administrative system through the obligation of the contracting States to create Central Authorities.¹⁹ Central authorities oversee the extrajudicial part of the IPCA cases:

¹⁶ Fiorini, A. (2005). Enlèvements internationaux d'enfants solutions internationales et responsabilités étatiques. McGill Law Journal, 51(2), 279-326.

¹⁷ Bodenheimer, B. M. (1980). The Hague draft convention on international child abduction. Family Law Quarterly, 14(2), 99-120.

¹⁸ Hague Convention, Article 1

¹⁹ Hague Convention, Article 6

they must locate the child, to find amicable solutions or assist the parents in the judicial procedure.²⁰ Central authorities pursue the Convention's objective of securing the immediate return of the child. The left-behind parent should first turn to the Central Authority of his choice which will check whether the provisions of the Hague Convention apply to the application for the return of the child. The Central Authority then transmits the application for the return of the child to the Central Authority of the State where the child is located. The requested Central Authority will support the judicial proceedings relating to the request for return with the information they have on the case.

To assist States in the application of the Convention and to achieve uniformity of practice, a Special Commission organized by the Permanent Bureau of the Hague Conference on Private International Law meets periodically to develop Guides to Good Practice. The Guide to Good Practices on Central Authorities emphasizes the need to act quickly at every stage of the process.²¹ Central Authorities are therefore responsible for ensuring that applications are processed quickly, but also for ensuring that the judge does not delay in deciding on the return of the child. The requirement for speedy proceedings stems from the Convention's main objective of ensuring the '*prompt return*'²² of the child.

Hague Convention relies on a simple mechanism: the judge of the State where the child has been removed (State of refuge) must pronounce only on the return of the child to the State of his habitual residence. In order to decide on the return, the judge must respect Article 10 which provides that the return of the child is automatic when less than one year has elapsed since the wrongful removal or retention. The judge of the State of refuge must also consider the exceptions to return provided for in Articles 13 and 20 of the Convention which allow him to refuse the return of the child. The most important rule established by the Hague Convention is that the judge of the State of refuge should not decide on the issue of custody of the child. Only the judge of the State of the child's habitual residence may decide on the custody of the

²⁰ Hague Convention, Article 7

²¹ Conférence de La Haye de droit international privé 2003. (2003). *GUIDE DE BONNES PRATIQUES en vertu de la Convention de La Haye du 25 octobre 1980 sur les aspects civils de l'enlèvement international d'enfants PREMIÈRE PARTIE - PRATIQUE DES AUTORITÉS CENTRALES*. Droit de la famille Jordan Publishing Limited. <https://assets.hcch.net/docs/584857b8-6574-46a8-b254-426f3130c85d.pdf>

²²Hague Convention, Preamble

child. This rule stems from the lack of consensus on the recognition of custody decisions among the States that participated in the drafting of the Convention.

1.2. Brussels II Regulation

Article 81 of the Treaty on the Functioning of the European Union states that ‘*The Union shall develop judicial cooperation in civil matters having cross-border implications*’²³. In parallel to this provision, the European Union could not remain passive on the issue of unlawful removal and retention since the opening of borders makes it easier for a parent to take his child away from the other parent.

At first, the European institutions limited themselves to recognizing the regulation instituted by the Hague Convention. Brussels II Regulation of 29 May 2000 requires the Member States to apply the 1980 Hague Convention in child abduction cases.²⁴ Child abduction is dealt with incidentally by this regulation, which primarily addresses the issue of parental responsibility. At the time of the discussions on the revision of the Brussels II Regulation, there were debates between the desire of some to strengthen the Hague Convention at the European level while others felt that this would only bring complications to the systems set up by the Hague Convention.²⁵

A compromise between these two points of view was found as the Brussels II bis Regulation reinforces the rules of the Hague Convention but also brings additional provisions to ensure a better protection of the child. Brussels II bis Regulation sets out rules which take precedence over those of the Hague Convention while maintaining the same objective: to ensure the immediate return of the child to his State of habitual residence. Brussels II bis prevents the abducting parent from initiating proceedings in the State where the child has been removed to modify the custody rights and thus avoid the return of the child. In addition, Brussels II bis

²³ Article 81, Treaty on the Functioning of the European Union, Part three – Union Policies and internal actions

²⁴ 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, Document 32000R1347, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32000R1347>

²⁵ Corneloup, S. & Kruger, T. (2020). Le règlement 2019/1111, Bruxelles II : la protection des enfants gagnés du ter(rain). *Revue critique de droit international privé*, 2, 215-245. <https://doi.org/10.3917/rcdip.202.0215>

reinforce the obligation to act promptly as provided for in the Hague Convention.²⁶ Article 11 of the Regulation requires the courts of the Member States to act within six weeks. Hague Convention only provides that the Central Authority may request an explanation of the delay in the proceedings after six weeks.²⁷ Brussels II bis Regulation promotes the return of the child also by limiting the grounds for non-return especially by instituting the *second chance* procedure. This procedure allows the State of the child's habitual residence to order the child's return even if the State of refuge has issued a non-return order.

During the last reform of the Brussels II Regulation which gave birth to the Brussels II ter Regulation, the prevention of parental child abduction was put forward as it is now the subject of an entire chapter of the Regulation.²⁸ This new regulation came into force in 2019 and will apply from august 2022. As the Hague Convention, the various European regulations have always placed the return of the child as an absolute priority. However, the Brussels II ter Regulation, while reinforcing the objective of the immediate return of the child, emphasizes the protection of the child's rights and his best interests, an aspect neglected by the Hague Convention or by the previous European regulations. This is reflected particularly in the recognition of the child's right to be heard²⁹ which will be discussed in Chapter 2. In the same vein, Brussels II ter Regulation reinforces the obligation for States to use mediation, a practice that ensures better consideration of the best interests of the child.³⁰ Thus, the Brussels II ter Regulation is probably the private international law rule on IPCA where the best interests of the child are given greater consideration. In addition to these international private law standards, in cases of cross-border abduction, EU Member States must also consider standards protecting the fundamental rights of the child.

²⁶ Farge, M. (2006). Les réalisations de l'Union européenne concernant l'enfant: Le règlement Bruxelles II bis. *Informations sociales*, 129, 70-83. <https://doi.org/10.3917/inso.129.0070>

²⁷ Hague Convention, Ar. 11

²⁸ *Bruxelles II ter*, Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, Chapter III International Child Abduction <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019R1111>

²⁹ *Bruxelles II ter*, Article 21, Article 26

³⁰ Ganancia, D., & Dahan, J. (2007). *La médiation familiale internationale : LA DIPLOMATIE DU COEUR DANS LES ENLEVEMENTS D'ENFANTS (Trajets) (French Edition)*. Eres.

2. Legal standards prioritizing the best interest of the child

United Nations Convention on the Rights of the Child (UNCRC) as well as the jurisprudence of the European Court of Human Rights (ECtHR) set out general obligations that States must respect during IPCA procedures. While the primary objective of private international law standards is the return of the child to the State of his habitual residence, these legal standards emphasize the need to act primarily in the best interests of the child.

2.1. United Nations Convention on the Rights of the Child of 1989 (UNCRC)

United Nations Convention on the Rights of the Child³¹ was adopted by the United Nations in 1989. UNCRC has been ratified by all EU Member States. UNCRC contains a series of fundamental rights granted to the child. UNCRC does not specifically address the issue of IPCA. The text merely requires States to take measures to combat this phenomenon, as Article 11 provides: ‘*States Parties shall take measures to combat the illicit transfer and non-return of children abroad*’.³² A broad interpretation of this article could result in an obligation for States Parties to ratify the Hague Convention. Indeed, the Hague Convention, signed ten years before the UNCRC, remains one of the only international multilateral instruments regulating IPCA. However, while a large majority of states have ratified the UNCRC (196 signatory states³³), the Hague Convention currently has only 101 States parties³⁴. Article 11 therefore leaves a margin of appreciation for States to establish measures to combat IPCA outside the Hague Convention, for example by signing bilateral agreements.

If the UNCRC would have imposed the ratification of the Hague Convention on its Member States, this would have posed practical problems since the two conventions contain conflicting provisions. Article 1 of the UNCRC defines a child as ‘*every human being below the age of*

³¹ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3

³² UNCRC, Ar. 11

³³ United Nations. (s. d.). United Nations Human Rights Treaty Bodies Data Base. United Nations Human Rights Treaty Bodies. https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRC&Lang=en

³⁴ *Hague Convention on the Civil Aspects of International Child Abduction*. (2022). Attorney-General’s Department. <https://www.ag.gov.au/families-and-marriage/families/international-family-law-and-children/hague-convention-civil-aspects-international-child-abduction>

*eighteen years*³⁵ whereas the Hague Convention only applies to children under the age of sixteen.³⁶ Nevertheless, the main discrepancy remains the objective of the two conventions. Hague Convention was built on the assumption that the best interests of the child is his immediate return to his State of habitual residence when he has been abducted. Therefore, only the preamble of the Hague Convention refers to the best interests of the child: ‘*the interests of the children are of paramount importance in matters relating to their custody*’.³⁷ The rest of the text focuses solely on fulfilling the objective of returning the child. Even article 13 of the Hague Convention, on exceptions to the return of the child, does not include the best interests of the child as a ground for non-return.³⁸ At the same time, Article 3 of the UNCRC states that all decisions concerning the child ‘*the best interests of the child shall be a primary consideration*’.³⁹ In addition, Article 9 of the UNCRC does not explicitly refer to the IPCA, but provides that a child shall not be separated from his parents unless ‘*the separation is necessary in the best interests of the child*’.⁴⁰ In the light of the procedure of IPCA, this provision could include the best interests of the child as an exception to the return of the child whereas the Hague Convention does not include it in the exceptions to return. As the EU Member States have all ratified the UNCRC and the Hague Convention, cross-border parental child abduction cases should be regulated and adjudicated in accordance with the provisions contained in both Conventions even if some of them are contradictory.

2.2. European Court of Human Rights

The European Court of Human Rights (ECtHR) has contributed to a better understanding of how IPCA should be applied with respect to the fundamental rights of the child. IPCA is not specifically addressed in the European Convention on Human Rights (ECHR). Prior to 1998, the European Commission of Human Rights declared all IPCA cases

³⁵ UNCRC, Art.1

³⁶ Hague Convention, Art 4.

³⁷ Hague Convention, Preamble

³⁸ Keller, H., & Heri, C. (2015). Protecting the Best Interests of the Child: International Child Abduction and the European Court of Human Rights, *Nordic Journal of International Law*, 84(2), 270-296. doi: <https://doi.org/10.1163/15718107-08402006>

³⁹ UNCRC, Art.3

⁴⁰ UNCRC, Art. 9

inadmissible. After the major procedural reform of the Court by Protocol 11, which entered into force in 1998, IPCA cases were brought before the Strasbourg judges.

One of the first IPCA cases the Court dealt with was *‘Ignaccolo-Zenide v. Romania’*⁴¹. The applicant was a mother whose two children were abducted by their father in the United States. After visiting their father in the United States for the holidays, the two children did not return to their mother in France. In application of the Hague Convention, the American authorities issued an order for the return of the children to France where their habitual residence is located. To escape this judgment, the father fled with his two children to Romania. Although the Romanian authorities issued a return order as the American authorities, the children were still being detained by the father in Romania. The mother of the two children applied to the ECHR for the return order to be enforced by the Romanian authorities. ECtHR states that the right to respect for family life asserted in Article 8 includes a *‘positive obligation’*⁴² for States. This positive obligation involves taking the appropriate measures *‘to facilitate the reunion’* between the left-behind parent and the children. Therefore, by failing to act to assist in the return of the two children to their mother, Romania violated Article 8 of the Convention. The Court adds that the positive obligation *‘must be interpreted in the light of the Hague Convention’* which means that the measures considered appropriate are those provided for in the Hague Convention. In this case, the ECtHR acts as the guardian of the effectiveness of the Hague Convention, which has no supranational jurisdiction to ensure its application and effectiveness. In many subsequent decisions⁴³, the Court will condemn States for failing to ensure the prompt return of the child by not taking the necessary measures to enforce the return order.

Nevertheless, the Court does not directly control whether States comply with the Hague Convention but whether States have taken all the necessary measures to comply with the return mechanism provided by the Hague Convention. Thus, the ECtHR sometimes deviates from the provisions of the Hague Convention. As the Strasbourg judges pointed out in *Ignaccolo-Zenide*

⁴¹ *Ignaccolo-Zenide v. Romania*, no. 31679/96, (2001), ECHR

⁴² *Ignaccolo-Zenide v. Romani*

⁴³ *Maire v. Portugal*, Application no 48206/99, (2006) / *Iglesias Gil and A.U.I v. Spain*, Application no 56673/00, (2005) / *Bianchi v. Switzerland*, Application No. 7548/04 (2006) / *Bajrami v. Albania*, Application no. 35853/04 (2006), ECtHR

v. Romania, the obligation to take measures to reunite the child and the left-behind parent 'is not absolute'⁴⁴. For the ECtHR, the enforcement of the return order should privilege cooperation rather than coercion. Cooperation takes time, whereas coercion allows the procedure to be accelerated using force. ECtHR considers that cooperation should be preferred to coercion in view of the best interests of the child. In contrast, the preamble of the Hague Convention points out that the best interests of the child necessarily entail his immediate return to the State of habitual residence. A strict interpretation of this provision would imply that all measures, whether coercive or not, should be used to return the child to his State of habitual residence. In *Ignaccolo-Zenide v. Romania*, the Court opens the possibility that the child's interest is not in the prompt enforcement of the return order but rather in the time taken by the authorities to cooperate.

3. The best interest of the child and speed of the procedure: a difficult articulation

The notion of the best interests of the child is not defined in any international convention but is still mentioned in many texts. To help the implementation of the UNCRC in the signatory states, the Committee on the Rights of the Child (CRC) develops observations in which it clarifies the exact meaning of the Convention. In its observation number 14, the CRC mentioned that the best interests of the child is a concept that may evolve over time.⁴⁵ The Committee does not provide precise criteria for assessing the best interests. Although it provides a non-hierarchical list of criteria that can be considered, CRC states that the assessment of the best interests of the child depends on the individual situation of the child. Therefore, to assess the best interests of the child, judges must take time as they must first assess the personal situation of the child. However, in IPCA cases, assessing the child's personal situation can be complicated as the judge who must decide on the child's return is not the judge of the habitual residence and does not have all the information about the child's life before the abduction. Therefore, the Hague Convention only allows the judge of the State of the child's habitual residence to decide on parental responsibility and custody rights. The judge of the State of refuge of the child must only decide on the return of the child.

⁴⁵ UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC /C/GC/14

The limit to the consideration of the best interests of the child by the Hague mechanism is that it is only really considered when the child has returned to his State of habitual residence and the judge decides on the custody of the child. However, Article 3(1) of the UNCRC states that the best interests must be a primary consideration in '*all decisions affecting the child*'.⁴⁶ The decision to return the child to his State of habitual residence is a decision primarily affecting the child. Thus, according to Article 3 of the UNCRC, it should consider the best interests of the child when the judge of the State of refuge has to decide on the return of the child. However, in order to properly assess the child's personal situation, the authorities need time, whereas the Hague Convention obliges States to decide quickly on the child's return. Moreover, the Brussels II bis Regulation, which obliges the judge to decide within a minimum of 6 weeks⁴⁷, is stricter on the need to act quickly

Authorities must find a balance between the speed of the procedure required by the Hague Convention and Brussels II bis with the need to assess the best interests of the child as required by the UNCRC. The ECtHR has sometimes jeopardized this balance between these two types of legal norms. The case *Neulinger and Shuruk v. Switzerland*⁴⁸ illustrated that the equilibrium between the Hague mechanism and the consideration of the best interests of the child is difficult to achieve. In this case, the applicant was the abducting parent. She was a Swiss woman who had moved to Israel, the country of her husband, with whom she had a child. At the time of the divorce, she had custody rights, but her ex-husband had managed to obtain limited visiting rights. After illegally taking her son with her to Switzerland, the Swiss courts issued an order to return the child to Israel. The mother objected to the return to Israel on the grounds that her son would be at serious risk by returning to his father, who was part of an Orthodox community considered extreme. ECtHR went against the Hague mechanism by stating that if the child's return to Israel was enforced, Switzerland would be in violation of Article 8 of the ECHR. According to the ECtHR judges, the return of the child was not in his best interests since he had lived outside his country for too long. Rather than referring to the exception to return based on a *grave risk*⁴⁹ to the child of the Hague Convention Article 13(b),

⁴⁶ UNCRC, Article 3 (1)

⁴⁷ Brussels II bis Regulation, Article 11

⁴⁸ *Neulinger and Shuruk v. Switzerland* (Application No 41615/07), Grand Chamber, ECHR

⁴⁹ Hague Convention, Ar. 13 (b)

the Court refers to the best interests of the child. The Court left open the possibility that the best interests of the child could be a ground *per se* for not returning the child.

Later, in *X. v. Latvia*⁵⁰, the Court tempered the *Neulinger* judgment by stating that the Hague Convention and the ECHR must be applied in ‘*harmony*’. In this case, the European Court found that the Latvian judges had violated the Hague Convention by issuing a judgment for the return of a child even though the child faced ‘*a grave risk of harm*’.⁵¹ In this judgment, the Court recalls that the Hague Convention, in favouring an immediate return of the child, is acting in the best interests of the child which is a different approach from the one taken in the *Neulinger* judgment. Assuming that the return mechanism provided by the Hague Convention is in the best interests of the child, ECtHR points out that the exceptions to return must be interpreted strictly: ‘*the concept of the best interests of the child must be evaluated in the light of the exceptions provided for by the Hague Convention*’. Thus, the best interests of the child cannot be a sole ground for non-return but must be combined with the exceptions provided by the Hague Convention.

Finally, the best interests of the child should not be opposed to the application of the Hague Convention. Since the best interest of the child is his immediate return, the authorities must strictly apply the exceptions to the return of the child according to the *X c. Latvia*’s conception. The fact remains that the best interests of the child are difficult to assess as the whole family situation must be taken into account. The authorities must therefore find a balance between speed and the assessment of the best interests of the child. In addition to this complex task, the authorities must also be vigilant in respecting the rights of the child during the procedure.

⁵⁰ *X. v. Latvia* (Application No. 27853/09), Grand Chamber, ECtHR

⁵¹ Ar. 13 (b), HCCH

CHAPTER 2: PLACE OF THE CHILD WITHIN THE PROCEDURE OF CROSS-BORDER PARENTAL CHILD ABDUCTION

The previous chapter analysed the standards that govern cross-border parental child abduction. This chapter will focus specifically on the place of the child in the proceedings. Many international and European standards recognise the rights of children in civil proceedings affecting them. For these rights to be effective, the child must be legally represented.

1. The rights of the child in civil proceedings concerning him/her

One of the fundamental rights of the child in any proceedings, whether civil or criminal, is the right to be heard. From this fundamental right derive other rights such as the right of the child to be informed about the proceedings, the right to protection and respect of privacy, or the right to non-discrimination.

1.1. Right to be heard

1.1.1. Specific standards regulating International Parental Child Abduction

Hague Convention makes no reference to the rights of the child. Article 13 paragraph (2) only mentions that the child's opposition can be an exception to his return. This exception requires that the child be heard to express his opposition to return. Paradoxically, the Hague Convention does not mention the right of the child to be heard. This omission suggests that the drafters of the Convention intended that the exception to the child's return based on his opposition be used sparingly. Hague Convention Guide to Good Practice provides another explanation for the lack of recognition of the child's right to be heard by stating that when the Convention was adopted, children were rarely heard in court proceedings.⁵²

In contrast to international standards on IPCA, the child's right to be heard is recognised in European law. As seen previously, the Brussels II ter Regulation recognises a

⁵² Conférence de La Haye de droit international privé 2003. (2003). *GUIDE DE BONNES PRATIQUES en vertu de la Convention de La Haye du 25 octobre 1980 sur les aspects civils de l'enlèvement international d'enfants DEUXIEME PARTIE-MISE EN OEUVRE* Droit de la famille Jordan Publishing Limited.
<https://www.hcch.net/fr/publications-and-studies/details4/?pid=2781>

genuine right for the child to be heard during the cross-border abduction procedure. Article 26 of the regulation provides that Article 21 on parental responsibility is applicable to cross-border parental child abduction proceedings.⁵³ Article 21 imposes a positive obligation on States to give '*a genuine and effective opportunity to express his or her views*' to '*the child who is capable of forming his or her own views*'.⁵⁴ Brussels II ter leaves it to the Member States to assess the child's capacity to form his own views and also to lay down procedural rules regarding the hearing of the child. Nevertheless, Article 21 obliges States to take measures to ensure that children who are capable of forming their own views are heard. By enshrining the child's right to be heard, the Brussels II ter Regulation is in line with texts protecting the fundamental rights of children.

1.1.2. General standards relating to fundamental rights and freedoms

The child's right to be heard is recognised in Article 12 of the UNCRC which states that '*the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child*'⁵⁵. This obligation is part of the general obligation to respect the best interests of the child. Indeed, the CRC recalls that the best interests of the child and the right to express his opinion are '*inextricably*'⁵⁶ linked. According to the committee, the best interests of the child can only be respected if the child is heard and vice versa. Furthermore, the CRC has pointed out that the concept of the best interests is a '*threefold concept*'⁵⁷ by being a substantive right, a legal principle, and a procedural rule. The best interests of the child as a procedural rule require procedural guarantees. The Committee's conception of the best interests of the child as a procedural rule would thus place an obligation on States to implement procedural measures to ensure that the child's views are heard.

⁵³ Article 26, Brussels II ter

⁵⁴ Article 21, Bruxelles II ter

⁵⁵Ar.12, UNCRC

⁵⁶ Considering UNCRC General Comment No.14

⁵⁷Ibid

At European level, in addition to being recognised in the standards specifically governing cross-border abductions, the child's right to be heard is also recognised in the Charter of Fundamental Rights of the European Union. The Charter was adopted on 7 December 2000 by the Member States of the European Union, thus before the child's right to be heard was recognised by the Brussels II ter Regulation. Article 24(1) of the Charter provides that children: '*may express their views freely*'⁵⁸. Although the Charter does not specify when this right is applied, paragraph 2 of the same provision states that '*In all actions concerning children, whether taken by public authorities or private institutions, the best interests of the child shall be a primary consideration*'. If the best interests of the child imply respecting his right to be heard, according to the interpretation of the CRC, Article 24 involves an obligation for the Member States to listen to the child in judicial proceedings.

Within the European area, the child's right to be heard in IPCA proceedings is thus subject to a double protection. Firstly, even before the enshrinement of Article 26 on the child's right to be heard in the Brussels II ter Regulation, the Charter already imposed an obligation to hear the child in decisions affecting him. As EU Member States are bound by the Charter of Fundamental Rights when applying Union law, they had to respect the child's right to be heard when implementing the post-Brussels II ter regulations. Subsequently, the child's right was reinforced by a second level of protection with the adoption of the Brussels II ter Regulation. As the Regulation is a European act binding, Member States cannot avoid the obligation to listen to the views of the child in cross-border abduction proceedings. European law provides real protection of the child's right to be heard which is not implemented in the Hague Convention. It is important to stress that this protection is only granted to child victims of IPCA within the European Union, i.e., where the State of habitual residence and the State of refuge are both members of the EU. Children who are victims of IPCA involving a third State, whether the country of refuge or the country of habitual residence, are more vulnerable to not being heard.

1.2. Rights of the child arising from the right to be heard

⁵⁸ European Union: Council of the European Union, *Charter of Fundamental Rights of the European Union* (2007/C 303/01), 14 December 2007, C 303/1

The right of the child to be heard in IPCA proceedings implies other secondary rights that States must respect otherwise the right to be heard would be ineffective.

1.2.1. Right to be informed

The European Union Agency for Fundamental Rights (FRA) in collaboration with the European Commission has conducted a study on the relationship between the justice system and the child in the Member States. As a result of this report, the FRA recalled the different rights granted to children in judicial or criminal proceedings affecting them and issued opinions inviting Member States to improve certain judicial practices towards children. Beyond reiterating that the child has the right to be heard in all proceedings concerning him, the conclusions of this study mention other ancillary rights such as the child's right to be informed.

The child's right to be informed contributes to the effectiveness of the right to be heard since a well-informed child is a child who has more confidence in the judicial system and therefore speaks freely.⁵⁹ However, the FRA report points out that the right to information in the Member States is not specifically recognised for children and is instead recognised indifferently for adults and children. Furthermore, in practice, the right to information is less exercised in civil proceedings than in criminal proceedings.⁶⁰ As a result, in most civil proceedings it is the parents or legal representatives who provide the information to the child. In cross-border parental child abduction cases, where the child is torn between these two parents, it is important that the information about the procedure that the child receives is independent of the parent's point of view. Indeed, the abducting parent, by having the power to provide information about the proceedings, could influence the child and thus bias his opinion. To counteract this influence of the abducting parent on the child, Member States should follow the FRA's recommendation to appoint a professional as a contact person for the child to provide him/her with the necessary information about the procedure.

1.2.2. Right to protection and respect for privacy

⁵⁹ (2015). Une justice adaptée aux enfants. Points de vue et expériences de professionnels. *Journal du droit des jeunes*, 345-346, 26-34. <https://doi.org/10.3917/jdj.345.0026>

⁶⁰ Agence des droits fondamentaux de l'Union européenne. (2015). *Une justice adaptée aux enfants – points de vue et expériences de professionnels*. https://fra.europa.eu/sites/default/files/fra-2015-child-friendly-justice-professionals-summary_fr.pdf

In addition to being informed, in order for the child to be able to speak freely and without any influence, he must feel protected by the judicial system. FRA stresses that a *'protective and safe environment'*⁶¹ helps to prevent further trauma to the child. As with the right to information, the right to protection is more respected in criminal proceedings than in civil proceedings. A higher proportion of children who have been involved in the criminal justice system, report that they have benefited from protective measures. These protection measures remain at the discretion of the judge. At the same time, Article 7 of the Hague Convention provides that Central Authorities must take measures to *'prevent further harm to the child'*.⁶² This obligation falls on the Central Authorities and not on the judicial authorities, which have more means to ensure effective protection of the child. Opinion number 23 of the FRA report argues that *'EU Member States should introduce measures to prevent contact between children and defendants and any other party that the child may perceive as threatening'*. For IPCA cases, it seems difficult to apply this recommendation since limiting the child's contact with the parties to the proceedings means limiting contact with his parents. However, this recommendation may be relevant where the abducting parent has fled to another country with the child to escape domestic violence. Protective measures to limit the child's contact with other parties to the proceedings must always be taken under the prism of the child's best interests. Particularly in IPCA proceedings, the FRA's recommendation must be balanced against the child's right to maintain contact with both parents and the danger or influence the parent may have over the child.

1.2.3. Right to non-discrimination

One of the rights of the child that requires particular attention from the judicial authorities is the right to non-discrimination. The child must be heard during the judicial procedure regardless of his social origin, nationality, or disability. This right is based on Article 2 of the UNCRC, which states that: *'States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind'*.⁶³ Since Article 12 of the UNCRC sets up the child's right to be heard, Article 2 imposes

⁶¹ Considering FRA's rapport (quote no.50)

⁶² Hague Convention, Ar. 7

⁶³ UNCRC, Ar. 2

an obligation on States Parties not to discriminate against the child when implementing his right to be heard. For this right to be effective, the judicial authorities must take special measures to ensure that every child is heard. The FRA recommendation⁶⁴ stresses that the EU Member States should ensure that the hearing of the child takes place in the child's mother tongue. This recommendation is important in relation to IPCA cases because the child often ends up in a country where he does not speak the language. Justice professionals must also adapt their language to the age of the child and even more so when the child has a disability. In consequences, States must guarantee that professionals are trained to respect the specific needs of the child. A multidisciplinary approach is advocated by the FRA to achieve a better consideration of the specific needs of each child and thus treat them without any form of discrimination. On 5 April 2022, the European Parliament adopted a resolution on the protection of children's rights in civil, administrative and family law proceedings. In this report, the European Parliament aligns itself with the FRA recommendations by inviting the Member States to gather the opinion of professionals from different disciplines such as '*doctors, psychologists, qualified child neuropsychiatry professionals, social workers and childcare specialists*'.⁶⁵ Furthermore, according to the European Parliament '*an individualized approach should be adopted for each child involved in civil, administrative and family proceedings*'.⁶⁶ The multidisciplinary approach is a tool to assess the best interests of the child in IPCA cases. This approach must respond to the requirements of rapidity, which in practice can be complicated to achieve. However, the requirement to act swiftly established by the Hague Convention and Brussels II ter should not exonerate States from respecting these rights that have been developed. It should also be noted that these rights can only be respected if the child is represented by an adult at the time of the proceedings.

2. The different legal representations of the child in civil proceedings in the EU countries

The issue of legal representation of the child in cross-border parental child abduction cases is crucial as it allows the child's right to be heard to be fully effective. There are no international or European standards relating to this issue. While the mechanisms for

⁶⁴ Considering FRA's report (quote no.50)

⁶⁵ Résolution du Parlement européen du 5 avril 2022 sur la protection des droits de l'enfant dans les procédures relevant du droit civil, du droit administratif et du droit de la famille (2021/2060(INI))

⁶⁶Considering the resolution from the European Parliament

representing the child are broadly the same across the European Member States, there are differences in the articulation of these mechanisms with the IPCA procedure. Thus, it is necessary to study the different legal representation methods of European countries in light of the IPCA procedure.

2.1. Parental representation

Article 12 of the UNCRC, in addition to recognising the child's right to be heard, provides that: '*the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative.*'⁶⁷ By leaving States the liberty to hear the child with or without representation, this article also leaves States the discretion to choose which representative can express the child's views. In the General Comment No.12, the CRC stated that the child's representative can be the '*parent(s), a lawyer, or another person*'⁶⁸. In most EU Member States, the child's ex officio representative in civil proceedings remains the parent.⁶⁹ For example, Article 1510 of the Civil Code of Greece includes in parental care the legal representation of the child in matters '*concerning his/her person*'.⁷⁰ Article 1517 of the same code makes an exception to the principle of legal representation of the child by the parents: '*Where the interests of the child are in conflict with the interests of its father or its mother who exercise parental care*'⁷¹ a special representative is appointed. The left-behind parent who uses the Hague mechanism to obtain the return of the child necessarily has custody rights over the child since this is one of the conditions under Article 2 of the Convention for removal or retention to be considered wrongful. Thus, unless the interests of the left-behind parent conflict with the interests of the child, no special representative is appointed for the child to intervene in Greek IPCA proceedings.⁷² As the

⁶⁷ Ar.12, UNCRC

⁶⁸ UN Committee on the Rights of the Child (CRC), General comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12, available at: <https://www.refworld.org/docid/4ae562c52.html> [accessed 6 June 2022]

⁶⁹ European Commission, Directorate-General for Justice, Behrens, J. (2014). Study on children's involvement in judicial proceedings: contextual overview for the criminal justice phase : Germany, Publications Office. <https://data.europa.eu/doi/10.2838/73960>, Considering the reports on the different Member States

⁷⁰ Article 1510, Civil Code of Greece

⁷¹ Article 1517, Civil Code of Greece

⁷² Permanent Bureau of the Hague Conference on Private International Law (HCCH). (2018). Special focus, The Child's Voice 15 Years Later. The Judges' Newsletter on International Child Protection, XXII(Fall 2018).

child's interest is presumed to be the return of the child to the left-behind parent, the possibility of using Article 1517 to appoint a special representative seems limited.

Although the UNCRC leaves some discretion to States as to the rules relating to the legal representation of the child, the CRC has emphasized that the child should have the choice of how to be legally represented.⁷³ In jurisdictions such as Greece, where in an IPCA procedure the child can only be represented by a parent, it seems important to implement measures to ensure that the child has the possibility to be represented by a person outside the family dispute so that the child can express himself freely.

2.2. A specially appointed representative

To give the child a voice apart from the representation of the parents, the Netherlands allows the child to be represented by an independent person. In civil family matters, the Dutch procedural rules offer three ways of representing the child which are determined by the nature of case. The child can thus be represented by a general guardian ad-litem, a filiation guardian ad-litem or by a lawyer. In cases of international parental child abduction, the general guardian-ad litem will be responsible for accompanying the child throughout the procedure.⁷⁴ Annette Oland, a Dutch judge working in the District of the Hague Court, pointed out in a workshop in London on the Hague Convention (2018) that the guardian ad-litem is the: '*interpreter of the voice of the child vis-à-vis the judges who have to decide on the child's return*'.⁷⁵ Before the guardian ad-litem accompanies the child to the Court, he receives the child in his offices for two interviews where he asks questions in order to obtain the child's opinion. During these interviews, the guardian ad litem can answer any questions the child may have about the procedure. Therefore, the guardian ad-litem contributes to the child's right to be heard but also to his right to be informed about the procedure. The guardian ad-litem can also be present if the child wishes when the judge desires to interview the child alone. The guardian ad-litem is present at every court hearing and remains appointed in case of a possible appeal.

⁷³ Mol, C. (2019). Children's Representation in Family Law Proceedings. *The International Journal of Children's Rights*, 27(1), 66-98. <https://doi.org/10.1163/15718182-02701001>

⁷⁴ Considering The Judges' Newsletter on International Child Protection (quote no.62)

⁷⁵ Ibid

The Dutch procedural system therefore offers extensive protection to the child's right to be heard by allowing the child to be represented by a person outside the family dispute. Although the guardian ad-litem is not the person who will represent the child's interests in court, he is still the person who brings the child's point of view to the judge, the parents' lawyers and the parents themselves. The guardian ad-litem, therefore, plays a crucial role in the procedure in protecting the best interests of the child by representing his voice.

2.3. A child's advocate

The French procedural system offers the possibility for a child to be represented by a lawyer in civil proceedings. Beyond recognizing this possibility, French law raises the representation by a lawyer as a real right attributed to the child whose respect must be controlled by the judge. Indeed, Article 388-1 of the French Civil Code requires the judge to ensure that '*the minor has been informed of his right to be heard and to be assisted by a lawyer*'.⁷⁶ This provision applies in particular to '*any proceedings concerning him*'.⁷⁷ A child who is a victim of IPCA can therefore ask a lawyer to assist him or to be heard. Representation by a lawyer increases the protection of the child's rights in civil proceedings. As every lawyer is bound by professional secrecy, a child who speaks to a lawyer will have his right to privacy strictly respected. The relevance of seeking legal representation for a child only exists if the child's lawyer is independent of the parents' lawyer. Particularly in cases of parental abduction, if the child's opinion is obtained by the abducting parent's lawyer, it may be influenced by the interests of the abducting parent. The French rules of civil procedure require that the child himself designates whether he wishes to be represented by a lawyer and by which lawyer he wishes to be represented. If the child has not appointed a lawyer himself, it is not the parents who are responsible for appointing a lawyer but the judge.⁷⁸ Furthermore, if a child wishes to use a lawyer, he is automatically entitled to financial assistance. The right for the child to be assisted by a lawyer is however limited in scope. Indeed, the right to be represented by a lawyer is accessory to the right to be heard. This means that it is when the child wishes to be heard or when the judge decides to hear the child that he can be represented by a lawyer. The right to be represented by a lawyer thus fulfils the requirements for the child to be heard. Article 388-1

⁷⁶ Article 388-1, French Civil Code

⁷⁸ Verdier, P. (2007). Le choix de l'avocat de l'enfant dans les procédures d'assistance éducative. *Journal du droit des jeunes*, 265, 34-36. <https://doi.org/10.3917/jdj.265.0034>

requires that the child '*is capable of discernment*' to be heard. Consequently, in France, legal representation is not available to all child victims of IPCA.

Although French law offers the possibility of using a lawyer, this is subject to the child's capacity for discernment. In contrast, in the Dutch court system, the guardian ad-litem is independent of the child's capacity for understanding. Both mechanisms are alternatives to parental representation, allowing the child to express himself freely when he is the victim of an IPCA. The right to be heard and its derivative rights enshrined in the UNCRC and further elaborated by the CRC are protected by these two mechanisms of representation. A child whose link with the judicial institution is through parental representation will have his rights less respected than those whose representative is a person independent of the conflict. As a result, it will be more difficult for children represented by their parents to present their views to the judge. While it may be difficult for children to express their views within the court system, when they do express their views, the judge does not necessarily take their opinion into account.

CHAPTER 3: IMPACT OF THE CHILD'S OPPOSITION IN THE NON-RETURN DECISION

The mechanisms for obtaining the child's views in cross-border parental child abduction cases are not the subject of consensus among European countries, as discussed above. Nevertheless, both the Hague Convention and the Brussels II ter Regulation provide that the child's opposition may be one of the grounds for a decision not to return him or her to the place of habitual residence. The consideration of the child's views remains subject to conditions of age and maturity of the child which the Hague Convention and the Brussels II ter Regulation do not define precisely. The ECHR and the ECJ have therefore provided their interpretation of this exception to return. Furthermore, mediation may be a way to give the child's voice more weight in the decision of the judge of the State of refuge on the return of the child.

1. The refusal of the child: an exception to his return to his country of habitual residence

The exception to the return of the child based on the child's opposition is provided for in Article 13(2) of the Hague Convention. In cases of cross-border parental child abduction in the European Union, this exception is further enhanced by the second chance procedure set up by the Brussels II ter Regulation. Moreover, both standards emphasise the practice of mediation. Mediation is a means of out-of-court resolution that allows the voice of the child to be given greater consideration.

1.1. Article 13 paragraph 2 of the Hague Convention

Article 12 of the Hague Convention requires judicial authorities to automatically order the return of the child to his country of habitual residence when less than one year has elapsed since the date of the wrongful removal or retention.⁷⁹ Based primarily on this principle, the Hague mechanism provides only limited exceptions to the return of the child. The Explanatory Report of the Convention asserts that a strict interpretation of the exceptions is necessary to prevent the Convention from becoming a '*dead letter*'.⁸⁰ The opinion of the child is one of the

⁷⁹ Hague Convention, Ar. 12

⁸⁰ E. Pérez Vera, « Rapport explicatif sur la Convention de La Haye de 1980 sur l'enlèvement international d'enfants » in *Actes et documents de la Quatorzième session (1980)*, tome III, *Enlèvement d'enfants*, La Haye, Imprimerie Nationale, 1982, (<https://www.hcch.net/fr/publications-and-studies/details4/?pid=2779>)

exceptions to return of the child which is contained in Article 13(2): *‘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’*.⁸¹

As mentioned above, this provision does not explicitly recognize a right for the child to be heard. Furthermore, if the child is given the opportunity to be heard, his views are not automatically taken into account. There are two conditions for taking the child's opinion into account: age and maturity. However, neither a precise age nor a definition of maturity is included in the Hague Convention. This silence undermines the harmonious application of the Hague Convention by leaving States the liberty to decide on the age and degree of maturity necessary to take the child's views into account.

1.1.1. Age

Within the European Union, there is no consensus among Member States on the age of the child required to be heard in divorce and custody cases. The FRA has produced statistics on the right of the child to be heard in divorce and custody proceedings in the EU Member States.⁸² 12 Member States do not set any minimum age for the child to be heard. As regards the Member States that set a minimum age, there are 10 Member States where the required age is between 10 and 12 years and 2 Member States set the minimum age at 14 years. The remaining Member States (4) do not regulate the issue. Special provisions may apply in parental abduction cases. For example, in the Netherlands, the age for the child to be heard in proceedings requirement is normally 12 years, but judges have allowed children as young as 6 years to be heard in IPCA cases.⁸³ Imposing a minimum age for being heard and therefore excluding children who are underage is contrary to Article 12 of the UNCRC. If this provision affirms that the opinion of the child must be taken into consideration in accordance with his age and maturity, it formulates first that *‘States Parties shall assure to the child who is*

⁸¹ Hague Convention, Ar. 13 (2)

⁸² Minimum age requirements related to rights of the child in the EU. (2022, 10 février). European Union Agency for Fundamental Rights. <https://fra.europa.eu/en/publications-and-resources/data-and-maps/minag?mdq1=dataset>

⁸³ Considering The Judges’ Newsletter on International Child Protection (quote no.62)

*capable of forming his or her own views the right to express those views freely*⁸⁴. In other words, as soon as the child is capable of expressing himself, he should have the right to be heard. Thereafter, it is up to the judge to take into account the opinion of the child *‘being given due weight in accordance with the age and maturity of the child.’*⁸⁵

1.1.2. Maturity

Age is not the only factor when considering the child's views, the child's degree of maturity should also be taken into account. Neither the Hague Convention nor the UNCRC indicates how the child's degree of maturity should be assessed. The CRC has stated that the degree of maturity can be understood as *'the ability of the child to understand and evaluate the implications of a given issue'*.⁸⁶ The Committee adds that article 12, in mentioning the child's degree of maturity, refers to the child's capacity *'to express his or her views on matters in a reasonable and independent manner'*.⁸⁷ Thus, the degree of maturity must be assessed on a case-by-case basis. The assessment of the situation of each child undeniably allows for a better consideration of his best interests. However, the freedom given to the judge to assess age and maturity gives him the power to interpret the exception to return in Article 13(2) broadly and thus override the return mechanism of the Hague Convention. Article 13 (2) may pose a risk to the effectiveness of the Hague Convention. Within the European Union, this exception is less likely to be raised since the Brussels II ter Regulations provide for a second chance procedure.

1.1.Second chance procedure: a limitation of the application of Article 13 (2)

In cases of cross-border parental abduction within the European Union, Member States must apply the provisions of the Hague Convention while respecting the specificities of the Brussels II ter Regulation, formerly Brussels II bis. The exceptions provided for in the Hague Convention, in particular the opposition of the child, are also applicable to cross-border

⁸⁴UNCRC, Art 12

⁸⁵ Ibid

⁸⁶ Considering UNCRC General Comment No.14

⁸⁷ Ibid

abduction. However, the Brussels II bis Regulation has established a specific procedure when the judge in the child's State of refuge issues a decision of non-return. This procedure called *second-chance* procedure has been taken over by the reform of the Regulation, but its scope has been limited. According to the second chance procedure, the judge in the State of the child's habitual residence may review the decision of the judge of the refuge State not to return the child. Under Brussels II ter, the second chance procedure remains limited to the exceptions to the return provided for in Article 13(1) and (2) of the Hague Convention contrary to Brussels II where all exceptions under Article 13 could be subject to the second chance procedure. In practice, under the second chance procedure, the judge in the State of the child's habitual residence can order the return of the child even if the judge in the State of refuge orders non-return on the basis of a serious risk to the child or the child's opposition.⁸⁸ In consequence, the second chance procedure considerably limits the probability that a child will not return to his State of habitual residence when he objects to return.

The reform of the second chance procedure had further consequences for the consideration of the child's views. Indeed, under Brussels II bis, the review of the non-return judgment by the judge of the State of habitual residence was the subject of a separate procedure from the custody procedure. This meant that the child could be brought before the judge several times.⁸⁹ Henceforth, under Brussels II ter, the reassessment of the order of non-return and the question of custody of the child are subject to the same procedure before the judge of the State of the child's habitual residence.

There is no doubt that the second chance procedure provides a second layer of protection for the effective application of the Hague Convention making the application of exceptions to the child's return more difficult to raise. At the same time, this procedure is an obstacle to the opinion being considered, as it may ultimately be discussed by two judges, the judge of the State of refuge and the judge of the State of habitual residence.

2. The child's view and effectiveness of the return mechanism

⁸⁸ Corneloup, S. & Kruger, T. (2020). Le règlement 2019/1111, Bruxelles II : la protection des enfants gagnée du ter(rain). *Revue critique de droit international privé*, 2, 215-245. <https://doi.org/10.3917/rcdip.202.0215>

⁸⁹ Ibid

EU Member States must ensure that they take into account the views of the child when objecting to his return in accordance with his age and degree of maturity. However, Member States are also obliged to make every effort to ensure that the child is returned to his State of habitual residence. A complex balance must be reached to ensure that the child's views are considered without prejudicing the return mechanism under the Hague Convention and Brussels II ter. The case law of the ECHR and the Court of Justice of the European Union has thus come to the assistance of States in clarifying how Article 13(2) HC should be applied.

2.1. European Court of Human Rights: an inconsistent jurisprudence

2.1.1. X. c. Latvia prism

In several decisions⁹⁰, the ECtHR has reaffirmed that the refusal of the child does not in itself constitute a ground for non-return. In *Rouiller v. Switzerland*⁹¹, the applicant mother of Swiss nationality had obtained custody of her children following a divorce with the father. The habitual residence of the children was in France. The father who has visiting rights initiates an IPCA procedure under the Hague Convention after the mother left with her children for Switzerland. The Swiss courts ordered the child's return to France. Both children had declared their refusal to return to France, but this did not prevent the Swiss judge from ordering their return. According to the Swiss authorities, the children's refusal was normal in view of the time they had spent in Switzerland following their illegal removal. ECtHR found that the Swiss authorities had not violated the right to respect for private and family life under Article 8 of the Convention. The judgment states that Article 13(2) of the Hague Convention '*does not confer on the child the possibility of freely choosing where to live*'. The Court also refers to its previous judgment, *X. v Latvia*⁹², which states that the exceptions to return under the Hague Convention must be interpreted strictly.⁹³ A year earlier the Court had also held that the refusal of the child to return did not automatically imply an '*obstacle*'⁹⁴ to his return. This strict position of the

⁹⁰ *Rouiller v. Switzerland*, Application No. 3592/08 (2014), *Raw v. France*, Application No. 10131/11 (2013), ECtHR

⁹¹ *Rouiller v. Switzerland*, ECtHR

⁹² *X. v. Latvia*, ECtHR

⁹³ *Ibid*

⁹⁴ *Raw v. France*

Court on the interpretation of the exception to return based on the child's opposition demonstrates that the Court follows its case law *X. v. Latvia* in privileging the mechanism of the child's return rather than the concept of the best interests of the child as set out in the case *Neulinger and Shuruk v. Switzerland*.⁹⁵

2.1.2. Neulinger and Shuruk v. Switzerland prism

Nevertheless, in the field of cross-border parental child abduction, the ECtHR has frequently taken contradictory positions. The case-law of the ECtHR on the interpretation of the exception to Article 13 (2) of the HC is a demonstration of this instability. In some cases, rather than referring to the case-law *X. v. Latvia* to oblige States to adopt a strict interpretation of the exceptions to return, the Court allows States to deviate from the application of the Hague mechanism by referring to the case of *Neulinger and Shuruk*. When the Court adopts this position, the exception of the child's opposition to return is widely interpreted.

In *M.K. v. Greece*⁹⁶, the Court stated that the best interest of the child implies that the return mechanism provided by the Hague Convention '*cannot be ordered automatically or mechanically*'. In this case, the French mother had two children with a Greek citizen. After the divorce was granted, the mother obtained custody of one of the children and moved with him to France. When the child returned to Greece for the holidays, his father did not return him to his mother. The mother initiates the Hague Convention mechanism before the French authorities. After the French judge had established the child's habitual residence in France; the Greek judge, in a judgment on 30 September 2015, refused to rule on the child's custody and ordered the child's return to France. In this judgment, the judge noted that the child had not clearly expressed his opposition but only expressed feelings of loneliness. The IPCA procedure should have ended with this decision by the Greek authorities to return the child to France. However, following this judgment, the child is not returned to her mother due to decisions by the Greek judge contradicting the judgment of 30 September 2015 but also due to their inaction regarding the execution of this judgment. The Greek judge, in justifying their actions, raised

⁹⁵ *Neulinger and Shuruk v. Switzerland*

⁹⁶ *M.K. c. Greece* Application No. 51312/16 (2018), ECtHR

the fact that the child had stated that *'he wanted to stay with his brother and father because he would have felt safer with them and because he would not have been subjected to psychological pressure by their side. He added that he loved his mother but that after what she had done'*.⁹⁷ The ECtHR, which has to rule on the violation of the mother's right to respect for her private and family life, considers that these contradictory decisions of the Greek authorities were taken in *'the best interests of A. and taking into account the evolution of these interests - in function of A.'s maturity, attitude and wishes, as well as the risk of psychological harm'*. The Court concluded that there was no violation of Article 8, because the Greek authorities had considered that the family's situation *'had changed radically over the years'*.

In this judgment, the ECtHR inflicts a setback on the Hague return mechanism by confirming that the child's views can be an obstacle to the enforcement of the return order. In accordance with the Hague Convention, the child's opposition can only be raised at the time of the return order by the State of refuge. In this case, the Greek judge had already ruled on the child's return and decided not to take his opposition into account. Subsequently, the Greek judges used the child's opposition as a justification for not enforcing the return order. However, the child's opinion was necessarily biased by the passage of time due to the inaction of the Greek authorities to ensure the child's return to France. Instead of reminding States that they must take all necessary measures to enforce return orders, the ECtHR leaves the door open for judges to use the passage of time coupled with the child's opinion not to apply the Hague return mechanism.

2.2. European Court of Justice: promotion of the principle of mutual trust

The European Court of Justice (ECJ) also had to rule on the articulation between the child's opinion and the enforcement of a return order. In *Joseba Andoni Aguirre Zarraga v. Simone Pelz*⁹⁸, the Court clarified that the violation of the child's right to be heard had no influence on the execution of the return order. In this case, a father of Spanish nationality had obtained custody of his daughter after the divorce from her mother of German nationality. After a holiday in Germany with her mother, the daughter was not returned to her father. The father instituted IPCA proceedings under the Hague Convention before the German courts. In the first

⁹⁷ *M.K. c. Greece*

⁹⁸ *Joseba Andoni Aguirre Zarraga v. Simone Pelz*, Case C-491/10, 22th December 2010, ECJ

instance, the German judge orders the return of the child, but after an appeal by the mother, the return order is overturned on the basis of Article 13(2) of the Hague Convention. The German judge, through the preliminary ruling procedure, asked the Court of Luxembourg whether it could oppose the enforcement of the return request issued by the Spanish authorities on the grounds that the child had not been heard by the Spanish judge. On the one hand, ECJ states that while Article 42(2) of Brussels II bis and Article 24 of the Charter of Fundamental Rights recognise a right to be heard; there is not an '*absolute obligation*'⁹⁹ on States to hear the child. Indeed, the Court considers that the principle of mutual trust and recognition of decisions in IPCA cases override the child's right to be heard. ECJ emphasises that decisions taken under the Brussels II bis Regulation '*must be based on the principle of mutual trust, with the grounds for non-recognition being kept to the minimum necessary*'. Thus, the judges of the Luxembourg Court agree with the ECtHR case-law *X. v. Latvia* that the exceptions must be interpreted strictly so as not to undermine the mechanism of recognition and enforcement of return orders provided for by the Hague Convention and the European Regulation. Thereby, in this case, even if the Spanish judge (State of habitual residence) had not heard the child when making its decision on custody, Germany (State of refuge) could not oppose the return on the ground of failure to respect the child's right to be heard by Spanish authorities.

On the other hand, the Court points out that the hearing of the child is determined on a case-by-case basis and '*must be assessed in the light of the requirements of the best interest*'. According to the ECJ, the hearing of the child is not *automatic*¹⁰⁰ and depends on the assessment of his best interests to be heard. The ECHR takes the opposite position, as it considers that the child, in cases concerning him, must always be heard. On the contrary, the ECJ considers that the assessment of the best interests of the child must be made at the time of the decision to hear the child or not. For the judges of the Strasbourg Court, it is always in the best interests of the child to be heard.

Ultimately, this is a complex task that is left to national judges whether they are acting on behalf of the State of refuge or the State of habitual residence. In cases where the child opposes return, they must juggle the individual assessment of each child, taking into account

⁹⁹ *Joseba Andoni Aguirre Zarraga v. Simone Pelz*, ECJ

¹⁰⁰ *Ibid*

the child's age, maturity and best interests, while acting quickly and ensuring that decisions under the Hague Convention and Brussels II ter are enforced.

3. Mediation: a tool to strengthen the child's voice

Mediation is a valuable tool for gathering the child's views while making a general assessment of the family situation. Thus, while mediation cannot always lead to an amicable solution, it can be an important aid to the judge in the complex task of assessing the child's views.

As IPCA cases involve numerous court decisions that may aggravate the family conflict, the extrajudicial route has always been mentioned in IPCA instruments. Article 7(c) of the Hague Convention requires central authorities *'to bring about an amicable resolution of the issues'*.¹⁰¹ Article 10 also provides that *'all appropriate measures should be taken to obtain the voluntary return of the child.'*¹⁰² In addition, a Guide to good practice on the application of the Hague Convention is specifically devoted to mediation.¹⁰³ Through this guide, the Permanent Bureau of the Hague Convention encourages States to implement mediation in IPCA cases. It also provides recommendations on the use of mediation. The Guide stresses that mediation should be accompanied by *'safeguards and guarantees to ensure that the mediation process is not detrimental to either party'*. Indeed, if mediation is to be a preferred solution, it must be subject to limits and control. Moreover, for the solutions reached during mediation to be effective, it is recommended that States give legal effect to these decisions.

There is a growing interest in mediation in the field of parental abduction, as highlighted in this guide¹⁰⁴, but as can also be seen in the reform of the Brussels II bis Regulation. Brussels II ter Regulation devotes an article to the use of mediation in cases of cross-border parental child abduction: *'As early as possible and at any stage of the proceedings, the court either*

¹⁰¹Hague Convention, Art.7 (c)

¹⁰²Hague Convention Ar. 10

¹⁰³ *GUIDE DE BONNES PRATIQUES en vertu de la Convention de La Haye du 25 octobre 1980 sur les aspects civils de l'enlèvement international d'enfants CINQUIEME PARTIE-MEDIATION*. Droit de la famille Jordan Publishing Limited. <https://www.hcch.net/fr/publications-and-studies/details4/?pid=6561>

¹⁰⁴ Ibid

directly or, where appropriate, with the assistance of the Central Authorities, shall invite the parties to consider whether they are willing to engage in mediation'¹⁰⁵ As well as the Hague Permanent Bureau, the Regulation also sets limits on the use of mediation: mediation must not be contrary to the best interests of the child.¹⁰⁶ Beyond the legal provisions, the ECtHR also stresses that states must use mediation in IPCA cases. ECtHR focuses on whether States have taken the necessary measures to facilitate the voluntary return of the child under Article 7 of the Hague Convention. In some circumstances, such as in the above-mentioned case of *M.K. v. Greece*, the '*high conflict*'¹⁰⁷ relationship between the two parents may justify the authorities' failure to use the cooperation route to resolve the dispute.

Yet, even in cases where there are strong tensions between the parties, mediation is a necessary means of ensuring that the child's views are at least heard, if not taken into account. Indeed, as we have seen above, the child's voice must overcome many obstacles before it reaches the judges. Mediation allows the child to be heard in a less intimidating environment than the courts. In addition, a mediator is an impartial person who will not take the final decision, so the child can express himself more freely. Furthermore, the mediator will not only listen to the child but also defuse any influence from the abducting parent by reminding the child of the '*laws of co-parenting*'.¹⁰⁸ The mediator also dialogues with the parents and can therefore be the voice of the child. By adopting this role, the mediator can ensure that the child's needs '*are heard by both parents*.'¹⁰⁹

By helping the parents to understand the child's wishes in IPCA cases, the mediator helps to ensure that the conflict is resolved by the parents' will and not by a court decision. In this way, the mediator helps to protect the best interests of the child, as it is in the best interests of every child to remain outside the world of justice. Although this paper has attempted to trace

¹⁰⁵ Ar. 25, Regulation Brussels II ter

¹⁰⁶ Ibid

¹⁰⁷ *M.K v. Greece*

¹⁰⁸ Ganancia, D., & Dahan, J. (2007). *La médiation familiale internationale : LA DIPLOMATIE DU COEUR DANS LES ENLEVEMENTS D'ENFANTS (Trajets)* (French Edition). Eres.

¹⁰⁹ Ibid

the path of the child's voice from its expression to its consideration by the judge, the most important fact is that the child's voice is heard by the parents.

CONCLUSIONS

The aim of this thesis was to assess the impact of the child's views on the return decision in cross-border parental child abduction. Thus, the procedure has always been approached through the prism of the child.

1/ Balancing the best interests of the child against the need to return the child to the State of habitual residence

Private international law standards regulating IPCA have been developed to ensure that in most cases the child is promptly returned to his State of habitual residence. The drafters of these standards assumed that the best interests of the child were in his immediate return. However, the best interests of the child is a complex concept that takes into account a number of factors in determining which situation is better for the child. The best interests of the child are thus not automatically in his immediate return. Although the Hague Convention provides for exceptions to the return of the child, its mechanism is mainly focused on the immediate return of the child. States should not lose sight of the fact that they must also consider international and European standards protecting the fundamental rights of children even if they do not specifically address IPCA. Under these standards, States must always respect the best interests of the child in matters concerning him. Since the notion of best interests is a subjective and complex concept, judges have sometimes undermined the mechanisms of the Hague Convention by referring to this concept rather than to the return exceptions provided for by the Hague Convention.

2/ Reinforcing the protection of children's rights in civil proceedings through cooperation between Member States

The exception to return relating to the child's opposition raises many problems of interpretation. As the Hague Convention does not specify the age and maturity criteria for the child's views to be taken into account, the Convention leaves States free to adopt divergent positions. Furthermore, the failure to recognise the right to be heard in the Hague Convention creates inequality between children. A child in a State where the right to be heard is recognised will be more likely to oppose his return, while countries that do not recognise the right to be heard reduce the chance that a child will express his views against a decision that primarily

affects him. European law protecting the child's right to be heard thus helps to reduce these inequalities of treatment between children in the Member States. Nevertheless, EU Member States still have some way to go to make the child's right to be heard fully effective. Indeed, as discussed in this thesis, the right to be heard is accompanied by secondary rights such as the right to be informed or the right to non-discrimination. In civil proceedings, these rights remain ineffective in practice. In addition to implementing more protective rules for the child in civil proceedings concerning him, Member States should also be more attentive to the modes of legal representation of the child. A child who is represented by a competent person and independent of the parents' legal representatives, will be able to express himself more easily. Allowing the child to be legally represented by an independent person reinforces the child's right to be heard.

3/ Clarified age and maturity criteria at the international and European level

If the child is to be heard in any case, the consideration of his views must be strictly evaluated. Age and maturity are the two criteria provided by the Hague Convention for the child's opposition to be considered in the return decision. States are free to set a minimum age or no minimum age for listening to the child, which is another factor of inequality depending on the country where the child is located. The notion of maturity is not detailed in the Convention either, leaving it to the discretion of the judge. Finally, the way in which the child's opposition is taken into account may vary from one IPCA case to another. Allowing judges this freedom allows them to consider the situation of each child without being obliged to obey binding rules that would go against the best interests of the child. However, this freedom may be negative in the sense that respect for the best interests of the child remains solely in the hands of the judge.

4/ Reinforcing mediation practice

This thesis ends up highlighting the benefits of mediation. If mediation is now increasingly being promoted as a method of conflict resolution, in particular with the recast of the Brussels II bis Regulation, it should be emphasized. High conflict situations such as international parental abduction cases can only be de-escalated through dialogue. Mediation allows this dialogue to take place, but above all it allows the child's voice to be heard by both parents. Since States are often powerless to enforce return orders, emphasis should be placed on influencing the parents' willingness to end the conflict. Mediation, within the limits of the

best interests of the child, should therefore be a privileged means in cases of international parental child abduction.

BIBLIOGRAPHY

Academic articles :

- Perdrille, S. (2012). Conflit parental et conflit de loyauté : pour un usage raisonné de l'audition de l'enfant. *Enfances & Psy*, 56, 70-78. <https://doi.org/10.3917/ep.056.0070>
- Spilman, S. K. (2006). Child Abduction, Parents' Distress, and Social Support. *Violence and Victims*, 21(2), 149-165. <https://doi.org/10.1891/vivi.21.2.149>
- Bannon, C. M. (2011). The Hague Convention on the Civil Aspects of International Child Abduction : The Need for Mechanisms to Address Noncompliance. *Boston College Third World Law Journal*, 31(1), 129-162.
- Donyale N. Leslie, *A Difficult Situation Made Harder: A Parent's Choice Between Civil Remedies and Criminal Charges in International Child Abduction*, 36 Ga. J. Int'l & Comp. L. 381 (2008). Available at: <https://digitalcommons.law.uga.edu/gjicl/vol36/iss2/4>
- Fiorini, A. (2005). Enlèvements internationaux d'enfants solutions internationales et responsabilités étatiques. *McGill Law Journal*, 51(2), 279-326.
- Bodenheimer, B. M. (1980). The Hague draft convention on international child abduction. *Family Law Quarterly*, 14(2), 99-120.
- Corneloup, S. & Kruger, T. (2020). Le règlement 2019/1111, Bruxelles II : la protection des enfants gagne du terrain). *Revue critique de droit international privé*, 2, 215-245. <https://doi.org/10.3917/rcdip.202.0215>
- Farge, M. (2006). Les réalisations de l'Union européenne concernant l'enfant: Le règlement Bruxelles II bis. *Informations sociales*, 129, 70-83. <https://doi.org/10.3917/inso.129.0070>
- Keller, H., & Heri, C. (2015). Protecting the Best Interests of the Child: International Child Abduction and the European Court of Human Rights. *Nordic Journal of International Law*, 84(2), 270-296.
- (2015). Une justice adaptée aux enfants. Points de vue et expériences de professionnels. *Journal du droit des jeunes*, 345-346, 26-34. <https://doi.org/10.3917/jdj.345.0026>
- Permanent Bureau of the Hague Conference on Private International Law (HCCH). (2018). Special focus, The Child's Voice 15 Years Later. The Judges' Newsletter on International Child Protection, XXII(Fall 2018).
- Mol, C. (2019). Children's Representation in Family Law Proceedings. *The International Journal of Children's Rights*, 27(1), 66-98. <https://doi.org/10.1163/15718182-02701001>

- Verdier, P. (2007). Le choix de l'avocat de l'enfant dans les procédures d'assistance éducative. *Journal du droit des jeunes*, 265, 34-36. <https://doi.org/10.3917/jdj.265.0034>
- McEleavy. (2015). The European Court of Human Rights and the Hague Child Abduction Convention: Prioritising Return or Reflection? *Netherlands International Law Review*, 62(3), 365–405. <https://doi.org/10.1007/s40802-015-0040-z>
- Benassy, M. (2009). La Convention internationale des droits de l'enfant et la parole de l'enfant. *Le Journal Des Psychologues*, 268(5), 24. <https://doi.org/10.3917/jdp.268.0024>
- Abduction of Children by Their Parents: A Survey of the Problem. (1991). *Social Work*. <https://doi.org/10.1093/sw/36.5.421>
- Tavares, A., Crespo, C., Ferreira, L., & Ribeiro, M. T. (2021). Left behind parents : A qualitative study on the experience of parental abduction of a child in Portugal. *Journal of Marital and Family Therapy*, 47(3), 595-613. <https://doi.org/10.1111/jmft.12478>
- Van Hof, T., & Kruger, T. (2018). Separation from the Abducting Parent and the Best Interests of the Child: A Comparative Analysis of Case Law in Belgium, France and Switzerland. *Netherlands International Law Review*, 65(2), 131–153. <https://doi.org/10.1007/s40802-018-0108-7>
- Bonafé-Schmitt, J. (2008). À propos des ouvrages de B. Blohorn-Brenneur, Justice et médiation. Un juge du travail témoigne, Le Cherche-Midi, Paris, 2006, 197 p. D. Ganancia, La médiation familiale internationale. La diplomatie du cœur dans les enlèvements d'enfants, Éres, co. *Négociations*, 10, 163-168. <https://doi.org/10.3917/neg.010.0163>
- Tetley. (2012). The Hague Convention: Who is Protecting the Child? *Children Australia*, 37(4), 135–141. <https://doi.org/10.1017/cha.2012.34>
- Van Hof, Lembrechts, S., Maoli, F., Sciacaluga, G., Kruger, T., Vandenhoe, W., & Carpaneto, L. (2020). To Hear or Not to Hear: Reasoning of Judges Regarding the Hearing of the Child in International Child Abduction Proceedings. *Family Law Quarterly*, 53(4), 327–351.
- Cornec, A. (2011). Il faut nommer l'intérêt supérieur de l'enfant : La Convention de La Haye du 25 octobre 1980 sur les aspects civils de l'enlèvement international d'enfants : un exemple d'intérêt supérieur de l'enfant. *Journal du droit des jeunes*, 303, 39-44. <https://doi.org/10.3917/jdj.303.0039>
- Loo, H. (2016). In the Child's Best Interests: Examining International Child Abduction, Adoption and Asylum. *Chicago Journal of International Law*, 17(2), 609-636.

- Martín. (2015). International Parental Child Abduction and Mediation. *Anuario Mexicano de Derecho Internacional*, 15(1), 353–412. <https://doi.org/10.1016/j.amdi.2014.09.007>
- Gebler, L. (2007). L'audition de l'enfant par le juge aux affaires familiales. *Enfances & Psy*, 36, 50-60. <https://doi.org/10.3917/ep.036.0050>

Books:

- Ganancia, D., & Dahan, J. (2007). *La médiation familiale internationale : LA DIPLOMATIE DU COEUR DANS LES ENLEVEMENTS D'ENFANTS (Trajets) (French Edition)*. Eres.
- Fulchiron, H. (2005). *Les enlèvements internationaux d'enfant* (1^{re} éd.). Presses universitaires de France (PUF).

International and European norms:

- Hague Conference on Private International Law, Hague Convention on the Civil Aspects of International Child Abduction, 25 October 1980, Hague XXVIII
- UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3
- Treaty on the Functioning of the European Union, Part three – Union Policies and internal actions
- 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, Document 32000R1347, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32000R1347>
- Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5
- Council Regulation (EC) No 2201/2003 of 27 November 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
- European Union: Council of the European Union, *Charter of Fundamental Rights of the European Union* (2007/C 303/01), 14 December 2007, C 303/1,
- Résolution du Parlement européen du 5 avril 2022 sur la protection des droits de l'enfant dans les procédures relevant du droit civil, du droit administratif et du droit de la famille (2021/2060(INI))

Publication of the Hague Conference on Private International Law:

- Conférence de La Haye de droit international privé 2003. (2003). *GUIDE DE BONNES PRATIQUES en vertu de la Convention de La Haye du 25 octobre 1980 sur les aspects civils de l'enlèvement international d'enfants PREMIÈRE PARTIE - PRATIQUE DES AUTORITÉS CENTRALES*. Droit de la famille Jordan Publishing Limited. <https://assets.hcch.net/docs/584857b8-6574-46a8-b254-426f3130c85d.pdf>
- Conférence de La Haye de droit international privé 2003. (2003). *GUIDE DE BONNES PRATIQUES en vertu de la Convention de La Haye du 25 octobre 1980 sur les aspects civils de l'enlèvement international d'enfants DEUXIEME PARTIE-MISE EN ŒUVRE* <https://assets.hcch.net/docs/d39d846a-7355-438d-8cb4-ca4c933d7f6c.pdf>
- Conférence de La Haye de droit international privé 2003. (2003). *GUIDE DE BONNES PRATIQUES en vertu de la Convention de La Haye du 25 octobre 1980 sur les aspects civils de l'enlèvement international d'enfants QUATRIEME PARTIE-EXECUTION*
- Conférence de La Haye de droit international privé 2003. (2003). *GUIDE DE BONNES PRATIQUES en vertu de la Convention de La Haye du 25 octobre 1980 sur les aspects civils de l'enlèvement international d'enfants CINQUIEME PARTIE-MEDIATION* <https://assets.hcch.net/docs/b700704f-98b9-49a6-bb93-f3de37342628.pdf>
- Conférence de La Haye de droit international privé 2003. (2003). *GUIDE DE BONNES PRATIQUES en vertu de la Convention de La Haye du 25 octobre 1980 sur les aspects civils de l'enlèvement international d'enfants SIXIEME PARTIE-ARTICLE 13(1)(b)* <https://assets.hcch.net/docs/843d1604-e3af-4b79-9797-10e3cf51c35a.pdf>

CRC General comments:

- UN Committee on the Rights of the Child (CRC), General comment No. 12 (2009): The right of the child to be heard, 20 July 2009, CRC/C/GC/12, available at: <https://www.refworld.org/docid/4ae562c52.html>
- UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC /C/GC/14

Domestic norms:

- Civil Code of Greece

- French Civil Code

Case-law:

a) ECtHR:

- *Ignaccolo-Zenide v. Romania*, no. 31679/96, (2001), ECHR
- *Maire v. Portugal*, Application no 48206/99, (2006)
- *Iglesias Gil and A.U.I v. Spain*, Application no 56673/00, (2005)
- *Bianchi v. Switzerland*, Application No. 7548/04 (2006)
- *Bajrami v. Albania*, Application no. 35853/04 (2006)
- *Neulinger and Shuruk v. Switzerland* (Application No 41615/07), Grand Chamber
- *X. v. Latvia* (Application No. 27853/09), Grand Chamber
- *Rouiller v. Switzerland*, Application No. 3592/08 (2014)
- *Raw v. France*, Application No. 10131/11 (2013)
- *Gajtani v. Switzerland*, Application No. 43730/07 (2014)

b) ECJ:

- *Joseba Andoni Aguirre Zarraga v. Simone Pelz*, Case C-491/10, 22th December 2010, ECJ

c) Domestic case-law:

- *Redmond v. Redmond*, 126 A.D.3d 1476, 6 N.Y.S.3d 355, 2015 N.Y. Slip Op. 2598 (N.Y. App. Div. 2015)
- Cour de cassation, civile, Chambre civile 1, 8 juillet 2010, No. 09-65.172

Reports:

- Agence des droits fondamentaux de l'Union européenne. (2015). *Une justice adaptée aux enfants – points de vue et expériences de professionnels*. https://fra.europa.eu/sites/default/files/fra-2015-child-friendly-justice-professionals-summary_fr.pdf
- European Commission, Directorate-General for Justice, Behrens, J. (2014). Study on children's involvement in judicial proceedings: contextual overview for the

criminal justice phase: Germany, Publications Office.
<https://data.europa.eu/doi/10.2838/73960> (considering also the studies about Greece, France and Netherlands)

- E. Pérez Vera, « Rapport explicatif sur la Convention de La Haye de 1980 sur l'enlèvement international d'enfants » in *Actes et documents de la Quatorzième session (1980)*, tome III, *Enlèvement d'enfants*, La Haye, Imprimerie Nationale, 1982, (<https://www.hcch.net/fr/publications-and-studies/details4/?pid=2779>)
- Professor Nigel Lowe And Victoria Stephens. (2017). *The Seventh Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention – October 2017* (Hague Conference on International Private Law, Ed.). Hague Conference on International Private Law.
- Heckendorn Urscheler, Pretelli, I., Curran, J., Druckman, K. T., De Dycker, S., Skala, J., Westermarck, H., Fournier, J., Parkes, A., Aronovitz, A., Cekanavicius, A., Dezso Ziegler, T., Curry-Sumner, I., Fötschl, A., Jagodzinska, K., & Sebeni, A. (2015). Cross-border parental child abduction in the European Union. Publications Office.

Online sources:

- Unmarried couples (cohabitation) – rights/obligations across Europe. (2022, 4 février). Your Europe. https://europa.eu/youreurope/citizens/family/couple/de-facto-unions/index_en.htm
- *EU cross-border parental child abduction*. (2022). Your Europe. https://europa.eu/youreurope/citizens/family/children/abduction/index_en.htm
- *La refonte de Bruxelles II bis : le point de vue d'un avocat | Think Tank | European Parliament*. (2016). European Parliament. [https://www.europarl.europa.eu/thinktank/en/document/IPOL_BRI\(2016\)571390](https://www.europarl.europa.eu/thinktank/en/document/IPOL_BRI(2016)571390)
- https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRC&Lang=en
- *Hague Convention on the Civil Aspects of International Child Abduction*. (2022). Attorney-General's Department. <https://www.ag.gov.au/families-and-marriage/families/international-family-law-and-children/hague-convention-civil-aspects-international-child-abduction>