Universitat Autònoma de Barcelona

TRABAJO DE FIN DE GRADO

GRADO EN DERECHO

TITLE: INTERNATIONAL CHILD ABDUCTION : AN ANALYSIS OF THE LEGAL FRAMEWORK AND ITS ADEQUACY FOR SAFEGUARDING THE BEST INTEREST OF THE CHILD

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Academic year: 2024-2025

Firstly, I would like to thank my supervisor for his help and continuous support throughout my end of degree project.

I would also like to thank my sister Madeleine for her advice, and patience.

OBJECTIVES:

International child abduction is a global problem that, despite the existence of legal frameworks aimed at preventing it, continues to be a very present issue in today's society. Indeed, abduction by one of the parents or a family member represents a significant problem, although many people are unaware of the consequences and the long-lasting impact it can have, especially on the child.

For this reason, and with the aim of raising awareness of this issue, I have decided to focus my work on international child abduction, and more specifically on how the existing legal instruments seek to protect the best interests of the child and whether these solutions are truly adequate. An important part of my analysis will focus on cases in which domestic violence is involved. By addressing situations where domestic violence lies at the heart of the conflict, I hope to demonstrate a fundamental aspect of this problem.

As a fourth-year Law student, I was especially drawn to this topic due to its international legal dimension and the fact that it has not been covered in depth throughout my studies. This project has allowed me to explore a serious and highly relevant issue. My intention is to contribute to the reflection on this topic by analysing whether the current legal mechanisms are suitable to guarantee the protection and well-being of the affected children.

ABSTRACT:

This work analyses the question of international child abduction. These cases represent an issue of Private International Law, as they often concern multiple countries and individuals of different nationalities. Many legal norms aim to regulate these cases to ensure their proper handling. One of the key aspects of international child abduction is the principle of the best interest of the child. Indeed, the child being the primary victim of these cases, making sure that their best interest is always seen as a priority is essential. However, the adequacy of the solutions foreseen in the existing norms and conventions have begun to be increasingly questioned, especially in certain specific cases where domestic violence is involved.

RESUMEN:

Este trabajo analiza la cuestión de la sustracción internacional de menores. Estos casos representan una situación de Derecho Internacional Privado, ya que afecta a múltiples países y a individuos de diferentes nacionalidades. Numerosas normas jurídicas pretenden regular estos casos para garantizar su correcta tramitación. Un aspecto clave de la cuestión de la sustracción internacional de menores es el principio del interés superior del menor. El niño es la principal víctima de estas situaciones de sustracción, por lo que es esencial asegurarse de que su interés se considere siempre prioritario. Sin embargo, se cuestiona la adecuación de las soluciones previstas en las normas y convenciones existentes particularmente en los casos en los que la violencia doméstica está involucrada.

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INTRODUCTION

International child abduction is a global issue that affects thousands of families worldwide. Indeed, the most recent statistical study conducted by Professor Nigel Lowe of Cardiff University and Victoria Stephens, analyses the data received concerning applications made under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereafter "the Hague Convention") in 2021 and found that "at least 2,771 children were involved in the 2,180 return applications"[1].

International child abduction is the wrongful removal or retention of a child or children, by a family member, most of the time by one of the parents. Indeed, when there is a situation of international child abduction, "a child is abruptly taken from his or her known environment and placed in a new, often uncertain situation"[2]. It is an international issue, made easier by the process of globalisation. Indeed, crossing borders is an easy task for many, especially within areas such as the European Union, in which movement across Member States is permitted and easily accessible. Being a worldwide issue, it is only normal that global remedies be put in place to deal with this issue.

By global remedies it is to be understood, conventions that States can be a part of to resolve cases of international child abduction. In this case, the most relevant convention is the Hague Convention. The case of the European Union in regard to this subject is an interesting one, as over the years its legislation has evolved and progressed, and it adopted a binding Regulation for European Union Member States, dealing with international child abduction, the 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 (recast).

Being an international matter, it is of primary importance that the different legal norms are applied harmoniously and in accordance with the national laws of the countries concerned. This aspect is what shall be analysed in the first chapter of the work.

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[1] Professor N. LOWE and V. STEPHENS, *Global Report – Statistical study of application made in 2021 under the 1980 Child Abduction Convention*, https://assets.hcch.net/docs/bf685eaa-91f2-412a-bb19-e39f80df262a.pdf

[2] C. MOL & T. KRUGER, "International child abduction and the best interests of the child: an analysis of judicial reasoning in two jurisdictions", *Journal of Private International Law*, P. Beaumont FRSE, J. Harris QC (Hon.), Routledge, 2018, p 421 - 454, p. 421

Indeed, the first chapter will examine the different legal norms and how they are applied, so as to attain the end goal of successfully dealing with cases of international child abduction. By first analysing the different legal norms and how they interact with one another, it gives an overview and general understanding of the procedures and measures at hand, before going into depth about certain specific aspects.

One of the key aspects that will be analysed in the second chapter of this work is the best interest of the child. Being at the heart of the conflict, it is important and necessary to know and understand the place of the child within the procedural aspect of the cases. The child has various rights that will be examined throughout the duration of the work. The second chapter therefore explores the concept of the best interest of the child and how the rights this concept provides are regulated, carried out and protected.

Though it is important to acknowledge the conventions and regulations put in place with the purpose of solving these child abduction cases, it is also just as important to analyse their inadequacies and whether the measures and procedures put in place are enough to be able to adequately resolve the cases at hand. Legal norms evolve and change over time, so it is no surprise that many legal advances and changes have been made in regard to international child abduction, especially since the Hague Convention. However, it is important to acknowledge that there are potentially still some deficiencies, especially in certain specific aspects, such as in the cases where domestic violence is involved.

Focusing on cases where domestic violence is at the heart of the abduction offers a different perspective to the situation and shows another facet to international child abduction that needs to be considered. The third chapter of this work puts an emphasis on this situation and examines whether there is a conflict between the application of the legal norms and the best interest of the child.

CHAPTER I – THE LEGAL REGULATION OF INTERNATIONAL CHILD ABDUCTION: A PLURALITY OF INSTRUMENTS

In this chapter we shall study the different legal norms that govern and regulate international child abduction. The cases of the return of a child who has been abducted internationally, otherwise known as a cross-border illegal abduction, are governed by international law[3]. In terms of international norms, the two main ones that are applicable in these specific cases and that we shall be examining are, The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (**A**) and the 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 (recast). (**B**)
However, to be in a position to apply these legal norms, each State must ensure that its internal law is adequate and equipped to be capable to enforce the legal framework specified within the international norms. That is why we shall also be examining the role of internal law when it comes to the proper and efficient application of international norms applicable in cases of international child abduction. (**C**)

A) THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

The Hague Convention was concluded on the 25th of October 1980 and entered into force on the 1st of December 1983[4]. As of today, a large majority of the world's States have decided to ratify it. Indeed, there are 103 Contracting Parties to the Convention[5]. The number of Contracting States to the Hague Convention is an indicator as to the importance each State places on the welfare of children and their willingness to have the most efficient systems in place to solve cases of child abduction as quickly as possible.

Indeed, it states at the beginning of the Hague Convention that "the States signatory to the present are firmly convinced that the interests of children are of paramount importance in

[3] Citizens Information, Services and Support for children of International Child Abduction, https://www.citizensinformation.ie/en/birth-family-relationships/services-and-supports-for children/international-child-abduction/
[4] Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, https://www.hcch.net/en/instruments/conventions/full-text/?cid=24
[5] Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Status Table, https://www.hcch.net/en/instruments/conventions/status-table/?cid=24

matters relating to their custody" and that they are "desiring to protect children internationally from the harmful effects of their wrongful removal or retention"[6].

1) The key goals to be achieved through the Hague Convention

The main objectives that the Hague Convention sought out to achieve are clearly stated in its first article, according to which the goals 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 of access under the law of one Contracting State are effectively respected in the other Contracting States"[7].

Right from the first article, the Hague Convention conveys the idea that the return of the child as quickly as possible is of primary importance, as it is seen as the most efficient way to protect the child. A sense of urgency is implied which is reinforced throughout the various articles of the Hague Convention.

2) The scope of application of the Hague Convention

As stated before, in reference to the temporal scope of application, the Hague Convention entered into force on the 1st of Decembre of 1983, meaning all cases falling under its material scope of application that happened after this date, are to be governed by it.

Regarding the territorial scope of application, the Hague Convention is to be applied to cases of international child abduction, meaning where there is an element of internationality involving two or more different States party to the Hague Convention. It is applied to the States that are signatories to it. For it to be applicable, both countries involved in the case must have signed it. This is exposed in article 38 of the Hague Convention, which states that "the accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession"[8].

[6] *Op.cit*. Note 4
[7] *Ibid*, article 1
[8] *Op.cit*. Note 4, article 38

The most common case that will lead to the application of the Hague Convention is when "one parent relocates with a child across an international border without the consent of the left behind parent or without a court order permitting that relocation"[9].

As for the material scope of application, article 3 of the Hague Convention lists the two cases in which a removal or retention of a child is to be considered "wrongful". It is so, when "a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention"[10].

However, it must be said that the Hague Convention is for the protection of children. Children within the Hague Convention are not equivalent to minors, that is to mean an individual under the age of 18. This difference is clarified in article 4, which expressly states to whom the Hague Convention is applicable, and which children benefit from the system and measures put in place. According to article 4, "the Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years"[11]. If we take a closer look at this article, it is important to note that "the nationality and the parentage of the abducted child is irrelevant, as is also the person who has abducted the child"[12].

One important term that is essential to the correct application of the Hague Convention is the term of "habitual residence". Habitual residence, in accordance with the relevant case law is to be considered as "the social centre of life" of the minor, the place where their affective ties, not necessarily family ties deriving from their daily life, are based[13], "the physical space in which

[9] Hon. J D. GARBOLINO*,* "The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judge"*,* Second edition, Federal Judicial Center International Litigation Guide, 2015, p. 9
[10] *Op.cit*. Note 4, article 3
[11] *Ibid,* article 4
[12] I. LORENTE MARTINEZ, *Sustracción internacional de menores estudio jurisprudencial, practico y crítico,* Madrid, Dykinson, 2019, p. 55
[13] Sentencia Corte Cassazione Italia, 2 febrero 2005. Rivista di Diritto internazionale privato e procesuale. Anno XLII. Nº2. Aprile, giugno 2006. Edizione Cedam Padova. Pp. 425-429, *cit.*, I. LORENTE MARTINEZ, *Sustracción internacional de menores estudio jurisprudencial, practico y crítico,* Madrid, Dykinson, 2019, p. 34

the centre of his or her interests are located"[14]. The idea of being socially integrated in a certain location is an important factor in the courts determining of the habitual residence of the child. It is "not a term that depends on legal data, such as the registration of the minor in registers, or other systems of administrative control"[15].

3) Characteristics and direct measures available to ensure the objectives of Hague Convention are attained

The Hague Convention is an "innovative convention"[16]. Its innovative character is underlined in Spanish case law, as it can be seen in this judgment from 2004, that states that it is a "sui generis" convention. This is to mean that it is out of the ordinary. The judgment goes on to say that it is "self-executing and does not require the adoption of internal rules in the signatory State for its application"[17]. Equally, this means that the measures and actions that can be taken in application of the Hague Convention are applicable by themselves without the need for Contracting States to elaborate rules for its development[18].

The fundamental point of the Hague Convention is that it establishes direct measures to ensure the immediate return of the child to its country of residence. The effectiveness of the Hague Convention is therefore guaranteed by ensuring that it is directly applicable as a stand-alone legal norm for the signatory States. In line with this, the Hague Convention also ensure its effectiveness by not taking any decisions relevant to the substantive issue of custody rights. This is shown in article 16, according to which "the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not

[14] Sent. 1 Juzgado Mixto Carabayllo, Perú 19 julio 2005, https://www.incadat.com/es/case/873, *cit*., I. LORENTE MARTINEZ, *Sustracción internacional de menores estudio jurisprudencial, practico y crítico,* Madrid, Dykinson, 2019, p. 55

[15] V.H. HOLL, *Funktion und Bestimmung des gewöhnlichen Aufenthalts bei internationalen Kindesentfürungen*, Frankfurt am Main, P. Lang, 2001*, cit*., I. LORENTE MARTINEZ, *Sustracción internacional de menores estudio jurisprudencial, practico y crítico,* Madrid, Dykinson, 2019, p. 57

[16] *Op.cit.* Note 12, p.33

[17] AAP Almería 6 de febrero de 2004 [Solicitud de restitución de Juzgado de Bélgica. Causas de oposición. No acceso a la restitución]. Id Cendoj: 04013370012004200009 ECLI:ES:APAL:2004:48A *cit*., I. LORENTE MARTINEZ, *Sustracción internacional de menores estudio jurisprudencial, practico y crítico,* Madrid, Dykinson, 2019, p. 34

[18] *Op.cit*. Note 12, p.45

to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice"[19].

This is a "rule of negative international jurisdiction"[20], in the sense that it prohibits a court in the State where the child is now located from hearing and deciding, temporarily, on the merits of the case. This means that if the return of the child to another country is ordered, the merits of the case cannot be considered. This is also the case in a situation where the decision on the return or not of the child is not final[21].

The Hague Convention is not one that resolves child custody cases, instead it is an "effective remedy to be able to establish if the child was wrongfully taken from her habitual residence, in which case, the Convention would be used to order the child return to the nation"[22]. Indeed, the merits of the case are questions that are to be reserved for the courts of the habitual residence of the child to decide. This idea is also reinforced by case law from the European Union. In a judgment from the Court of Justice of the European Union, from 2014, it was stated that the actions in the Hague Convention do "not concern the substance of parental responsibility and therefore do not have the same subject matter or the same cause of action as an action for a decision on the merits of parental responsibility"[23].

The Hague Convention thus creates direct measures to be able to achieve the return of the child. It does not go into the merits of the case, its object is "exclusively the mere restitution of the child to the country of his habitual residence, with the aim of preventing the situation created by an illegal abduction of the child from becoming consolidated"[24].

Though the Hague Convention has 103 Contracting States and provides direct measures to ensure the prompt return of the abducted child, it is not the only international norm that can be applied to these types of situations. Indeed, the Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and

[19] *Op.cit*. Note 4, article 16
[20] *Op.cit.* Note 12, p.47
[21] AAP Valladolid 14 de noviembre de 2005 [Intervención procesal de la Abogacía del Estado] Id Cendoj: 47186370032005200081 ECLI:ES:APVA:2005:996A, *cit*., I. LORENTE MARTINEZ, *Sustracción internacional de menores estudio jurisprudencial, practico y crítico,* Madrid, Dykinson, 2019, p. 48
[22] *Op.cit*. Note 9, p.9
[23] STJUE de 9 de octubre de 2014, asunto C376/14 PPU. ECLI:EU:C:2014:2268, *cit*., I. LORENTE MARTINEZ, *Sustracción internacional de menores estudio jurisprudencial, practico y crítico,* Madrid, Dykinson, 2019, p. 199
[24] *Op.cit.* Note 12, p. 42

the matters of parental responsibility, and on international child abduction is to be applied automatically when cases of child abduction concern Member States of the European Union. This Regulation, along with its place within the legal norms is what we are going to focus on in our next chapter.

B) EU REGULATION 2019/1111, ON JURISDICTION AND ENFORCEMENT OF DECISIONS IN MATRIMONIAL MATTERS AND THE MATTERS OF PARENTAL RESPONSIBILITY, AND ON INTERNATIONAL CHILD ABDUCTION (RECAST)

Before this regulation, the European regulation that used to refer to child abduction was the 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. This Regulation was regarded as a "well-functioning but improvable instrument"[25]. As the years went on it became clear that this Regulation needed to be "recast" to clarify certain aspects, as well as to specify and make the process of resolving child abduction cases more efficient.

Once the previous regulation was revised it became what we now know as the 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 (recast) (hereafter "the Regulation"). This Regulation became applicable to European Union Member States as of the 1st of August 2022. It focuses on enhancing efficiency of the cross-border proceedings in parental responsibility and abduction proceedings "either by clarifying the current provisions or introducing new elements which will render the procedures faster"[26].

[25] Recital (1)2; M NEUMAYR, "Die Brüssel IIb-VO – Grundlagen und Ziele", in T Garber and K Lugani (eds), Die Brüssel IIb-Verordnung: Zuständigkeit, Anerkennung und Vollstreckung in Ehesachen und Kindschaftssachen einschließlich der internationalen Kindesentführung (Verlag Österreich and Nomos, 2022), para 3/4; C Pachmayr, "Die wesentlichen Neuregelungen der Brüssel IIb-VO im Hinblick auf Kindschaftssachen" (2022) Zeitschrift für das Juristische Studium (ZJS) 311, 311, *cit*., L. LUSZNAT, "The Brussels IIb Regulation – Most significant changes compared to its predecessor and enhancement of the 1980 Hague Convention on International Child Abduction"*, Journal of Private International Law*, 31 May 2024, p. 129-153, p.130

[26] Hague Conference on Private International law, Info document from the European union EU laws and initiatives to combat violence against women and international child abduction, https://assets.hcch.net/docs/ade6fa5c-fdc2-4337-ab1a-43c76d089de1.pdf

The Regulation complements the Hague Convention within the European Union and applies to an abduction from one Member State to another. International conventions will therefore still apply to cases where the Regulation does not apply.

The Regulation is of application to all European Union Member States except for Denmark, and it reaffirms the intention of the Member States to "enhance the operation of the 1980 Hague Convention with respects to intra- EU abductions"[27]. The main goals of the Regulation are therefore to "improve the return mechanism for wrongfully removed or retained children" by "providing efficient and expeditious proceedings to return the children within a legally certain framework"[28].

In terms of comparison to the old regulation, the recast Regulation puts a greater emphasis on international child abduction cases. This can be seen in the title of the two regulations, the recast version expressly mentioning child abduction in its title, which was not the case in the previous one. Furthermore, the Regulation 2019/1111, "upgrades the only existing provision enhancing the Hague Convention (article 11) into a whole new chapter (chapter III, international child abduction), therefore improving the structure"[29].

The new Regulation offers a more complete and detailed legal regimen to follow since "it develops the previsions present in article 11 of the regulation from 2003"[30].

The legal relationship between the Regulation and the Hague Convention, is clearly defined in the first article of the Regulation. According to this article, "chapters III and VI of this

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[27] F. MAOLI, *"*The Brussels II ter Regulation: A Quick Look at Some Significant Innovations*"*, *The European Association of Private International Law,* 21 September 2022, https://eapil.org/2022/09/21/the-brussels-ii-ter-regulation-a-quick-look-at-some-significant-innovations/

[28] Compare F Gascón Inchausti and P Peiteado Mariscal,"International Child Abduction in the Case Law of the Court of Justice of the European Union: Learning from the Past and Looking to the Future" (2021) PPC 617, 620; Köllensperger, supra n 14, para 2/12; Martiny, supra n 96, 508, *cit*., L. LUSZNAT, "The Brussels IIb Regulation – Most significant changes compared to its predecessor and enhancement of the 1980 Hague Convention on International Child Abduction"*, Journal of Private International Law*, 31 May 2024, p. 129-153, p.145, https://www.tandfonline.com/doi/full/10.1080/17441048.2024.2338625?scroll=top&needAccess=true

[29] L. LUSZNAT, "The Brussels IIb Regulation – Most significant changes compared to its predecessor and enhancement of the 1980 Hague Convention on International Child Abduction"*, Journal of Private International Law*, 31 May 2024, p. 129-153, p.145, https://www.tandfonline.com/doi/full/10.1080/17441048.2024.2338625?scroll=top&needAccess=true

[30] G. PALAO MORENO (Director), C. AZCÁRRAGA MONZONIS, "Artículo 22 restitución del menor con arreglo al convenio de la haya de 1980", *El nuevo marco europeo en materia matrimonial, responsabilidad parental y sustracción de menores, Comentarios al reglamento (UE) n°2019/1111,* Valencia, Tirant lo Blanch, 2022, p. 262

Regulation apply where the wrongful removal or retention of a child concerns more than one Member State, complementing the 1980 Hague Convention. Chapter IV of this Regulation applies to decisions ordering the return of a child to another Member State pursuant to the 1980 Hague Convention which have to be enforced in a Member State other than the Member State where the decision was given"[31].

This idea is reinforced further along in article 96 of the Regulation. This article states that when there is a case of wrongful removal or retention of a child, "the provisions of the 1980 Hague Convention shall continue to apply as complemented by the provisions of Chapter III and VI of this Regulation"[32]. We can see here that the idea of complementarity is present. No one legal norm is applied over the other. They are both applied simultaneously, the Regulation being there to complement the provisions of the Hague Convention.

This idea is one that was kept from the previous regulation, as its article 11 states that it shall be of application "where a person, institution or other body having rights of custody applies to the competent authorities in a Member State to deliver a judgment on the basis of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction"[33].

Another significant change in terms of the scope of application, is the specific reference to the age up until which the Regulation shall apply. In article 2 of the Regulation, it is stated that a "child means any person below the age of 18 years"[34]. However, in article 22, a clarification appears, and it is stated that in the case of international child abduction, the Regulation applies to children "under 16 years old"[35]. This clarification is in line with the scope of application of the Hague Convention. Therefore, in both cases, the two legal norms cease to apply when the child reaches the age of 16.

Furthermore, a precision which was added to benefit the child and ensure the legal systems put in place are working in its favour, is the change in article 9 on the jurisdiction of the courts that

[31] 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 (recast), Article 1
[32] *Ibid.*, article 96
[33] 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, article 11
[34] *Op.cit*. Note 31, article 2
[35] *Ibid*., article 22

are able to hear the case. Indeed, this reinforced and clarified the old provision, to protect the child when it comes to being able to change jurisdictions. It states that the court of the habitual residence "should be the one to have jurisdiction, until the child has acquired a habitual residence in another Member State"[36].

The Regulation is in line with the Hague Convention. Indeed, it encompasses the suppression of the exequatur procedure. This reinforces the idea of mutual recognition and establishes an equivalence between the legislators of different Member States. When it comes to the application of this rule, this means that "the final ruling by the court in the country of origin is automatically recognized and enforceable in the other EU country without the need for a declaration of enforceability ("abolition of exequatur"), provided that the judge has issued a corresponding certificate provided for in the Brussels II b Regulation"[37]. This provision is specified in the 28th article of the Regulation, according to which "a decision given in a Member State shall be recognised in the other Member States without any special procedure being required"[38]. The application of the full abolition of declaration of enforceability for all decisions in matters of parental responsibility ensures the free circulation of judgments, which leads in turn to speedier proceedings.

Though in the previous regulation there was already no special procedure in place for recognising decisions from another Member State, it still required an exequatur procedure, which is to say a declaration of enforceability for non-privileged judgements in order to enforce them[39]. By non-privileged judgments it is to be understood "all decisions except those that grant rights of access or entail the return of wrongfully removed or retained children after a return application under the Hague Convention was unsuccessful"[40].

[36] G. PALAO MORENO (Director), *El nuevo marco europeo en materia matrimonial, responsabilidad parental y sustracción de menores, Comentarios al reglamento (UE) n°2019/1111,* Valencia, Tirant lo Blanch, 2022,
[37]European E-Justice Portal, Parental Child Abduction, https://ejustice.europa.eu/309/EN/parental_child_abduction
[38] *Op.cit*. Note 31, article 30.1
[39] *Op.cit*. Note 29, p.139
[40] *Op.cit*. Note 31, article 42

C) THE ROLE OF INTERNAL LAW IN THE CORRECT APPLICATION OF THE LEGAL NORMS

Though the Hague Convention and the Regulation are very effective legal norms that offer a clear system and procedure on how to deal with cases of international child abduction, their swift application could not be done without the help of each Member State party to the Hague Convention and the Regulation. Indeed, national law, especially that regarding procedures, is essential to being able to apply the international norms correctly and ensuring the return of the child as quickly as possible. Indeed the "internal procedure of the Member States needs to be good in order to apply the international legal norms correctly"[41], as they are "essential to the smooth working of legal norms"[42]. One of the main ways that Member States can ensure this is through interstate cooperation, which is made possible through the existence of the Central Authorities of the State.

1) Central Authorities

The role of the Central Authority in each country is to "facilitate[s] the return of abducted children to the country of their habitual residence"[43]. In Spain, the Central Authority is the *Subdirección General de Cooperación Jurídica Internacional del Ministerio de Justicia*[44]. They are charged with receiving international return requests from foreign Central Authorities and forward them to the State Attorney's Office of the province where the child is located.

The State Attorney's Office, once the documentation has been studied and if all the necessary requirements are met, will proceed to file the return suit before the competent court on behalf of the Spanish Central Authority. They are entrusted with requesting information from the foreign State when necessary and providing updated information throughout the process[45].

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[41] G. PALAO MORENO (Director), I. REIG FABADO, "Artículo 24. procedimiento judicial acelerado", *El nuevo marco europeo en materia matrimonial, responsabilidad parental y sustracción de menores, Comentarios al reglamento (UE) n°2019/1111,* Valencia, Tirant lo Blanch, 2022, p. 272

[42] *Ibid*. p. 272

[43] *Op.cit*. Note 3

[44] Hague Convention on Private International Law, Members and Parts https://www.hcch.net/es/states/authorities/details3/?aid=124

[45] Ministerio de la Presidencia, Justicia y Relaciones con las Cortes, *Que hace la Autoridad central española cuando se produce la sustracción de un menor que tiene su residencia habitual en el extranjero y es traslado a España,* https://www.mjusticia.gob.es/es/areas-actuacion/internacional/tramites-internacionales/sustracción-de-menores/resuelve-tus-dudas/autoridad-residente-extranjero

One of the main roles of the Central Authorities is the reception and processing of applications for the return of a child. Article 23 of the Regulation establishes the urgency in regard to this procedure. This can be seen as it states that "the requested Central Authority shall act expeditiously in processing an application, based on the 1980 Hague Convention"[46]. The term expeditiously is illustrated by the delay expressed in the second paragraph of the article. Indeed, "where the Central Authority of the requested Member State receives an application referred to in Article 22, it shall, within five working days from the date of receipt of the application, acknowledge receipt. It shall, without undue delay, inform the Central Authority of the requesting Member State or the applicant, as appropriate, what initial steps have been or will be taken to deal with the application, and may request any further necessary documents and information"[47]. This extremely short time frame highlights the importance of acting with due diligence and without delay to meet the required deadlines.

The Central Authorities play a fundamental role in dealing with cases of international child abduction. This is seen in recital 72 of the Regulation, according to which Member States must "ensure that the Central Authorities have the adequate financial and human resources to enable them to carry out the tasks assigned to them under this Regulation"[48]. The Central Authorities are a means to enable the swift handling of the cases.

The Regulation refers on many occasions to internal law, and its relation to the Central Authorities. Indeed, this can be seen in article 87, which states that "the requested Central Authority shall transmit any application, request or the information contained therein in matters of parental responsibility or international child abduction, as appropriate, pursuant to this Regulation to the court, competent authority within its Member State or any intermediary as appropriate under national law and procedure"[49]. This referral to internal law is also present in the 4th paragraph of the same article, which states that "the requested Central Authority shall as necessary transmit the information obtained pursuant to this article to the requesting central authority in accordance with national law and procedure"[50]. In the case of Spain, the relevant legal norms are the provisions of the Spanish *Ley de Enjuiciamento Civil,* which is the Spanish civil procedural law.

[46] *Op.cit.* Note 31, article 23
[47] *Ibid.*, article 23
[48] *Ibid.*, recital 72
[49] *Ibid*., article 87
[50] *Ibid*., article 87

The Central Authorities are not the only judicial authority that are competent to communicate with the other Member State where the child is being held. Indeed, article 27.4 states that courts "may communicate with the competent authorities of the Member States where the child was habitually resident immediately before the wrongful removal or retention, either directly in accordance with Article 86 or with the assistance of Central Authorities"[51]. This emphasises the idea of international communication which can be done through various intermediaries, be it directly through the courts or through the Central Authorities.

Requested Central Authorities are also required to "take all the appropriate measures in order to facilitate communication between courts"[52]. To make this possible they are required to provide direct communication of information such as contact details of child welfare or the competent court[53].

2) Effects of the legal reform of 2015 on the application of international legal norms

One of the main reasons for Spain's ability to process the cases on child abduction in a quicker time frame is due to the reform of the *Ley de Enjuiciamento Civil* in 2015. The *Ley de Enjuiciamento Civil* is the legal instrument that regulates the procedure of child abduction, specifically its chapter IV Bis *título 1, libro IV*. The goal of this reform was to modernise the Spanish contentious system and the procedure for the restitution of the abducted child. In addition, it also "had many benefits in accelerating the applications for restitution of the child"[54]. This internal reform is in line with the obligations of the Member States to ensure internal State laws are the most effective they can be, to properly apply the relevant international laws and conventions.

In relation to the legal reform of the *Ley de Enjuiciamento Civil*, one of the main changes rests in the judicial competence, which is to mean which courts will have jurisdiction to hear the cases at hand. The judicial competence is attributed to the first instance courts of the circumscription of the habitual residence of the child that was taken, however it gives priority to the Spanish family law courts (*juzgados de familia*), if they are present in the circumscription

[51] *Op.cit.* Note 31, article 27.4
[52] *Ibid*., recital 79
[53] *Ibid.*, recital 79
[54] *Op.cit*. Note 41

of the habitual residence of the child in question. This preference in regard to the family law courts is coherent with the aim of being able to get through the procedures as quickly and as efficiently as possible for the benefit of the child, as it enables a specialisation of the procedures as well as of the judges dealing with the cases[55]. Indeed, one of the key points of the reform is the concentration of competence in relation to jurisdiction. This specialisation allows judges that have expertise and training in the international requirements to handle the complexity of these child abduction cases[56].

Another important aspect of the reform is in reference to the suspensive effect of the appeal against the judgement granting the return of the child. Before this reform there was no such effect. Once the judgement was given, even if it was contrary to the legal norms, an appeal would not put the process on hold, which led to extremely damaging consequences, for example in instances where a judgement in first instance granted the return of the child only to then be revoked in appeal by the "Audiencia Provincial" months down the line[57].

Spanish internal law is aligned with the requirements of the Hague Convention and the Regulation in terms of having an expeditious procedure to get the cases resolved as fast as possible. The courts are held to a strict deadline. Article 24 of the Regulation explicits the delays that are to be met when handling the court proceedings expeditiously. Indeed, they are required to act expeditiously in proceedings on the application, "using the most expeditious procedures available under national law"[58]. The reference to national law once again lets us know that while the provisions set out in the Regulation aim to achieve a quick handling of court proceedings, they are also dependant on the national laws of the Member States. Indeed, procedural law needs to be efficient enough to be able to handle the court cases with the urgency needed. Courts are required to give their "decision no later than six weeks after" they

[55] S. RECUENCO PÉREZ, "El procedimiento de sustraccion internacional de menores a la luz de la actual ley de jurisdiccion voluntaria", *LegalToday,* 17/08/2015, https://www.legaltoday.com/practica-juridica/derecho-civil/familia/el-procedimiento-de-sustraccion-internacional-de-menores-a-la-luz-de-la-actual-ley-de-jurisdiccion-voluntaria-2015-08-17/

[56] J. FRANCISCO y M. FORCADA, "El nuevo proceso español de restitución o retorno de menores en los supuestos de sustracción internacional : La decidida apuesta por la celeridad y la novedosa Circular de la Fiscalía 6/2015 (Parte II)", *Bictoria Millenium DIPr, Num 3°, 2016*. https://www.millenniumdipr.com/ba-39-el-nuevo-proceso-espanol-de-restitucion-o-retorno-de-menores-en-los-supuestos-de-sustraccion-internacional-la-decidida-apuesta-por-la-celeridad-y-la-novedosa-circular-de-la-fiscalia-6-2015-parte-ii

[57] *Op.cit.* Note 55

[58] *Op.cit.* Note 31, article 24

are "seized" and are also required to give their reasonings if ever they don't give a verdict within that six-week time frame[59].

This is reflected in a provision of Spain's internal law, in article 778.7 *quinquies* of *the Ley de Enjuiciamiento Civil*, that states that the relevant procedure should be "urgent and preferential"[60]. The article also mentions that the procedure must be finalised "in both instances, if any, within a total of six weeks from the date of filing the application for the return of the child, unless there are exceptional circumstances that make this impossible"[61].

Though there is a sense of urgency in resolving the cases of international child abduction, the many different parties and courts involved means that this deadline is extremely hard to meet. Indeed, according to data regarding applications in 2021, the average number of days "to arrive at a final settlement was 207 days, from the date at which the application was received by the Central Authority"[62]. This shows that even though all possible measures and legal provisions are put in place to ensure and guarantee a quick resolution of the cases, most of the time, in reality, it is not the case, and the resolution of the conflict in most cases is a long process.

[59] *Op.cit.* Note 31, article 24
[60] Ley 1/2000, de enero, de Enjuiciamiento Civil, article 778.7 quinquies
[61] *Ibid*., article 778.7 quinquies
[62] *Op.cit.* Note 1, p. 21

CHAPTER II - THE BEST INTEREST OF THE CHILD: THE CORNERSTONE OF THE RESOLUTION OF INTERNATIONAL CHILD ABDUCTION CASES

The previous chapter went into depth about the legal norms that regulate international child abduction. This chapter however is going to focus on the best interest of the child and how it is a primary legal concept to be considered and respected when dealing with the resolution of child abduction cases.

Indeed, in the first part of this chapter we are going define the best interest of the child all the while examining the place of the child according to legal norms. (**A**)

Then we are going to analyse one of the rights granted to minors in these cases as a direct reflection of having their best interest at heart, which is the right to be heard. We will be taking a closer look into the process of hearing the child's opinion and the extent to which it will be considered. (**B**)

Finally, we are going to examine article 13(1)(b) of the Hague Convention, an exception to the return of the child put in place to protect the children affected by these cases. (**C**)

A) THE BEST INTEREST OF THE CHILD: DEFINITION AND LEGAL FRAMEWORK

There are many different views as to how the best interest of the child can be defined, with some seeing it as an undetermined legal term whilst others are of the opinion that the best interest of the child is a concrete and tangible legal concept that should be considered when dealing with international child abduction cases. To establish a definition of what can be considered the best interest of the child, it is important that we analyse the place of the child in these particular cases, to explain why it is so important that child abduction cases be solved by taking into account as a priority, the best interest of the children affected.

1) The primary victim of international child abduction: the child

International child abduction can be defined as "a form of transgression of the law that is particularly harmful to those involved, most of all the child"[63]. Indeed, taking a child away from its habitual residence and forcing it to leave its whole life behind to enter a new one, can

[63] *Op.cit*. Note 2, p. 421

lead to very significant psychological trauma for the child. It can be the root cause of "serious psychopathological repercussions for the child"[64].

This is explained clearly in the *Circular 6/2015, de 17 de noviembre* on international abduction and kidnapping of children by one of their parents[65]. It is considered "that the removal or retention in another country of a child by one of the parents without the consent of the other parent constitutes an act of violence that particularly affects the child, who is used as an object of pressure between his parents"[66]. Indeed, in these situations, the child is often put in a vulnerable position by the abducting parent, especially when the child is of a particularly young age. Though the parent from whom the child has been taken away from also suffers a great deal due to the "loss" of their child, the "true victim of the childnapping is the child himself, who suffers from the sudden upsetting of his stability, the traumatic loss of contact with the parent who has been in charge of his upbringing, the uncertainty and frustration which comes with the necessity to adapt to a strange language"[67]. Therefore, as the child is the one who is set to suffer the most consequences due to the abduction, it seems self-explanatory that the way these cases are resolved should be in their best interest.

The child's best interest can be considered as "the physical, moral, intellectual and social well-being and, ultimately, the guarantee of the child's integral development and training"[68]. This said, it is important that the best interest of the child is considered by those dealing with these delicate cases. It should be taken into account the whole way through the process, and "in the end, must be the ultimate determinant of the decision that is adopted for the minor and that will condition his family life and will be configured throughout all the actions necessary to reach it"[69]. This is achieved through the legal regulation of this term and legal provisions put in place to facilitate keeping the best interest of the child at the heart of the resolution of each case.

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[64] Circular 6/2015, de 17 de noviembre, sobre aspectos civiles de la sustracción internacional de menores, Agencia Estatal Boletín Oficial del Estado, p. 2, https://www.boe.es/buscar/doc.php?id=FIS-C-2015-00006
[65] *Ibid*.
[66] *Ibid*
[67] E. PÉREZ-VERA, *Explanatory Report on the Convention HCCH on the Civil Aspects of International Child Abduction, Acts and Documents of the Fourteenth Session (1980),* tome III, Child Abduction, Barreau Permanent de la Conférence, 1982, p. 432
[68] Auto de la Audiencia Provincial de Barcelona. Sección 12ª, de 16 de diciembre de 1996, *cit*., M. MONTON GARCIA, *La sustracción de menores por sus propios padres,* Valencia, Tirant Lo Blanch, 2003, p. 57
[69] *Ibid*. p. 58

Now that the best interest of the child has been defined, it is important to examine the place it holds within the legal framework, as it is through these norms that the best interests of the child involved are trying to be upheld.

2) The legal framework regarding the best interest of the child

As we know from the previous chapter, the main international convention that governs the cases of international child abduction is the Hague Convention. While in the Hague Convention there is no explicit reference to the "best interest of the child" it is clear that the best interest of the child is still very much at its heart. Indeed, "the dispositive part of the Convention contains no explicit reference to the interests of the child to the extent of their qualifying the Convention's stated object, which is to secure the prompt return of children who have been wrongfully removed or retained"[70].

In the preamble of the Hague Convention, it is stated that the States member to it need to be "firmly convinced that the interests of children are of paramount importance in matters relating to their custody" and "desirous of protecting the child, at the international level, against the harmful effects which might result from wrongful removal or retention"[71]. The child here is put at the centre of the conflict resolution. Using words to qualify the interests of the child such as "paramount importance" shows the important place the child holds in these abduction cases[72].

Furthermore, as an application of this principle, the Hague Convention Guide to Good Practice (hereafter, "the Guide to Good Practice"), in its point 4.2.2.6 and under the heading "protect the child" states that "in application of the Hague Convention, Central Authorities are under a general obligation to protect the child from harm"[73]. This shows a positive obligation that the authorities must follow. They must act in a way that they see fit to protect the best interest of the child in question. Indeed, "the struggle against the great increase in international child abductions must always be inspired by the desire to protect children and should be based upon an interpretation of their true interests"[74].

[70] *Op.cit*. Note 67, p. 431
[71] *Op.cit*. Note 64, p.8
[72] *Ibid.*
[73] *Op.cit.* Note 64, p.9
[74] *Op.cit.* Note 67, p.431

According to the Hague Convention, the best interest of the child is "in principle and in general, the interest of the minor child and should be understood as the right not to be displaced or withheld on behalf of more or less debatable claims on his or her person, in order to protect the right of minors to respect for their vital balance"[75].

As we have stated beforehand, the child faces severe trauma when it is forced to go through a situation of kidnapping or abduction by one of the parents, so it makes sense that the general rule of the Hague Convention, is that the child should be returned as quickly as possible to avoid any further damage from being done. As a general rule, the Hague Convention considers it in the best interest of the child to be returned home to be able to get back to the status quo situation from before the abduction, stating that "the best interests of the child may be presumed to be served by the application of the Convention and the return of the child to the requesting country within the shortest possible time after all the conditions have been met"[76].

However, the Hague Convention is not the only legal norm that regulates these situations of international child abductions. Indeed, one of the most important conventions in terms of safeguarding the best interest of the child is the United Nations Convention on the Rights of the Child (hereafter the "United Nations Convention"). This convention was adopted on the 20th of November of 1989. Now, "although the Hague Child Abduction Convention is older than the CRC [Convention on the Right of the Child], it is possible to interpret the Child Abduction Convention in light of children's rights"[77].

The United Nations Convention explicitly refers to the best interest of the child and does so in its article 3.1, which states that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration"[78]. Through this article we understand that the best interest of the child is put forward as a priority and that all actions, legal norms and decisions taken in these situations should have the best interest of the child at the forefront of the reasoning. The United Nations Convention also makes an explicit reference to child abduction in its article 11.1, through which it details that "States

[75] *Op.cit*. Note 64, p.8
[76] *Ibid*., p. 9
[77] *Op.cit*. Note 2, p.433
[78] United Nations Convention on the Rights of the Child, Article 3.1, https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child

Parties shall take measures to combat the illicit transfer and non-return of children abroad"[79]. This convention joins the Hague Convention on the fact that the illicit transfer of a child is therefore not in its best interest.

The best interest of the child is not only protected on an international level. Within the legal framework of the European Union, we can see the primary importance of safeguarding the best interest of the child being held illegally in another country from that of its habitual residence. Indeed, the Charter of Fundamental Rights of the European Union, approved by the European Parliament on November 15, 2000, states in its article 24 that "in all actions relating to children, whether taken by public authorities or private institutions, the best interests of the child shall be a primary consideration"[80].

The best interest of the child is also protected on a national level. Indeed, this makes sense as all the Member States of the Hague Convention and equally those Member States of the European Union must be able to apply the conventions to which they are a part of. Therefore, they must also have legal provisions within their internal law that allows them to honour the various conventions. In light of this, the *Ley Organica* 1/1996 on of Legal Protection of Minors, of partial amendment of the Civil Code and of the Civil Procedure Law, states in its article 2, that in the application of this Law "the best interests of minors shall prevail over any other legitimate interest that may be involved"[81]. Furthermore, this supremacy of the interests of minors is configured in this law as one of the guiding principles of the actions of the public authorities (article 11.2)[82].

Article 1826 of the *Ley de Enjuiciamento Civil*, takes the best interests of the minor as the final principle when it states that "the Judge may order as many formalities as they deem appropriate to be carried out to ensure that the adoption, fosterage or termination thereof, are beneficial for the minor"[83].

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[79] *Op.cit*. Note 78, article 11.1
[80] J. C de BARTOLOMÉ CENZANO, "Sobre la interpretación del interés superior del menor y su trascendencia en el derecho positivo español"*, Revista sobre la infancia y la adolescencia, Universitat Politécnica de Valencia, 2012, n°3*, p. 46-60, p. 51
[81] Ley Orgánica 1/1996, de 15 de enero, de Protección Jurídica del Menor, de modificación parcial del Código Civil y de la Ley de Enjuiciamiento Civil, Article 2, https://www.boe.es/buscar/act.php?id=BOE-A-1996-1069
[82] *Op.cit*. Note 80, p.50
[83] *Op.cit*. Note 60, article 1826

The best interest of the child is therefore protected on all levels, international, European and national. This high level of protection shows the importance of safeguarding the best interest of the child. Through these provisions we can see that the best interest of the child is a principle of paramount importance.

Now that we have a general overview of what can be understood by "the best interest of the child" we shall analyse the concrete rights that are attached to this principle, more specifically, the right of the child to be heard and to express their opinions on their situation and the extent to which it is considered.

B) THE VOICE OF THE CHILD AND THEIR RIGHT TO BE HEARD

1) The right to be heard

The best interest of the child means that the child is treated as person with rights. One of these rights is the right to be heard, to express their opinion. These rights are expressly provided for in the legal norms relevant to the cases. Indeed, "this right of children, widely accepted in national and international law, has already been incorporated in the 1980 Hague Convention on the Civil Effects of International Child Abduction"[84]. This is seen in article 13 of the Hague Convention, which states that "the judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views"[85].

It is also clearly pointed out in the United Nations Convention, under article 12, according to which "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child"[86]. We see here a similar wording to that of the article of the Hague Convention. The criteria for taking into account a child's opinion and the weight it has, is to be determined by its age and degree of

[84] A. de RUITER, "La voz del menor en la sustracción internacional de menores", Sustracción parental de menores: aspectos civiles, penales y procesales, 21 a 23 de junio 2017, p. 3, https://www.fiscal.es/documents/20142/100691/Comunicación+Adriana+de+Ruiter.pdf/c1133b7f-edcf-3aa4-f9eb-bf405f500339?t=1531205055679
[85] *Op.cit*. Note 4, article 13
[86] *Op.cit.* Note 78, article 12

maturity. These two criteria and article 12 of the United Nations Convention are to be interpreted in light of "the best interest of the child"[87].

The right of the child to be heard is a delicate matter, as many of the children at the centre of the cases are young and vulnerable, hence why the procedure to hear the child is highly regulated to protect the child and his or her opinion. This is seen in the second part of the article 12 mentioned previously, which states 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 or an appropriate body, in a manner consistent with the procedural rules of national law"[88]. This article references the national procedural law of the Member States of the Hague Convention. Indeed, it is the internal law of the Member States that regulates the proceedings of the hearing of the child.

This right has also been enshrined in Spanish legislation, namely the *Ley de Enjuiciamento civil*, whose article 778.8 *quinquies* deals with the procedure regarding the hearing of the child. This article states that "before taking any decision on the appropriateness or inappropriateness of the child's return or his or her return to the place of origin, the judge shall, at any time during the proceedings and in the presence of the Public Prosecutor, hear the child separately, unless the hearing of the child is not considered appropriate in view of his or her age or degree of maturity, which shall be stated in a reasoned decision"[89]. Through this article we can see that hearing the child is an obligation for the judge, who cannot withhold from hearing the child during the trial unless there is the exception, that due to the child's age of age of maturity, it would not be appropriate to do so. The exception needs to be justified.

Indeed, this exception can only be applied if "hearing the child would be detrimental to the child"[90]. This exception is to be interpreted strictly as "not listening to the child in these matters is a violation not only of art. 12 CRC, but also of art. 3 CRC [Convention on the Rights of the Child], since the child's best interest is precisely to be heard, and to have his or her opinion taken into account in matters that may have a bearing on his or her personal, family or social

[87] *Op.cit*. Note 84, p.6
[88] *Op.cit*. Note 78, article 12
[89] *Op.cit*. Note 60, article 778.8 quinquies
[90] *Op.cit*. Note 84, p.8

sphere"[91]. Though it is an obligation for the judge to hear the child according to the correct procedure, "for the child it is never an obligation"[92].

Since the individuals concerned are children, the procedure of the hearing and the way of carrying it out is particular. It must be taken into account that the person being dealt with is a minor and therefore is more sensitive and vulnerable. Precautions must be taken to ensure the child's rights are protected all throughout the process. This is expressed by the final provision 1a of the Law 15/2005 of 8 July which explains that "in the examination of the minor, it shall be guaranteed that he/she may be heard in suitable conditions for the safeguarding of his/her interests, without interference from other persons, and exceptionally requesting the assistance of specialists when necessary"[93]. This idea is supported further by relevant case law in which it is said that "it is necessary to be extremely delicate in the selection and admission of relevant questions, avoiding those that are unnecessary in relation to the object of the proceedings and rejecting, as is logical, all those that seek to undermine the child's dignity or that seek to shock the child"[94].

Thus, minors are given the right to express their opinions and views on their situation, and to be heard. This opinion is to be taken into account based on the two criteria mentioned previously, the age and the maturity of the child in question.

2) Valuing the child's opinion: age and maturity

Articles 3 and 12 of the United Nations Convention give children the right to be heard and to have their views taken into account in accordance with their age and maturity. These two articles are "complementary"[95]. The first is there to protect the best interest of the child and the second establishes how the opinion of the child is supposed to be valued. Two key criteria are considered when dealing with hearing the child, these are the age and the maturity of the child in question. However, it is important to understand that "the age and degree of maturity should

[91] *Op.cit*. Note 84, p.7
[92] *Ibid*., p.7
[93] *Op.cit*. Note 64, p.34
[94] SSTS no 673/2007, de 19 de julio, 706/2000 de 26 de abril, *cit.,* Circular 3/2009, de 10 de noviembre, sobre protección de los menores víctimas y testigos, p. 23
[95] *Op.cit*. Note 84, p.7

be used not so much to deny the child's examination evidence, but to determine the method and procedure for hearing the child"[96].

Indeed, article 9 of the *Ley de protección jurídica del menor 1/1996* of 15th of January (Law on the Protection of Minors) states the obligation to listen to minors "without discrimination on the basis of age"[97]. This legal provision makes sense, as it is important to bear in mind that that "the actual degree of maturity does not always coincide with the chronological age and that it may vary for each child"[98]. Assessing the level of maturity of a child "will depend on the individual characteristics of each child, such as age, gender, experience, intellectual and emotional capacities, how the child has lived up to that point"[99].

As it can be seen, each assessment is done on a case-by-case basis to ensure that each child's rights are respected throughout. The judge will determine if the child is mature enough with the help of the psycho-social team and together they will "assess the child's arguments and decide whether they have sufficient grounds to be followed"[100].

However, if the child is heard and opposes restitution, this opposition does not ensure the automatic denial of his or her return to their country of habitual residence[101]. In light of this it is important to note that "the will of the child is not decisive"[102]. Indeed, it is within the judge's discretion to make the decision to value the child's objection or not after having heard and considered all factors of the situation.

[96] *Op.cit*. Note 84, p.9
[97] *Op.cit*. Note 81, article 9
[98] *Op.cit*. Note 64, p.17
[99] *Op.cit*. Note 84, p.9
[100] *Ibid.*, p.14
[101] AAP Valencia, secc. 10a, no 405/2011, de 5 de diciembre, *cit.*, Circular 6/2015, de 17 de noviembre, sobre aspectos civiles de la sustracción internacional de menores, Agencia Estatal Boletín Oficial del Estado, p.17
[102] *Op.cit*. Note 84, p. 14

C) EXCEPTION TO THE RETURN OF THE CHILD: ARTICLE 13(1)(B) AS AN ILLUSTRATION OF THE BEST INTEREST OF THE CHILD

If we look at the Hague Convention, the general rule is that the child should be returned to his or her habitual residence as soon as possible to resolve the situation of conflict. Through this, we can see that what is considered to be in the best interest of the child, is generally for him or her to be returned to their habitual residence. However, in the Hague Convention there are some exceptions to this principle, that allow authorities to not return the child to its habitual residence. Indeed, "through the exceptions to return, the CH80 [Hague Convention of 1980] itself contains escape valves that allow to overcome generalisations and to decide in accordance with the best interests of the child in each individual case, weighing the unique circumstances of each case deeply"[103].

Indeed, "the three types of exceptions to the rule concerning the return of the child must be applied only so far as they go and no further" which means that the exceptions under the Hague Convention are to be "interpreted in a restrictive fashion"[104].

On of these exceptions is found in article 12 of the Hague Convention, which states that "the judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment"[105]. Furthermore, an exception to the general rule is provided for in article 20, according to which "the return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms"[106].

However the exception that we shall be taking a closer look at is the one found in article 13(1)(b) which states that "the requesting State is not bound to order the return of the child if the person, institution or other body which opposes its return established that there is a grave

[103] AAP Almería secc. 3a no 28/2004, de 30 de abril de 2004, AAP Barcelona, secc. 18a, no 91/2006, de 4 de abril y AAP Sevilla, secc. 2a, no 185/2008, de 12 de septiembre *cit.,* Circular 6/2015, de 17 de noviembre, sobre aspectos civiles de la sustracción internacional de menores, Agencia Estatal Boletín Oficial del Estado, p. 9
[104] *Op.cit*. Note 67, p. 434
[105] *Op.cit.* Note 4, article 12
[106] *Op.cit*. Note 4, article 20

risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation"[107].

Indeed, this exception is directly linked to maintaining the best interest of the child, that could be further exposed to harm, if they were to be returned to their habitual residence where they would be put back in an "intolerable situation"[108]. It is an exception that "clearly derives from a consideration of the interests of the child"[109].

As it is an exception, it is to be interpreted narrowly and in a restrictive manner. Furthermore, it is "essential to avoid that through the use of this exception it is decided who has the best right to be the custodian of the child"[110]. Indeed, the court may only consider the non-return of the child on these grounds, it "may not decide on the merits of rights of custody"[111].

When it comes to the exceptions, they "do not apply automatically, in that they do not invariably result in the child's retention; nevertheless, the very nature of these exceptions gives judges a discretion — and does not impose upon them a duty — to refuse to return a child in certain circumstances"[112].Though it is to be interpreted narrowly, "the reference to an intolerable situation does give some scope for judges to consider the child's situation a bit more broadly than a strict evaluation of risk"[113]. That said, the "situation of risk must be objectifiable"[114].

[107] *Op.cit*. Note 4, article 13
[108] *Ibid.*, article 13
[109] *Op.cit*. Note 67, p.433
[110] AAP Madrid secc. 22 no 187/2005, de 5 de septiembre, *cit*., Circular 6/2015, de 17 de noviembre, sobre aspectos civiles de la sustracción internacional de menores, Agencia Estatal Boletín Oficial del Estado, p.16
[111] *Op.cit*. Note 2, p. 427
[112] *Op.cit*. Note 67, p. 460
[113] *Op. cit*. Note 63, p.428
[114] AAP Tarragona, no 82/2005, de 3 de mayo) y el peligro debe ser serio (vid. AAP Lugo, secc. 1a, no 272/2005, de 18 de julio), *cit*., Circular 6/2015, de 17 de noviembre, sobre aspectos civiles de la sustracción internacional de menores, Agencia Estatal Boletín Oficial del Estado, p.16

CHAPTER III - THE ADEQUACY OF THE SOLUTIONS TO RESOLVE INTERNATIONAL CHILD ABDUCTION

As we have seen in the first two chapters, there is an array of legal norms aimed at resolving international child abduction cases. These legal norms all have the same aim, the return of the child to the status quo before the abduction, all the while taking into account the best interest of the child. However, these two concepts can sometimes be contradictory especially in certain specific cases, such as those where domestic violence is alleged by the taking parent. In cases of international child abduction, the taking parent is the parent who takes the child away from its habitual residence without the consent of the other parent.

In relation to this, we will therefore analyse the possibility of striking a balance between the return of the child and its best interests in cases where domestic violence is involved. (**A**)
We will also look at the solutions that the legal norms offer to ensure a safe return for the child, such as protective measures and undertakings, and whether or not these are effective measures of protection capable of attaining their goal. (**B**)
Finally, we shall look at the difficulties faced in the resolution of international child abduction cases in particular due to the cross-border nature of the conflicts. (**C**)

A) STRIKING A BALANCE BETWEEN THE RETURN OF THE CHILD AND ITS BEST INTEREST: THE CASE OF DOMESTIC VIOLENCE

To be able to understand the context of this chapter, it is necessary to define what is to be understood by domestic violence. According to article 3b of the Council of Europe Convention on preventing and combating violence against women and domestic violence, domestic violence can be defined as "all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim"[115]. This definition encapsulates the broadness of the term which encompasses multiple different forms of violence. The issue of domestic violence can also occur in situations of international child abduction.

[115] Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul Convention, article 3, https://rm.coe.int/168008482e

Indeed, a strong link can be found between domestic violence and international child abduction. There is growing evidence "that a majority of return cases are brought by men against women"[116], many involving women alleging they are fleeing with their children from domestic abuse[117]. The Hague Conference on Private International Law identified "domestic violence allegations and return proceedings as one of its themes, noting that domestic violence issues have increasingly been raised as an area of concern in case law and academic literature"[118]. This in itself is a significant statement as it shows that the issue is of high importance for the Hague Conference on Private International Law.

As previously mentioned, the mechanisms of the Hague Convention are designed to privilege the return of the abducted child to the situation of status quo before the abduction had taken place. This aspect of the Hague Convention can sometimes "perhaps be too well implemented"[119], and therefore have severe consequences on the child. In some cases, when the child is returned at all costs to the country where the domestic violence is said to have occurred, this can produce "unfortunate results" as "the mandated return would not be in the child's best interest"[120]. Indeed, this is why the Hague Convention allows certain exceptions to the return of the child, as seen above. When it comes to domestic violence, the relevant exception is that of article 13(1)(b), the so-called grave risk exception that we mentioned in the previous chapter.

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[116] N. LOWE, "*A Statistical Analysis of Applications Made in 2008 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction",* 2011, *cit*., S.M. KING, "The Hague Convention and Domestic Violence: Proposals for Balancing the Policies of Discouraging Child Abduction and Protecting Children from Domestic Violence", *Family Law Quarterly*, American Bar Association, 2013, No.2, Vol. 47, p. 299-310, p.300

[117] WEINER, *"Navigating the Road"*, supra note 4, (*citing Hague Conference on Private International Law, Collated Responses to the Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction), cit.,* S.M. KING, "The Hague Convention and Domestic Violence: Proposals for Balancing the Policies of Discouraging Child Abduction and Protecting Children from Domestic Violence", *Family Law Quarterly*, American Bar Association, 2013, No.2, Vol. 47, p. 299-310, p.300

[118] Hague Conference on Private International Law, *Report of Part I of the Sixth Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention*, 4-6 Judges' Newsletter on Child Protection, Vol. XVIII, 2012, *cit*., S.M. KING, "The Hague Convention and Domestic Violence: Proposals for Balancing the Policies of Discouraging Child Abduction and Protecting Children from Domestic Violence", *Family Law Quarterly*, American Bar Association, 2013, No.2, Vol. 47, p. 299-310, p.305

[119] C.S. BRUCH, "The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases", *Family Law Quarterly*, American Bar Association, 2004, Vol. 38, 2004, No.3, p. 529-545, p. 529

[120] M. FALZARANO & K. KOSTEL, *"*Combating International Child Abduction:Understanding the Benefits and Drawbacks Created by the Hague Convention*"*, Alston and Bird LLP, p.5 https://www.alston.com/-/media/files/insights/publications/2024/02/hagueconvention_final.pdf?rev=1dda00ae298e4a3687373ef03bc20fa0&sc_lang=en

The issue at stake in child abduction cases is finding an adequate way to "maintain expeditious procedures and to avoid examination of the merits of the underlying custody dispute while also allowing proper consideration of a defence under article 13b"[121]. Indeed, an appropriate balance needs to be established between the return of the child and keeping its best interests at the heart of the resolution of the case.

As previously stated, exceptions set out in the Hague Convention are to be interpreted strictly. This makes sense, however in cases of domestic violence an interpretation that is too strict will eliminate the possibility for the taking parent of using the grave risk exception as a defence. Indeed, there is a large amount of discretion handed to the judges when considering whether or not the return of the child would place him in a situation of grave risk upon his arrival in his habitual residence. Progress has however been made in this regard. In 2020 a Guide to Good Practice was established on the interpretations and use of article 13(1)(b), to regulate the application of the exceptions and ensure a more harmonious application of the Convention[122].

When it comes to the interpretation of the term "grave risk" in relation to domestic violence, case law has been the determining factor in establishing the scope of application of the article. The taking parent may claim there is a grave risk for the child to return because of "physical, sexual or other forms of abuse of the child. It may also be asserted that the grave risk results from the child's exposure to domestic violence by the left-behind parent directed to the taking parent"[123]. It is not necessary for the child to have been physically harmed by the left-behind parent. Indeed, some relevant case law has established a wider scope of application of the exception and allowed for a broader interpretation of the article 13(1)(b).

The correct interpretation of the term grave risk is important as there is a lot at stake in these situations. Indeed, "there is an increasing recognition of the damaging phycological impact that witnessing domestic abuse has on children, and it is acknowledge that children do not need to

[121] Conclusions and recommendations and report of part I of the sixth meeting of the special commission on the practical operation of the Hague Child Abduction Convention and the 196 Hague Child Protection Convention, 1-10 June 2011, p. 31, §93

[122] Hague Conference on Private International Law, Guides to Good Practice under the 1980 Child Abduction Convention for the participants to the Forum on Domestic Violence and the Application of Article 13(1)(b) of the 1980 Child Abduction Convention, https://assets.hcch.net/docs/225b44d3-5c6b-4a14-8f5b-57cb370c497f.pdf

[123] Miltiadous v. Tetervak, 686 F. Supp. 2d 544 (E.D. Pa. 2010), *cit*., Compilation of relevant sections of the Guides to Good Practice under the 1980 Child Abduction Convention for the participants to the Forum on Domestic Violence and the Application of Article 13(1)(b) of the 1980 Child Abduction Convention, p.5, https://assets.hcch.net/docs/183d08be-9fdc-4442-8cc7-ae907ee5ad2a.pdf

be directly affected by the violence to be considered victims"[124]. In the case Taylor v. Taylor, it was established that in some situations "the grave risk may also be based on potential harm to the taking parent by the left behind parent upon return"[125]. The key in the cases of domestic violence is to consider the child and the situation that he or she will find himself in when they are returned. The courts have to take into account "the effects of the domestic violence on the child and whether it will place him in an intolerable situation"[126].

Indeed, "children who are placed in a situation where domestic violence is present are at a greater risk of being physically harmed themselves"[127], therefore it is important to take this into account, when considering the best interest of the child, as though they might not already be a victim of domestic violence, the return into the situation could lead them to becoming one. This is why the exception under article 13(1)(b) cannot be interpreted too narrowly, as it must give the taking parent claiming domestic violence a possibility of safeguarding their child's rights in upholding the application of the article. The application of the article 13(1)(b) still remains a case-by-case application which can lead to discrepancies in judgments and a lack of harmony in its application.

The burden of establishing the exception rests on the person, institution or other body which opposes the child's return, hence in most cases on the taking parent[128]. It is established that the "level of proof should be substantial and appropriate in order to determine that the allegations

[124] K. TRIMMINGS, *"The Interface Between Domestic Violence and International Parental Child Abduction: Focus on the Protection of Abducting Mothers in Return Proceedings",* p.35*, cit*., "The judges' newsletter on international child protection special focus experts' meeting on nurturing the 1980 Hague Convention", Volume XXVI, Hague Conference on Private International Law University of Westminster, 2024.
[125] Taylor v. Taylor, 502 Fed.Appx. 854, 2012 WL 6631395 (C.A.11 (Fla.)) (11th Cir. 2012), 20 December 2012, United States Court of Appeals for the Eleventh Circuit (the US) [INCADAT Reference:HC/E/US 1184], *cit*., Compilation of relevant sections of the Guides to Good Practice under the 1980 Child Abduction Convention for the participants to the Forum on Domestic Violence and the Application of Article 13(1)(b) of the 1980 Child Abduction Convention, p. 6, https://assets.hcch.net/docs/183d08be-9fdc-4442-8cc7-ae907ee5ad2a.pdf
[126] Tabacchi v. Harrison, 2000 WL 190576 (N.D.Ill.), 2 August 2000, United States District Court for the Northern District of Illinois, Eastern Division (the US) [INCADAT Reference: HC/E/USf 465], *cit*., Compilation of relevant sections of the Guides to Good Practice under the 1980 Child Abduction Convention for the participants to the Forum on Domestic Violence and the Application of Article 13(1)(b) of the 1980 Child Abduction Convention, p. 6, https://assets.hcch.net/docs/183d08be-9fdc-4442-8cc7-ae907ee5ad2a.pdf
[127] Permanent Bureau of the Hague Conference on Private International Law, "Domestic and Family Violence and the article 13 "Grave risk" Exception in the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: A Reflection Paper", May 2011, p. 25§103 https://assets.hcch.net/docs/ce5327cd-aa2c-4341-b94e-6be57062d1c6.pdf, p. 9, §20
[128] *Op. cit*. Note 123

are well founded"[129]. The courts are often "faced with little objective evidence of the risk of harm to the child and are therefore forced in large part on the credibility of the parties"[130].

It falls on the court of the Requested State (the State to which the abducted child is taken by the taking parent) to establish whether or not the child will be put in a situation of grave risk upon the return to the country of habitual residence. The court "determines that there is sufficient evidence or information demonstrating elements of potential harm or an intolerable situation"[131]. Therefore, the competent authority that is able to determine and examine the situation of grave risk or not, is the country where the child is being held. The evaluation of the grave risk exception is therefore based on general criteria set out by the legal norms and the Guide to good Practice, but it is also subject to the criteria of the Requested State, that decides whether it is applicable. However, the courts of the Requested State must be cautious not to overstep and fall into the merits of the case regarding custody, which are strictly the competence of the State of habitual residence of the child.

The international aspect of international child abduction cases can lead to issues in relation to the evidence process. Indeed, since these situations are cross-border by nature, accessing and gathering the relevant proof can be extremely challenging for the taking parent. In cases such as these, the Central Authorities play a crucial role in collecting evidence indeed, in some States, "Central Authorities quickly gather as much information and evidence as possible, such as measures of protection available in the requesting State and police, medical and social workers' reports, before filing the return application with the court"[132]. The Central Authorities having this role is essential in helping the taking parent establish sufficient evidence and in getting the court to apply the exception set out in article 13(1)(b).

[129] *Op.cit.* Note 121, p. 33, §103
[130] S.M. KING, "The Hague Convention and Domestic Violence: Proposals for Balancing the Policies of Discouraging Child Abduction and Protecting Children from Domestic Violence*", Family Law Quarterly*, American Bar Association, 2013, No.2, Vol. 47, p. 299-310, p.304
[131] *Op.cit.* Note 122, p.31
[132] *Op.cit.* Note 121, p. 33, §104

B) PROTECTIVE MEASURES AND UNDERTAKINGS: AN ADEQUATE SOLUTION TO PROTECT THE CHILD'S BEST INTEREST?

Though the exception exists of the non-return of the child if returning them to the *status quo* would put them at grave risk and in an intolerable situation, the use of the grave risk defence cannot be an obstacle to the return of the child if protective measures are put in place in their country of habitual residence upon their return. The reason these protective measures are put in place is to "facilitate the safety of the child and the abducting parent upon their return"[133]. Indeed, in order for the grave risk defence to be accepted, "the party assessing the grave risk of harm defence must also prove that no protective measures could be put into place to ensure adequate protection of the child in his or her state of habitual residence"[134]. The protective measures in question need to be approved by the courts, who need to be "satisfied, that adequate arrangements have been made to secure the protection of the child after his or her return"[135]. Indeed, it can be understood through article 7 of the Hague Convention, that "requesting States should accept direct responsibility for the welfare of children after a successful return application under the Convention"[136]. Therefore, there is a legal obligation to take into account and establish the necessary protective measures before taking a decision on the return or not of the child to his or her habitual residence.

When it has been established that the grave risk exception is not to be applied and the court orders the return of the child to his habitual residence, "the Permanent Bureau's Guide to Good Practice on article 13(1)(b) also strongly recommends protective measures"[137]. The Guide to Good Practice gives more insight into the use of protective measures and what it entails. Indeed, they are "more often considered in situations where the asserted risk involves child abuse or domestic violence"[138]. Protective measures are a key point when it comes to considering the application of article 13(1)(b). The interpretation of the term protective measures should be a broad one and should include an array of provisions aimed at keeping the child and the abducting parent safe upon their return, such as "access to courts and other legal services in the

[133] *Op. cit*. Note 125
[134] V.SHAKNES, J.L. EDLESON, "Protective Measures and their inability to protect against domestic violence" Hague Domestic Violence Forum Expert Paper #5, p. 2
[135] *Op.cit*. Note 26, p.5
[136] *Op.cit.* Note 127, p. 25§103
[137] *Op. cit.* Note 134, p.2
[138] *Op. cit.* Note 122, §43

requesting state, state assistance and support, including financial assistance"[139]. Some of the protective measures that have been found to be awarded in situations of child abduction in situations of domestic violence are, for example, to "provide appropriate housing for the mother and child"[140], or "to vacate the family residence in order that the returning parent and child/children could live there"[141].

When assessing whether there is a situation of grave risk, courts must also "assess the availability and efficacy of protective measures at the same time as they examine assertions of grave risk"[142]. Courts cannot establish the application of article 13(1)(b) without considering the protective measures that could be put into place in the state of habitual residence. However, if the courts deem that the arrangements put in place would not be adequate, then they are in capacity to deny the return of the child under article13(1)(b), as it was established in the case Klentzeris v Klentzeris[143].

Studies show that "the great majority of taking parents are mothers (75%), most of whom are the primary carer or joint primary carer of their child[144]. It is also shown that 78% of these mothers raise allegations of domestic violence by the left behind father [145]. The problem with situations like these and cases of domestic violence is that the abusers, most of the time the left-behind fathers are less than likely to comply and follow through with the protective measures put into place to ensure the safeguard of the child upon his return. Indeed, "leading

[139] *Op. cit.* Note 124, p.36
[140] *Katsigiannis v. Kottick-Katsigiannis*, [2000] 2000 CarswellOnt 4469, INCADAT cite: [upheld on appeal, HC/E/CA 758], *cit*., Permanent Bureau of the Hague Conference on Private International Law, "Domestic and Family Violence and the article 13 "Grave risk" Exception in the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: A Reflection Paper", May 2011, p. 25§103 https://assets.hcch.net/docs/ce5327cd-aa2c-4341-b94e-6be57062d1c6.pdf, p. 26 §107
[141] Struweg v. Struweg, [2001] S.J. No. 380 (Sask. Q.B. Jun 12, 2001), *cit*., Permanent Bureau of the Hague Conference on Private International Law, "Domestic and Family Violence and the article 13 "Grave risk" Exception in the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: A Reflection Paper", May 2011, p. 25§103 https://assets.hcch.net/docs/ce5327cd-aa2c-4341-b94e-6be57062d1c6.pdf, p. 26
[142] Op. cit. Note 122, §43
[143] Klentzeris v. Klentzeris [2007] 2 FLR 996 [INCADAT cite: HC/E/UKe 931], *cit*., Permanent Bureau of the Hague Conference on Private International Law, "Domestic and Family Violence and the article 13 "Grave risk" Exception in the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: A Reflection Paper", May 2011, p. 25§103 https://assets.hcch.net/docs/ce5327cd-aa2c-4341-b94e-6be57062d1c6.pdf, p. 34 §138
[144] N LOWE and V STEPHENS, *Global Report – Statistical study of applications made in 2021 under the 1980 Child Abduction Convention*. (HCCH, The Hague, Prel. Doc. No. 19A of September 2023) *cit*., V.SHAKNES, J.L. EDLESON, "Protective Measures and their inability to protect against domestic violence" Hague Domestic Violence Forum Expert Paper #5, p.2
[145] *Op. cit.* Note 134, p.2

English child-find organization's report that undertakings were violated in two thirds of the cases and honoured in only one-fourth"[146]. Taking into account these studies, it would therefore seem unreasonable to place a high level of trust on these protective measures and their ability to actually keep the child safe upon his return.

However, as mentioned previously in this chapter, the use of protective measures is a legal provision found in the Hague Convention. This is reinforced in the Regulation. Indeed, there are multiple provisions regarding protective measures, such as article 15, according to which the "courts of a Member State shall have jurisdiction to take provisional, including protective, measures which may be available under the law of that Member State in respect of: (a) a child who is present in that Member State; or (b) property belonging to a child which is located in that Member State"[147].

The second part of this article also provides for a necessity of communication between the two Member States party to the resolution of the case. Indeed, the "court having taken the measures referred to in paragraph 1 of this Article shall, without delay, inform the court or competent authority of the Member State having jurisdiction pursuant to Article 7 or, where appropriate, any court of a Member State exercising jurisdiction under this Regulation as to the substance of the matter, either directly in accordance with Article 86 or through the Central Authorities designated pursuant to Article 76"[148].

An obligation of communication between the two Member States, is a good indication that both are working together with the aim of making sure the relevant measures are put in place adequately. Therefore, as the Regulation is a binding legal norm, all Member States have the obligation to comply. This means that in theory, Member States will be reprimanded if the protective measures required were not put into place in the Requesting State (the State in which the child had its habitual residence prior to the abduction), therefore guaranteeing a certain level of protection.

[146] M. FREEMAN Reunite Research Unit, The Outcomes for Children Returned Following an Abduction 31 (Sept. 2003), *cit*., C.S. BRUCH, "The Unmet Needs of Domestic Violence Victims and Their Children in Hague Child Abduction Convention Cases", *Family Law Quarterly*, American Bar Association, 2004, Vol. 38, 2004, No.3, p. 529-545, p. 543
[147] *Op.cit*. Note 31, article 15
[148] *Ibid.* article 15

As well as protective measures, voluntary undertakings are also an option as a means to work towards a safe return for the child, however these appear to be even more unreliable as they are not easily enforceable in the State of habitual residence therefore questioning their effectiveness. A2006 Reunite study noted that the "lack of enforcement of undertakings upon the return to the country of habitual residence, could be a serious problem for accompanying parents, and in turn the child"[149]. Indeed, the Guide to Good Practice establishes that "unless voluntary undertakings can be made enforceable in the State of habitual residence of the child, they should be used with caution, especially in cases where the grave risk involves domestic violence"[150]. However, in some situations, there is somewhat an extra degree of protection ensured in cases where some judges were able to make the "return of the child conditional upon the performance of undertakings by the applicant"[151]. These specific cases are only in exceptional circumstances, meaning that these conditional provisional measures are not necessarily applied to the extent in which they should be.

In addition, certain cases show a willingness to ensure the safety of the child in regard to the compliance of the left-behind parent. Indeed, in one case, the court "emphasised a strict approach to voluntary undertakings and stated that "an expressed general willingness of the applicant to agree to undertaking was insufficient"[152]. This shows a serious and conscientious approach by the court by taking into account the reciditive nature of the left behind parent and highlights of a certain understanding of the degree of seriousness of the situations of domestic violence by not relying on the word of the abuser regarding voluntary undertakings.

While voluntary undertakings are deemed as a lacking measure of protection due to the dangerous nature of the left behind parent, even when dealing with protective measures, their enforcement can be a challenge due to the cross-border nature of the situations at hand. Indeed, as previously mentioned, protective measures may be disregarded by the left behind parent, and "satisfactory follow-up measures by relevant authorities in the state of habitual residence may be lacking"[153]. Once the child is returned to his place of habitual residence, the courts of

[149] *Op. cit*. Note 127, p.27
[150] *Op.cit* Note 122, §47
[151] *Op. cit*. Note 127, p.27
[152] P.F. v. M.F, unrep., Supreme Court of Ireland, 13 January 1993, INCADAT cite: HC/E/IE 102, *cit*., Permanent Bureau of the Hague Conference on Private International Law, "Domestic and Family Violence and the article 13 "Grave risk" Exception in the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: A Reflection Paper", May 2011, p. 25§103 https://assets.hcch.net/docs/ce5327cd-aa2c-4341-b94e-6be57062d1c6.pdf, p. 27
[153] *Op.cit*. Note 124

the country where the child was taken loses jurisdiction and it is up to the courts of the habitual residence to follow up on whether the requirements are fulfilled or not, something which does not happen systematically, leading to a somewhat ineffective level of protection for both the mother and the child upon their return.

This is seen in the third paragraph of article 15 of the Regulation, according to which the "measures taken pursuant to paragraph 1 shall cease to apply as soon as the court of the Member State having jurisdiction under this Regulation as to the substance of the matter has taken the measures it considers appropriate"[154]. In this case, the court of the Member State having jurisdiction as to the substance of the matter, is the court of the habitual residence of the child, the country to which he or she is being returned. The problem here is that both Member States might not have the same criteria in regard to what is considered appropriate or not, concerning the protective measures put in place. This can lead to discrepancies in the application of the provisional measures.

Through the use of protective measures, there is a will to make the child's return safe and to make sure that the child and the taking parent are not placed in a dangerous situation upon their return, however, the lack of enforcement and follow up upon the return of the child and taking parent and the nature of the domestic violence context means that these measures are often ineffective and might not be the best way of ensuring the child's wellbeing.

With the purpose of making them more effective, a more complete and routine follow up needs to happen upon the return of the child and taking parent. These follow ups need to be systemic in order for the protection to be ensured. In order for this to be possible, interstate communication needs to be effective and strong, and the Central Authorities and courts must ensure their roles are completed by promoting communication between the Requesting State and the State to where the child was taken. Indeed, several experts have noted that "the safe return of the child was the joint responsibility of both the requested states and the requesting state" and that in cases that involve domestic violence "it is important that States do all in their power to ensure that the child does not suffer harm"[155].

[154] *Op. cit*. Note 31, article 15
[155] *Op. cit*. Note 121, p.31, §93

The question of the efficiency of the measures put in place in these situations is not the only one that needs to be analysed. Indeed, these complex cases often face more obstacles due to their international nature.

C) THE DIFFICULTIES FACED DUE TO THE CROSS-BORDER NATURE OF INTERNATIONAL CHILD ABDUCTION

The resolution of international child abduction cases can prove to be difficult due to their cross-border nature. This is why the Hague Convention, and the Regulation have provisions regarding Central Authorities as we saw in the first chapter, so as to facilitate the procedures and gather information between the Requested and Requesting State.

However, it is questioned whether or not "the Central Authority Network and that of the International Hague Network of Judges are support mechanisms which are perhaps not being used as much as they could be in cases where domestic violence issues are raised"[156]. Indeed, these agencies are more than necessary to be able to resolve the cases, as they provide information needed for the judges to be able to make the correct and well-informed decision regarding the case. Therefore, countries should aim to have a competent Central Authority and aim for a high level of interstate communication and collaboration to ensure the best outcome of the cases.

It is not only the Central Authorities who play a role in the swift resolution of child abduction cases. Indeed, foreign judges are also able to provide the Requesting State with information necessary for resolving the cases at hand through the use of "direct judicial communications [which] were used to resolve a number of safe return issues in a Convention return proceeding involving domestic violence allegations"[157].

Another issue regarding the Hague Convention is the lack of sanctions when the countries do not apply it as it should be applied. Though the countries of the European Union also have to abide by the rules of the relevant regulations, and face sanctions if they do not, the application of the Hague Convention by both Contracting States relies on mutual trust between the two.

[156] *Op.cit.* Note 127, §120, p.29
[157] *Ibid*., §121 p.29

Indeed, it will only work if they both apply it as it should be applied, however there are no repercussions if one of the countries does not apply it correctly. This means that the correct resolution of international child abduction cases may be in some situations, left to the will of either the Requesting State or the Requested State.

CONCLUSIONS

As it has been shown through the various chapters of this work, international child abduction is still a relevant issue to this day. This is seen through the ever-changing legal norms, readapting themselves and evolving to become more efficient and be able to offer a suitable solution to resolve all cases of international child abduction. If we go back to the number of Contracting States of the Hague Convention, we can see the high level of commitment most States have, regarding the protection of children's rights. The protection on a European level, through various regulations is a sign of the importance of the topic and shows a true will to tackle it in the best way possible. Each State on a national level must also have laws and procedures put in place to be able to apply the conventions and regulations to which they are party.

Indeed, international child abduction is a situation that aims to be eliminated once and for all however the complexities between the relationships of the parents means this situation is most definitely not going to happen in the near future. Therefore, the legal norms in place aim to create efficient procedures to remedy the situation as well as they can.

The central party of the situations at hand is the child, who suffers more than any of the other parties involved. Through this work, the position of the child within these procedures and the importance of having its best interests the forefront of the resolution of each case was fully analysed and understood. The child has a right to express their opinion, as he or she is the one whose livelihood has been taken away and who has had to deal with the traumatic experience of being removed from his place of habitual residence.

Though legal norms aim to protect the child and create a swift return to its habitual residence, many sources showed a lack of adequacy in the solutions at hand to deal with the issue. Throughout my work I was able to focus on the case in which domestic violence is at the heart of the taking of the child. Through the study of these cases, I became aware that in most

conflicts where domestic violence is involved, the taking parent is more often than not the mother, who is fleeing her partner, the left-behind parent, in most cases the abuser. It became evident throughout the research, that more needs to be done to protect the taking parent and the child in these particular situations.

Though there are exceptions where the child is not forced to be returned if it means they will be placed in a situation of grave danger, these situations are interpreted strictly, sometimes to a fault and do not enable a safe protection of the child. Protective measures are there to ensure the safety of the child once they are returned, but as it was mentioned in the third chapter, these measures are not always adequate solutions and are not always respected. This being said, there is room for improvement, however the cross-border nature of the issue at hand and the plurality of countries involved, renders making any amendments, a hard challenge to overcome. Indeed, progress in this field is needed but is hard to come by as each modification and change needs to be agreed upon by all the parties involved.

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