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The Best Interests Of The Child In Parental Abduction Cases: Rethinking The Hague Abduction Convention In Light of Children's Rights.

Thesis submitted by **Betina Borisova** for the final examination of the Advanced L.L.M in International Children's Rights

Student ID: [redacted]

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Name Typed: Betina Borisova
Student ID Number: [redacted]

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Executive Summary

The thesis analyses the best interests of the child in cases of parental abduction. Parental abduction refers to a situation where one parent wrongfully removes or retains their child abroad, in breach of custody rights of the other parent. On an international level, this problem is addressed by the 1980 Hague Convention on the Civil Aspects of International Child Abduction (HCCA). Although the success of the HCCA cannot be questioned in cases of abductions by the non-primary carer, as it was drafted to address precisely these cases, the almost automatic return mechanism adopted by the HCCA is less elegant in cases of primary carer abductions. The statistic shows that 73% of the taking parents are mothers and in 91% of these cases the mothers are the primary or joint-primary carer of the child. Because of this and because of the greater importance placed on children's rights since the adoption of the 1989 United Nations Convention on the Rights of the Child (UNCRC), the thesis calls for a child-centred application of the HCCA, in light of UNCRC.

Chapter 1 presents the HCCA and the UNCRC and delves into the tension between the two instruments. The discussion on the tension between the two instruments is grouped into three categories. Firstly, the thesis questions the parental orientation of the HCCA, which portrays children as objects that ought to be returned promptly. Secondly, the thesis shows the narrow view on the child's right to participation in the context of parental abduction, as the HCCA does not give children the right to be heard. Thirdly, the thesis analyses the lack of consideration for the best interests of the abducted child. In light of societal developments, chapter 1 questions the validity of the policy objectives behind the HCCA and their present-day relevance.

Chapter 2 analyses the approach of the European Court of Human Rights (ECtHR) in cases of child abduction. In doing so, the chapter looks at the highly controversial case of Neulinger v Switzerland and the criticism put forward after the decision. The discussion then shifts to the Grand Chamber's changed approach in X v Latvia, which was praised by many as achieving a balance between the best interests of the individual child and the summary nature of the abduction proceedings. The thesis argues that from a children's rights perspective, such balance was not achieved by this case. The last section of the chapter looks at the emergence of a child-centred approach in ECtHR jurisprudence and its application in the recent cases of Ushakov v Russia, Thomson v Russia and O.C.I. v Romania.

Chapter 3 shows that child participation in abduction proceedings could ensure that decisions are taken in the child's best interests. Given the interdependency between Article 3(1) and 12 UNCRC, this chapter argues that strengthening the child's right to be heard during the return procedure will ensure that decisions are taken in the best interests of the child. The thesis bases this claim on recent studies exploring the link between child participation and the best interests of the child. Hence, the chapter argues that the child should be heard in all cases, where appropriate, and his or her views should be relevant for the outcome of the case not only in cases where the child's objection to return has been raised by the taking parent but also in cases when the settlement exception and the grave risk exceptions are alleged. The last part of the chapter analyses the added value of the proposed recast of the Brussels II *bis* Regulation, the Brussels II *ter* Regulation in terms of child participation. Based on the analysis, the chapter argues that child participation will not prolong unnecessarily the return proceedings.

Chapter 4 explores the possibility of a child-centred interpretation of the HCCA through the Communication Procedure under the Third Optional Protocol to the Convention on the Rights of the Child. Based on the analysis in this thesis, the chapter recommends how the United Nations Committee on the Rights of the Child (CRC Committee) should deal with cases of parental child abduction. In particular, it is recommended that the CRC Committee should find that the best interests of the individual child were not considered by the national authorities if the child was not given the opportunity to be heard. Further, the CRC Committee should require domestic courts to provide a sufficiently reasoned decision, in a child-

friendly manner, especially in cases when the views of the abducted child were not considered to be relevant by the court. Moreover, based on the findings of chapter 2, it is recommended that the CRC Committee advocates for a child-centred interpretation of the HCCH, in light of the UNCRC. Additionally, in cases where the child is particularly vulnerable, due to illness or disability, a more detailed examination of the child's situation is needed. Lastly, it is recommended that the CRC Committee requires domestic courts to ensure that the child involved in abduction proceedings maintains meaningful contact with both parents, when this is in the child's best interests, regardless of whether the child is returned to their habitual residence or remains in the country of refuge. This is important for the child's overall development and identity.

The thesis concludes that a balance between upholding the best interests of the child in individual cases while respecting the summary nature of Hague abduction proceedings is possible. This balance could be achieved if the child is given the opportunity to participate in these proceedings and the court considers the child's views when deciding if any of the exceptions to return has been established. In doing so, the courts should adopt a child-centred approach, meaning that the exceptions to prompt return should be interpreted in light of the UNCRC. The CRC Committee could play an important role in advocating for a child-centred approach in cases of parental child abduction through its views in communications submitted under the Third Optional Protocol.

Keywords

Best interests of the child – parental abduction – child participation – Committee on the Rights of the Child (CRC Committee) – European Court of Human Rights (ECtHR)

Overview of Main Findings

The thesis aims to advocate for a better balance between the best interests of the child in abduction proceedings and the summary nature of such proceedings. A better balance is needed given the tension between the HCCA and the UNCRC, and the change in the profile of the taking parent. To better protect the rights and interests of the abducted child, the thesis advocates for a child-centred approach to cases of parental abduction. Such an approach entails that the exceptions to prompt return contained in the HCCA should be interpreted in light of the UNCRC and the CRC Committee's General Comments. This thesis offers four main findings and contributions.

First, the thesis contributes to the current debate by analysing recent ECtHR jurisprudence focusing on parental abduction. The analysis shows a "trend" towards a child-centred approach in ECtHR jurisprudence in cases of parental child abduction dating back to *Maumousseau and Washington v France*, through *Neulinger v Switzerland* and *X v Latvia* and mostly seen in several dissenting opinions over the years. Most recently, the ECtHR has reiterated the importance of genuine examination of evidence alleging one of the exceptions to prompt return and stated that these should be interpreted also in light of UNCRC. Such a statement can be seen as indicating that the ECtHR places more importance on the rights and interests of the individual child while respecting the summary nature of the Hague abduction proceedings. Such development is welcome, as the thesis argues that X v Latvia does not strike an appropriate balance between the best interests of the child and the summary nature of the Hague abduction proceedings from a child's rights perspective. At most, this decision reinforces the logic behind the HCCA itself.

Second, building on the need for a child-centred approach and the link between Article 3(1) and 12 UNCRC, the thesis argues for broadening the relevance of the views of the child. The thesis contributes to the current debate by providing examples of how the views of the child could be relevant for the establishment of the settlement exception and the grave risk exception. In doing so, the thesis analyses a recent case from New Zealand, *Simpson v Hamilton,* on the issue of concealment in parental child abduction cases and taking *X v Latvia* as an example, shows that even the views of very young children can be ascertained by using tailored psychological reports.

The third contribution of the thesis is the analysis of the Brussels II *ter* Regulation, which will enter into force in August 2022. The Regulation is important, as it complements the HCCA within the European Union. The thesis finds that since Articles 22 and 26 of the Regulation adopt the wording of Article 12 UNCRC, it follows that these articles should be interpreted in light of Article 12 UNCRC and the CRC Committee's guidance in this context. This is an important development, as this allows for broader child participation in cases of parental abduction.

The fourth contribution of this thesis is the recommendations to the CRC Committee as to how to deal with communications concerning parental child abduction. In particular, consistent with Committee's practice, it is recommended that the CRC Committee should find that the best interests of the individual child were not considered by the national authorities if the child was not given the opportunity to be heard. Further, the CRC Committee should require domestic courts to provide a sufficiently reasoned decision, in a child-friendly manner, especially in cases when the views of the abducted child were not considered to be relevant by the court. Overall, it is recommended that the CRC Committee advocates for a child-centred interpretation of the HCCH, in light of the UNCRC. This would include taking into account particular vulnerability of the abducted child, their rights under Article 9(3) and 10(1), as well Articles 6 and 8 UNCRC. These recommendations are valuable for enriching the debate on this topic, as to date, the CRC Committee has not adopted Views in cases of parental abduction when the HCCA was invoked.

List of Abbreviations

CJEU – Court of Justice of the European Union
CRC Committee – United Nations Committee on the Rights of the Child
CRC-OP3 - The Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure
GC – General Comment
ECHR – European Convention on Human Rights
ECtHR – European Court of Human Rights
EU – European Union
HCCA – Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction
HCCH – Hague Conference on Private International Law
ISS – International Social Service
UNCRC – United Nations Convention on the Rights of the Child

1. Introduction

The subject of my Master thesis is the phenomenon of parental child abduction, which refers to a situation where one parent takes their child to another jurisdiction, in breach of custody rights of the other parent. To tackle this problem, the Hague Conference on Private International Law[1] has adopted the 1980 Hague Convention on the Civil Aspects of International Child Abduction.[2] Being the second most widely ratified HCCH Child Convention, with 101 Contracting Parties to date, the success and popularity of the HCCA cannot be questioned. However, despite this, the thesis argues that in the 41 years since the drafting of the HCCA societal developments question the methods employed by it in light of children's rights.

The most important societal development since its drafting is the adoption of the 1989 United Nations Convention on the Rights of the Child.[3] Its near-universal ratification[4] has changed the way society views children. Building on the powerful statement that "mankind owes to the Child the best that it has to give",[5] the UNCRC is the first binding treaty that recognizes children as subjects of rights. Indeed, as "[t]he most fundamental of rights is the right to possess rights"[6] the UNCRC equips children with participation, protection and provision rights.[7] Two of the four general principles of the UNCRC – the right to have their best interests taken into account in decisions affecting them (Article 3) and the right to be heard (Article 12) are at the heart of the tension between the UNCRC and the HCCA.

The thesis aims to explore to what extent it is possible to find a balance between upholding the best interests of the child in individual cases, while respecting the summary nature of the Hague proceedings in the context of parental child abduction? In doing so, it is argued that given the societal developments in recent years, a better balance must be struck between respecting the summary nature of the Hague proceedings and upholding the best interests of the child.

2. Chapter 1: The tension between the 1980 Hague Abduction Convention and the 1989 United Nations Convention on the Rights of the Child.

2.1. The Hague Convention on Child Abduction

Before the HCCH began work on the HCCA, on an international level the problem of parental child abduction did not receive specific recognition and there were very limited chances of recovering an abducted child.[8] The HCCA was drafted to address this problem.

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[1] Hereafter HCCH.

[2] Hereafter HCCA.

[3] Hereafter UNCRC.

[4] All countries in the world except for the United States.

[5] UN General Assembly, *Declaration of the Rights of the Child* [43].

[6] Michael Freeman, 'Why It Remains Important to Take Children's Rights Seriously' (2007) 15 Int'l J Child Rts 5, 8.

[7] Committee on the Rights of the Child, *General comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12 [18].

[8] P. Beaumont and P. McEleavy, *The Hague Convention on International Child Abduction* (OUP, 1999) 3.

The objectives of the HCCA are "to secure the prompt return of children wrongfully removed to or retained in any Contracting state"[9] and "to ensure that rights of custody and of access […] are […] respected."[10] To ensure the implementation of these objectives, the Contracting Parties are required to "use the most expeditious procedures available".[11] The removal or the retention of the child is considered wrongful where it is in breach of rights of custody,[12] which at the time of removal or retention were actually exercised.[13] The HCCA defines broadly custody rights as to also include the right to determine the child's place of residence.[14] The HCCA only applies to children under 16 years, who were habitually resident in a Contracting State immediately before wrongful retention or removal.[15]

The HCCA provides for some exceptions to the requirement of prompt return. However, even if one of the limited and restrictively interpreted[16] exceptions apply, the judge in the state of refuge still has the discretion[17] to order the return of the child to uphold the objectives of the HCCA.

The first exception to prompt return concerns a situation where the return proceedings commenced more than a year after the child has been wrongfully removed or retained and the child has settled in his or her new environment.[18] The second exception is that the left-behind parent was not actually exercising the custody rights at the time of removal or retention, has consented to the removal or the retention, or has subsequently acquiesced in the removal or retention.[19] The third exception refers to situations where there is a grave risk that the child's return would expose him or her to physical or psychological harm or otherwise place the child in an intolerable situation.[20] The fourth exception is where 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.[21] The final exception applies in situations where returning the child to their habitual residence would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.[22]

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[9] Article 1a) HCCA.

[10] Article 1b) HCCA.

[11] Article 2 HCCA.

[12] Article 3a) HCCA.

[13] Article 3b) HCCA.

[14] Article 5 HCCA.

[15] Article 4 HCCA.

[16] Elisa Pérez-Vera, 'Explanatory Report on the 1980 HCCH Child Abduction Convention' [34]. Hereafter the Pérez-Vera Report.

[17] Based on the wording of the HCCA, the thesis takes the view that Article 12 HCCA does not give judges discretion to return a settled child. For a detailed discussion on this see Rhona Schuz *The Hague Child Abduction Convention* (Hart Publishing 2013) 233-244.

[18] Article 12 HCCA.

[19] Article 13a) HCCA.

[20] Article 13b) HCCA.

[21] Article 13 HCCA.

[22] Article 20 HCCA.

The HCCA is a procedural mechanism only, which means that the decision of the court of the requested state is not determinative of any custody issue.[23] As such, the proceedings are only of summary nature, meaning that there is no full hearing of all of the circumstances in the case, the latter being more akin to custody proceedings.

2.2. The United Nations Convention on the Rights of the Child

The UNCRC is the first international binding instrument which recognizes children as holders of rights. This explicit recognition is important because the previous binding instruments on international human rights, although applicable to children, were only limited to care and protection.[24] Further, UNCRC also obliges states to take children's rights more seriously, by recognizing their inherent dignity and worth. A full examination of the UNCRC is beyond the scope of this thesis. This section focuses only on UNCRC provisions which come into play in cases of parental child abduction.

Article 3(1) of the UNCRC requires that "[i]n all actions concerning children […] the best interests of the child shall be a primary consideration." The Committee on the Rights of the Child[25] has identified Article 3(1) as one of the four general principles of the UNCRC for interpreting and implementing all the rights of the child.[26] Further, the CRC Committee stated that the concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all rights recognised in the UNCRC and the holistic development of the child.[27] Indeed, the principle of the best interests of the child is found in other UNCRC provisions, for the present thesis, Article 9(1) (right to maintain contact with both parents) is important, but also the CRC Committee has recognised that Article 3(1) is linked to Article 12 (child's right to be heard).[28]

The CRC Committee has highlighted elements to be considered when assessing and determining the child's best interests, which include, among others, the determination of the child's views,[29] identity,[30] preservation of the family environment and maintaining relations,[31] care, protection and safety of the child,[32] health[33] and education.[34] All these elements can be relevant in child abduction cases, however, as illustrated below, the HCCA does not allow the courts of refuge to consider them unless they are relevant for one of the exceptions to prompt return.

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[23] Article 19 HCCA.

[24] J. Doek, 'The Human Rights of Children: an Introduction' in U. Kikelly and T. Liefaard (eds), *International Human Rights of Children* (Springer 2019) 10.

[25] Hereafter CRC Committee.

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

[27] ibid [4].

[28] CRC Committee, *GC No.12* (2009) (n7) [74].

[29] ibid [53-54].

[30] ibid [55-57].

[31] ibid [58-70].

[32] ibid [71-74].

[33] ibid [77-78].

[34] ibid [79].

Article 9(3) of the UNCRC is a core provision in cases of parental child abduction. The article obliges the state to respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents regularly, except if it is contrary to the child's best interests.

This is problematic in cases of parental child abduction, where the child will have limited if any, contact with the left-behind parent. However, this also applies in cases where a court orders the return of the child to their habitual residence, but the taking parent cannot return with the child, because, for example, they might face criminal charges or might be victims of domestic abuse.

Article 12, one of the four general principles of the UNCRC, assures, to every child 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 their age and maturity. The CRC Committee has interpreted the phrase "capable of forming his or her own view" not as a limitation, but rather urges the states to presume that the child has the capacity to form her or his own views.[35] Simply listening to the child is insufficient, the views of the child must be seriously considered.[36] The CRC Committee also recommends that the child must be given the opportunity to be directly heard in any proceedings.[37] Although the Committee's General Comment on the topic is quite elaborate, it is regrettable that the Committee did not specifically address child's participation in abduction proceedings.

The last two articles that are relevant for the discussion on child abduction are Article 11 and Article 35 UNCRC. The provisions encourage states to ratify treaties that prevent child abduction. Indeed, the CRC Committee has urged State Parties to the UNCRC to ratify the HCCA.[38] This can be seen as the Committee's endorsement of the HCCA, but this should not be taken to mean that there is no tension between the two legal instruments.

2.3. Incompatibility of ideologies

The tension between the two legal instruments can be grouped into three broad categories. The first tension is that the UNCRC portrays children as subjects of rights, whereas the parental orientation of the HCCA portrays children as objects. The second tension relates to the child's right to be heard. The third tension relates to the concept of the best interests of the child. Because of these frictions, the thesis argues for a more child-orientated approach in parental abduction cases.

2.3.1. Subjects vs Objects

The discussion above showed that the UNCRC recognizes children as independent rights holders, autonomous human beings and not just objects of disputes between their parents. Yet, in abduction proceedings, children are treated as objects, which ought to be returned forthwith.

Schuz challenges the parental orientation of the HCCA, which "defines wrongful removal or retention in terms of rights of adults".[39] Indeed, from the definition, it appears that the victim in these cases is the left-behind parent, who cannot exercise their rights of custody over the child and, as a remedy, requests

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[35] CRC Committee, *GC No. 12* (2009) (n7) [20].

[36] ibid [28].

[37] ibid [35].

[38] For example, in the Concluding Observation to Bolivia (CRC/C/BOL/CO/4 16 October 2009) [80d)].

[39] Rhona Schuz, 'Thirty Years of the Hague Abduction Convention: A Children's Rights' Perspective' in A. Diduck (eds) *Law in Society: Reflections on Children, Family, Culture and Philosophy* (Brill, 2015) 610.

the return of the child.[40] Schuz compares this situation to cases where an owner who has been dispossessed of his property would request its return.[41] It is striking that on several occasions the HCCA refers to the child as "it".[42] This reinforces the view that the HCCA treats abducted children as objects in their parents' dispute.

From the text of the HCCA, it does not become evident that the victim in abduction cases is the child and his or her rights, in particular, his or her right to have contact with both parents, as guaranteed by Article 9(3) UNCRC. The defence for non-exercise of parental rights, consent and acquiescence also show that the HCCA protects parents.[43] Schuz proposes that to make the HCCA compatible with the child's rights doctrine, the 'trigger' which activates the obligation to order return should change.[44] The focus instead should be on the child's right to have regular contact with both parents. Under this approach, there will be a presumption of a violation of the child's right to have contact with both parents, when as a result of removal and retention, the child is living in a different country to one parent, when previously they were living in the same country.[45] Under this approach, however, it seems that children will be able to bring proceedings for their return to their habitual residence. This is problematic in practice, not only because many of the abducted children will not be in the position to do so because of their age, and dependency on the taking parent, but also it creates difficulties when the left-behind parent is unable or unwilling to look after the child.

A final remark on this issue is that it seems that the HCCA is more concerned with the geographic location of children rather than with children's rights. The Preamble of the HCCA indicates that its purpose is ensuring the prompt return of children to the state of their habitual residence from which they were taken, not to the left-behind parent. This means, that there is no guarantee that when returned, the child will have meaningful contact with the left-behind parent, even though they are in the same country. Thus, the HCCA is more about the physical place of residence of children than about protecting the children's rights to have a relationship with either parent.[46]

2.3.2. The voice of the child

As discussed above, Article 12(1) UNCRC provides that a child who is capable of forming his or her views, has a right to be heard in all proceedings, including the abduction proceedings.
The HCCA, however, does not explicitly provide for the child to be heard. The child can participate in the proceedings only if the taking parent raises the child objection exception to return (Article 13). This again reinforces the parent-orientated nature of the HCCA.

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[40] ibid.

[41] ibid.

[42] Art. 12(2) ("its environment"); Art. 13 ("its return") and Art. 13(2) ("its views").

[43] Rhona Schuz, 'The Hague Child Abduction Convention and Children's Rights' (2002) 12 Transnat'l L & Contemp Probs 393, 413.

[44] Rhona Schuz (2013) (n17) 116.

[45] ibid, 117.

[46] Lynn D Wardle, 'The Merit of Modesty: Abduction, Relocation, and the Hague Abduction Convention' (2014) 9 J Comp L 89, 100.

It is submitted that Article 13 HCCA requires a two-stage consideration, which differs from the standard in the UNCRC.[47] As such, under the HCCA, the child must object to being returned and he or she must have attained an age and maturity at which is it appropriate to take account of his or her views. This can be contrasted to Article 12 UNCRC, which provides that all children have the right to be heard, not only those of them who object and that the views of all children should be considered. Their age and maturity are only relevant when deciding the weight to be given to their views.

The HCCH admits that at the time of the drafting of the HCCA, it was not common in many jurisdictions to hear children in court proceedings and as a result, it does not contain an explicit obligation to hear the child.[48] It is also acknowledged, however, that although the decision to hear the child is left to the discretion of the judge,[49] it is important to take into account the child's perspective as early as possible during the return proceedings.[50] This is because when the decision cannot be enforced because the child strongly objects, this "equally frustrates the purpose of the Convention".[51]

It follows that the views of the child should not be confined to cases where the child objects to being returned. Indeed, the views of the child should be relevant to the settlement and grave risk exception too. After all who if not the child himself or herself is better placed to say if they have settled in their new environment or if there is a risk of harm if they were to be returned. This is also linked to their best interests, given the link between Article 3(1) and 12 UNCRC. Indeed, by listening to the views of the child in abduction proceedings, the judges can assert their best interests, without resorting to full welfare assessment. This point is further developed in chapter 3.

2.3.3. Best interests of the child

As discussed above, article 3(1) UNCRC requires that in all decision concerning children, the best interests of the child are a primary consideration. Article 3(1) begins by referring to "all actions concerning children" (in plural) but ends with the requirement that "the best interests of the child" (in singular) be a primary consideration.[52] Parker considers that courts of law often make decisions about individual children[53] and Alston considers that in custody cases, an individualistic focus may be appropriate.[54] However, other decision-makers are required to make decisions about a group of children or children in general, especially when there are policy considerations involved, such as the policy considerations behind the HCCA, discussed below. As a result, the abduction proceedings are somehow in the middle because even though they are not custody proceedings, they do concern a particular child, but the policy considerations behind the HCCA do not allow for individual approach to the best interests of the abducted child. A unique feature of the HCCA is that it takes a broad view on the issue of the best interests of the

[47] Claire Fenton-Glynn, 'Participation and natural justice: children's rights and interests in Hague Abduction Proceedings' 3.

[48] Hague Conference, *Guide to Good Practice Part IV- Enforcement* (2010) [98].

[49] ibid [99].

[50] ibid.

[51] ibid.

[52] Stephen Parker, 'The Best Interests of the Child - Principles and Problems' (1994) 8 Int'l JL & Fam 26, 28.

[53] ibid.

[54] Philip Alston, 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' (1994) 8 Int'l JL & Fam 1, 14.

child. Because abduction is not in the best interests of children collectively, such action must be discouraged. Discouraging such action means showing parents that abducted children will be returned expeditiously.[55] This approach, however, overlooks cases where return will not be in the best interests of that particular child. Indeed, the CRC Committee has clarified that the child's best interests are conceived both as a collective and individual right.[56]

The preamble of the HCCA states that "the interests of children are of paramount importance in matters relating to their custody". However, proceedings under the HCCA are not concerned with the merits of the case but are of a summary nature.[57] Hence, it appears that in return proceedings, the court of the state of refuge does not and should not consider the best interests of the abducted child, because these are not custody proceedings. Instead, the HCCA operates on the premise that the court of the habitual residence of the child during a custody hearing is better placed to assess the best interests of the child. In addition, assessment of the best interests of the abducted child by the court of the state of refuge would prolong the proceedings which goes against the spirit of the HCCA for prompt return.[58]

The inherent tension between the two instruments is that the HCCA is concerned with the interests of children collectively and the UNCRC is focused on the rights of each individual child.[59]

Over the years, there were various attempts to reconcile the application of the HCCA and the UNCRC. Such an attempt can be found in the argument that the best interests principle is not relevant in applications for return, precisely because the abduction proceedings are not custody hearings.[60] This argument, however, is inconsistent with Article 3(1) UNCRC which is explicit that the best interests of the child are a primary consideration in *all* decisions concerning them. Although the Hague proceedings are only procedural, the decision of whether a child must be returned to their habitual residence is indeed a decision that concerns that child. As such, the best interests of the particular child cannot be disregarded merely because of the procedural nature of given proceedings. Schuz further argues that the welfare of that child may be affected by being returned to the requesting state.[61] The return of the child might cause him or her actual harm, for example, harm that was not considered severe enough to trigger the application of the grave risk exception to return. Nevertheless, this affects the welfare of the child and because of this, it ought to be taken into consideration.

Another attempt to reconcile the two instruments is put forward by arguing that the HCCA cannot be inconsistent with the UNCRC because the latter approves the former in Article 11(2), which urges the states to conclude multilateral agreements to prevent the abduction of children. Schuz is critical of this argument arguing that the fact that the UNCRC encourages treaties like the HCCA does not mean that its specific provisions are compatible with the UNCRC.[62] It should be acknowledged, however, that because Article 11(2) refers to "accession to existing agreements" there is room for the argument that the drafters

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[55] Charlotte Mol and Thalia Kruger, 'International child abduction and the best interests of the child: an analysis of judicial reasoning in two jurisdictions' (2018) 14 (3) Journal of Private International Law, 421, 426-427.

[56] UN Committee on the Rights of the Child (CRC), *General comment No. 11 (2009): Indigenous children and their rights under the Convention [on the Rights of the Child]*, 12 February 2009, CRC/C/GC/11 [30].

[57] Article 16 HCCA.

[58] Charlotte Mol and Thalia Kruger (n55) 427.

[59] ibid, 432.

[60] The Preamble of the HCCA states that the interests of the child are paramount in custody disputes.

[61] Rhona Schuz (2002) (n43) 437.

[62] ibid.

of the UNCRC intended to support the HCCA.[63] However, as forcefully argued by Schuz, there is "nothing in the CRC to suggest that the need to combat abduction should override the application of the best interests standard in all actions concerning children".[64]

The last argument put forward in this context is that the two instruments cannot be inconsistent, because the HCCA is based on the best interests principle. The first limb of this argument is that the HCCA operates on the basis that the best interests of the child are served if the welfare assessment is undertaken by the courts of the child's habitual residence. However, there is no guarantee that a full custody hearing will take place once the child is returned. Further, Schuz argues that not in all cases it is in the child's best interests to reside in the place of habitual residence pending determination of the dispute.[65] The second limb of the argument asserts that the best interests of the child require his or her immediate return to his or her habitual residence. It cannot be disputed that this is indeed true for many abducted children. The drafters themselves acknowledged that for some children, however, return to their habitual residence will not be in their best interests and accordingly provided for some limited exceptions. The narrow interpretation of these exceptions, however, means that some children will be returned even if the return is not in their best interests. The thesis is concerned with the rights and interests of these children. The current approach serves to strengthen the deterrent effect of the automatic return mechanism, which by not examining the welfare of the abducted child, benefits each and every child by reducing the chance that she or he will be abducted.[66] Thus, "the best interests of individual children are occasionally sacrificed in the more general interests of the wider class of children in the international community".[67] This benefit exists only if the deterrent effect of the HCCA can be proven.

It appears that the collective interpretation of Article 3(1) UNCRC is satisfied by the HCCA. The question remains, however, how to satisfy the individualistic interpretation of the provision. Before addressing this in the following chapters, the last section of chapter 1 will assess if the policy objectives behind the HCCA are still relevant today.

2.4. Present-day relevance of the policy objectives of the Hague Convention on Child Abduction

The policy objectives behind the Convention are clear – prompt return to their habitual residence serves the best interests of children collectively because abduction is not in children's best interests. The strong assumption in favour of prompt return and the strict interpretation of the exceptions, reinforce the HCCA's objective to deter parents from unilaterally removing or retaining their children abroad. A related aspect of the policy for prompt return is that the taking parent should not be able to benefit from their illegal action by remaining with the child in the state of refuge.

These policy objectives were designed to address a situation where the father became frustrated with being denied access to his children after the court has granted sole custody to the mother, he stole the

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[63] Victoria Stephens & Professor Nigel Lowe, 'Children's welfare and human rights under the 1980 Hague Abduction Convention – the ruling in *Re E'* (2012) 34(1) Journal of Social Welfare and Family Law 125, 127.

[64] Rhona Schuz (2002) (n43) 437.

[65] ibid, 438.

[66] Rhona Schuz, 'The Hague Child Abduction Convention: Family Law and Private International Law' (1995) 44 INTL & COMP. L.Q. 771, 775.

[67] Andrew Bainham, *Children: The Modern* Law (Bristol: Family Law 2nd edn. 1998) 582.

child, went abroad, and then underground.[68] Indeed, in this situation, the child "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 come with the necessity to adapt to a strange language, unfamiliar cultural conditions and unknown teachers and relatives".[69] Undoubtedly, in these circumstances, the prompt return will be in the best interests of the abducted child. However, in the 41 years since the drafting of the HCCA, the profile of the abductor and the reasons for the abductions have dramatically changed.

The statistics show that in 2015, 73% of taking persons were the mothers of the children.[70] Further, 91% of the taking mothers were primary or joint-primary carers of the children.[71] Moreover, in 58% of applications involved, the taking parent travelled to a State of which they were a national, where they have been brought up or have family ties.[72] It follows that the situation described above is no longer the reality for most cases.

Hence, the thesis challenges the present-day relevance of the policy objectives behind the HCCH. It was not drafted to address abductions by the primary carer of the child, and it is precisely in these cases where the best interests of the particular child are overlooked in the name of protecting the integrity of the HCCA. The comment of Waite J. that "it is implicit in the whole operation of the Convention that the objective of stability for the mass of children may have to be achieved at the price of tears in some individual cases"[73] is simply not relevant in a society that treats each and every child as a right holder. Schuz is right to equate the violation of children's rights to the phenomenon of child abduction,[74] as both go against the best interests of the child.

3. Chapter 2: The approach of the European Court of Human Rights in child abduction cases.

The chapter analyses the ECtHR's approach in child abduction cases by first looking at the two far-reaching Grand Chamber decisions in *Neulinger v Switzerland*[75] and *X v Latvia*.[76] The discussion then focuses on recent ECtHR jurisprudence. The chapter argues that it seems that the ECtHR has managed

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[68] P. Beaumont and P. McEleavy (1999) (n8) 9, citing interview and unpublished papers with Adair Dyer, former Deputy-Secretary General of the HCCH.

[69] A. Dyer, 'The Report on International child abduction by one parent ('legal kidnapping')' (Doc. No 1, August 1977) 21.

[70] N Lowe, 'Part I – A statistical analysis of applications made in 2015 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Global report', (Prel. Doc. No 11 A of September 2017) The Hague Conference, 2018 [37]. Available at: https://assets.hcch.net/docs/d0b285f1-5f59-41a6-ad83-8b5cf7a784ce.pdf [last accessed: 27.05.2021].

[71] ibid [43].

[72] ibid [45-46].

[73] *W v. W* [1993] 2 F.L.R. 211, 220

[74] Rhona Schuz (2002) (n43) 451.

[75] (Application No 41615/07) Grand Chamber, 6 July 2010.

[76] (Application No. 27853/09) Grand Chamber, 23 November 2013.

to further develop the *X v Latvia*[77] approach, which results in a more child-centred approach in light of the UNCRC. Such an approach is a way to satisfy the individualistic interpretation of Article 3(1) UNCRC.

3.1. Hard cases make bad law, or do they? The case of *Neulinger v Switzerland*

The applicants in this case were the taking mother and the abducted child, who claimed that the order to return the child to Israel from Switzerland violates their right to respect for their family life within the meaning of Article 8 ECHR.

The Grand Chamber confirmed that the child's removal was wrongful within the meaning of the HCCA because the left-behind parent had guardianship jointly with the mother, which under Israeli law is comparable to the definition of custody rights in Article 5 a) HCCA, namely that the left-behind parent has the right "to determine the child's place of residence". Further, as the HCCA also seeks to protect access rights,[78] the child's removal from Israel rendered these rights illusory in practice.[79] Accordingly, as the removal of the child was wrongful, the Grand Chamber found that the return order was a measure that has a legal basis.[80] The Court also stated that the measure pursued the legitimate aim of protecting the interests of the child and the father.[81] The Grand Chamber, however, found that the taking mother would sustain a disproportionate interference with her right to respect for her family life if she were forced to return with her son to Israel.[82] Based on several experts' reports, the Court stated that the return to Israel without his mother would constitute significant trauma and a serious psychological disturbance for the child.[83] The Court also bluntly stated that it would not be "in the child's best interest for him to return to Israel.[84]

This case attracted a lot of criticism. The outcome of the case was not questioned, given the extreme and unusual facts of the case and the lengthy court proceedings. It was problematic, however, that the Grand Chamber seemed to have formulated a new general principle to be applied in the context of parental child abduction cases.

In addition to stating that the best interests of the child "must be assessed in each individual case"[85] in the infamous paragraph 139 of the judgment, the Grand Chamber seems to require domestic courts to conduct "an in-depth examination of the entire family situation" and to consider factors of "a factual, emotional, psychological, material and medical nature" in making a "balanced and reasonable assessment of the respective interests of each person", while being constantly concerned for "what the best solution would be for the abducted child". The Grand Chamber based this *new* requirement on the case of *Maumousseau and Washington v France*,[86] where the same paragraph appears but with one important

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[77] ibid.

[78] See the Preamble.

[79] Neulinger and Shuruk v Switzerland (n75) [101-102].

[80] ibid [105].

[81] ibid [106].

[82] ibid [151].

[83] ibid [143-144].

[84] ibid [151].

[85] ibid [138].

[86] Application No. 39388/05 (6 December 2007).

difference. In this case, the Court observed that French courts "conducted an in-depth examination of the entire family situation"[87] and found that there is no risk that the child would be exposed to physical or psychological harm in the event of her return.[88] The Court was thus satisfied that the child's best interests were taken into account by the domestic courts.[89] In *Neulinger*,[90] however, the Grand Chamber seems to have adopted the French court's practice as a *general principle* applicable in cases of parental child abduction, thus signalling a change from the swift procedural aspect of the abduction proceedings to a more substantive determination of the merits of the case.

This practice goes against the spirit and letter of the HCCA, namely the prompt return mechanism. This is problematic because *Neulinger*[91] was followed in subsequent ECtHR case law.[92] Consequently, *Neulinger*[93] attracted a lot of criticism from the academic community[94] and the HCCH.[95] It has been submitted that *Neulinger*[96] and the subsequent cases "rang the death toll of the efficient Hague Abduction Convention"[97] because the approach taken by the ECtHR is diametrically opposed to the procedural approach of the HCCA.[98] The in-depth analysis of the entire family situation approach corresponds to custody proceedings, and as such is incompatible with the summary nature of the HCCA. Moreover, it is submitted that in many parental child abduction cases, the detailed examination of the best interests of the child is not appropriate.[99] Concerns have been raised that this approach slows down the expeditious proceedings[100] and as shown by the *Raban v Romania*[101] case, even rewards the taking parent.[102] This

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[87] ibid [74].

[88] ibid.

[89] ibid [75].

[90] n75.

[91] n75.

[92] See *İlker Ensar Uyanik v Turkey* (Application No. 60328/09) 3 May 2012; *B. v Belgium* (Application No. 4320/11) 10 July 2012.

[93] n75.

[94] See LJ Silberman, 'The Hague Convention on Child Abduction and Unilateral Relocations by Custodial Parents: A Perspective from the United States and Europe – Abbott, Neulinger, Zarraga' (2011) 63 Oklahoma Law Review 733, 743–44; L Walker and P Beaumont, 'Shifting the Balance Achieved by the Abduction Convention: The Contrasting Approaches of the European Court of Human Rights and the European Court of Justice' (2011) 7 Journal of Private International Law 231, 232.

[95] Special Commission on the practical operation of the 1980 and 1996 Hague Conventions (1–10 June 2011), see the Conclusions and Recommendations [47-49] available at https://assets.hcch.net/upload/wop/concl28sc6_e.pdf [last accessed: 14.05.2021].

[96] n75.

[97] Charlotte Mol and Thalia Kruger (n55) 435.

[98] Hellen Keller and Corina Heri, 'Protecting the Best Interests of the Child: International Child Abduction and the European Court of Human Rights' (2015) 84 Nordic Journal of International Law 270, 274.

[99] ibid, 284.

[100] H. van Loon, 'Interaction Between Recent Case Law of the European Court of Human Rights and the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction' (17 March 2011) [9], available at www.hcch.net/upload/coe2011.pdf [last accessed: 14.05.2021].

[101] (Application No. 25437/08) 26 October 2010.

means the preventive aim of the HCCA is undermined, so is the practical objective of the HCCA, namely, the summary nature of the proceedings.[103] The full welfare assessment also undermines the underlying philosophy of the HCCA as regards the best interests of the child.[104] As discussed in section 2.3.3. above, the starting point of the HCCA is that prompt return is in the best interests of the abducted children because their abduction in the first place was not in their best interests. Therefore, the full welfare assessment replaces this presumption with a neutral starting point.[105] The full welfare assessment requires the domestic courts to determine if the return is in the best interests of each individual abducted child.

The criticism put forward is on the one hand justifiable, given that indeed in many cases the speedy return, which restores the *status quo ante*, is in the child's best interests. On the other hand, however, the presumption of return fails to acknowledge that in some cases, the return will not restore the *status quo ante* because the situation before the abduction does not exist anymore. This is especially so in cases where the taking parent, who is also the primary carer of the child, cannot return or refuses to return with the child. Even though the HCCA makes it clear that the child should be returned to their habitual residence, not to the left-behind parent, in practice in these cases, the return of the child to their habitual residence would mean returning to their non-primary carer. A situation might exist where the left-behind parent is unable to take care of the children[106] and sometimes does not even speak the same language as the child.[107] This hardly represents a situation where the return is in the best interests of the child. Thus, it is submitted that the HCCA was not designed to address abductions by the primary carer[108] and as such, the grave risk harm exception, with its restrictive interpretation, fails to acknowledge that return in these cases might lead to major changes in child's life and by no means restore the *status quo ante*.

Neulinger[109] should, however, be praised for the detailed analysis of the principle of the best interests of the child, reiterating the consensus in international law that "in all decisions concerning children, their best interests must be paramount".[110] The Grand Chamber also states that because the best interests of the child will depend on a variety of individual circumstances, those best interests must be assessed in

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[102] H. van Loon (2011) (n100) [17].

[103] Jennifer Paton, 'The Correct Approach to the Examination of the Best Interests of the Child in Abduction Convention Proceedings Following the Decision of the Supreme Court in Re E (Children) (Abduction: Custody Appeal)' (2012) 8 J Private International Law 547, 560-561.

[104] ibid, 561.

[105] K Norri, 'The Welfare Imperative' (2011) 6 (1) Journal of the Law Society of Scotland 16, 17.

[106] See the *Wood case* (Western Australia, 24 August 2006) where after their return from Switzerland to Australia, the children were placed in foster care, as the mother was not able to return with them, because of potential criminal action against her and their father was unable to take care of them. For a full discussion see Russell Merle H. Weiner, 'Intolerable Situations and Counsel for Children: Following Switzerland's Example in Hague Abduction Cases' (2008) 58 American University Law Review 335, 338-343.

[107] See *Sneersone and Kampanella v Italy* (Application No. 14737/09) 12 July 2011 [94].

[108] Hellen Keller and Corina Heri (n98) 289.

[109] n75.

[110] n75 [135].

each individual case.[111] This interpretation is indeed in line with Article 3(1) UNCRC. This also shows that the Grand Chamber advocated that the child's Article 8 rights be respected.[112]

Nevertheless, *Neulinger*[113] attacked the integrity of the HCCA, precisely because it requires an individual welfare assessment. The President of the ECtHR, Judge Jean Paul Costa, writing extrajudicially, stated that *Neulinger*[114] "does not […] signal a change of direction at Strasbourg in the area of child abduction".[115] It was acknowledged, however, that an "over-broad"[116] interpretation of *Neulinger*[117] could indeed go against the logic of the HCCA. Yet, paragraph 139 is a statement expressly made "in the specific context of proceedings for the return of an abducted child".[118] Judge Jean Paul Costa tried to soften the blow of paragraph 139 *Neulinger*,[119] by stating that the courts of the child's habitual residence are best placed to review the child's situation in full.[120] How this differs from the "in-depth examination of the entire family situation and of a whole series of factors",[121] is not clear. The ECtHR was provided with the opportunity to clarify the matter in *X v Latvia*.[122]

3.2. Balance achieved? The case of *X v Latvia*.

The case concerned the abduction of a child from Australia to Latvia, the home country of the taking parent. After the decision of the Latvian court to order the return of the child to Australia, the mother alleged that this decision violates her right to family life under Article 8 ECHR. Before the Latvian courts, the taking parent argued that one of the exceptions to prompt return under the HCCA applies to the case, namely, the grave risk exception.[123] The mother argued that a grave risk exists that the return of the child to Australia would expose her to physical or psychological harm or otherwise place her in an intolerable situation. The Latvian Regional Court, however, dismissed the psychological report on the ground that it concerned the question of custody of the child.[124] The Grand Chamber's assessment of this decision attracted the attention of foreign governments,[125] which expressed concern about the requirement for in-

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[111] ibid [138].

[112] Peter McEleavy, 'The European Court of Human Rights and the Hague Child Abduction Convention: Prioritising Return or Reflection' (2015) 62 Neth Int Law Rev 365, 387.

[113] n75.

[114] n75.

[115] Judge Jean Paul Costa, 'The Best Interests of the Child: Recent Case-law from the European Court of Human Rights' [2011] IFL 183, 187.

[116] ibid, 186.

[117] n75.

[118] Judge Jean Paul Costa (n115) 186.

[119] n75.

[120] Judge Jean Paul Costa (n115) 186.

[121] n75 [139].

[122] n76.

[123] Article 13 (b).

[124] n76 [68].

[125] ibid [83-91].

depth assessment of the child's best interests in the context of parental child abduction cases and sought clarification as to the scope of this requirement.

The Grand Chamber began its assessment by clarifying the applicable principles in this area of law.[126] The ECtHR expressly addressed the infamous paragraph 139 of *Neulinger*[127], acknowledging that it "may and has indeed been read as suggesting that the domestic courts were required to conduct an in-depth examination of the entire family situation".[128] The Grand Chamber, however, neither endorsed, nor criticised this interpretation.[129] Responding to the criticism, discussed in the previous section, the Grand Chamber seems to have retracted from paragraph 139 of *Neulinger*,[130] by stating that it "does not in itself set out any principle for the application of the [HCCA] by the domestic courts".[131] Instead, the Court stated that the harmonious interpretation of the ECHR and the HCCA is achieved when "factors capable of constituting an exception to the child's immediate return [are] genuinely […] taken into account"[132] by the requested court and that court has made "a decision that is sufficiently reasoned on this point".[133] In other words, Article 8 ECHR requires the domestic courts to "undertake an effective examination of allegations made by a party on the basis of one of the exceptions"[134] in the HCCA.

Some academics have praised *X v Latvia*[135] for striking the right balance between the summary nature of the return proceedings and the best interests of the child.[136] The thesis, however, respectfully disagrees.

It is interesting that in his Concurring Opinion, in this case, judge De Albuquerque submits that replacing the "in-depth" examination with "effective" examination is not adopting a new test, but simply using a "new jargon".[137] Because of this, Beaumont argues that the word "effective" must be construed in accordance with the limited time available to judges in summary return proceedings.[138] It follows that "a moderate level of due diligence" is appropriate.[139] Nevertheless, it must be remembered that the Grand

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[126] ibid [92].

[127] n75.

[128] *X v Latvia* (n76) [104].

[129] Onyoja Momoh, 'The interpretation and application of Article 13(1) b) of the Hague Child Abduction Convention in cases involving domestic violence: Revisiting *X v Latvia* and the principle of "effective examination' (2019) 15(3) Journal of Private International Law 626, 644.

[130] n75.

[131] *X v Latvia* (n76) [105].

[132] ibid [106].

[133] ibid.

[134] ibid [118].

[135] n76.

[136] See Charlotte Mol and Thalia Kruger (2018) (n55), p 442; Paul Beaumont, Katarina Trimmings, Lara Walker and Jayne Holliday, 'Child Abduction: Recent Jurisprudence of the European Court of Human Rights' (January 2015) 64 ICLQ 39, 43; Helen Keller and Corina Heri (2015) (n98) 287.

[137] *X v Latvia* (n76) 46. See also 50 where the Honourable Judge says that "in-depth" *or* "effective" evaluation of the child's situation can provide justice.

[138] Paul Beaumont et al (2015) (n136) 45.

[139] ibid.

Chamber stated that the requirement of Article 11 of the HCCA to act expeditiously "does not exonerate"[140] the domestic courts from undertaking an effective examination of the allegations made.[141]

The *X v Latvia* approach was also praised for requiring the requested court to adequately reason their decisions when considering factors that could establish one of the exceptions to prompt return.[142] It is argued that this will solve the problem of delay before the ECtHR because the Court should only take an application forward where the domestic court did not comply with this requirement.[143]

This "new" general principle, however, hardly strikes "a new balance", especially from a children's rights perspective. *X v Latvia*[144] is important to the extent that it clarifies that paragraph 139 *Neulinger*[145] should not be read in a way in which it undermines the HCCA. However, the requirement that factors constituting exceptions to the prompt return of the child should not be lightly disregarded and should be carefully examined by the requested state is just a logical consequence of the fact that the HCCA provided for those circumstances. The exceptions to the prompt return of the child acknowledge that sometimes return will not serve the best interests of the abducted child.[146] Therefore, examining factors that could constitute an exception to return guarantees that the requested state has taken the best interests of the abducted child into consideration. This means that not examining the factors capable of constituting one of the exceptions to prompt return, goes against the spirit of the HCCA.[147] In this respect, *X v Latvia*[148] is not a new or revolutionary reading of the HCCA and as such, it cannot be said that this Grand Chamber decision achieves a balance between the best interests of the abducted child and the summary nature of the proceedings, at least not more so than the HCCA itself. As illustrated by chapter 1, the balance proposed by the HCCA - between the best interests of the child and the policy objectives behind the HCCA – is problematic nowadays. The tension between the UNCRC and the HCCA calls for a more child-centred approach to the application of the HCCA. The next section shows a trend towards a child-centered approach in the ECtHR, which better serve the best interests of the abducted child in case law post *X v Latvia*.[149]

3.3. Towards a child-centred approach in ECtHR cases on parental abduction?

The emphasis to focus on the individual child, rather than on the policy of return in parental abduction cases, did not originate in *Neulinger*.[150] This trend can be traced back to Judge Zupančič in his dissenting opinion in the case of *Maumousseau and Washington v. France*.[151] He stated that "the "best interests of

[140] *X v Latvia* (n76) [118].

[141] ibid.

[142] ibid [44].

[143] ibid.

[144] n76.

[145] n75.

[146] Pérez-Vera Report (n16) [25].

[147] See Paul Beaumont et al (2015) (n136) 43.

[148] n76.

[149] n76.

[150] n75.

[151] n86, dissenting opinion 38-43.

the child" is the fundamental determinative criterion, which must be assessed *de novo* by each court".[152] From this assessment it follows that it cannot be in the best interests of a "four-year-old girl to be torn from the hands of her mother by force and transported back to the State of New York into the hands of her father with whom she has not been in any meaningful contact for 19 months".[153] Judge Zupančič was of the view that to sacrifice the best interests of an individual child in order "to vindicate abstract juridical goals […] goes against most basic human good sense".[154] This argument corresponds to Schuz's observation that the objective to "deter abduction cannot justify a violation of child's rights"[155] especially since the deterrent effect of the HCCA is unproven and not provable.[156]

In this context, *Neulinger*[157] is significant, because the desire to protect the individual child, given the circumstances of the case, was at the core of the majority's decision. Even though the ECtHR has referred to UNCRC in applications concerning the HCCA before *Neulinger*,[158] the way *Neulinger*[159] presented the UNCRC could be taken to signal a change in the way the Grand Chamber looks at children's rights in these cases. Firstly, the starting point for the Grand Chamber in *Neulinger*[160] was not the HCCA, but the UNCRC.[161] Secondly, for the first time, the provisions of the UNCRC were presented by an explanatory subtitle[162] - "Protection of the rights of the child".[163] Thirdly, the Grand Chamber only referred to the Preamble and Articles 7, 9, 14, 18 and 3(1) UNCRC.[164] McEleavy notes that the ECtHR did not refer to Article 11 UNCRC, which requires the states to take measures to combat illicit transfer and non-return of children abroad.[165] This is noteworthy because, in previous ECtHR jurisprudence, Article 11 was the only UNCRC provision cited.[166] When taken together, these elements suggest that for the interpretation of Article 8 ECHR, the primary aim of the HCCA, namely, to secure prompt return, is no longer to be prioritised as it was in the past.[167]

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[152] ibid, 39.

[153] ibid.

[154] ibid, 40

[155] Rhona Schuz (2002) (n43) 424. Cf. Helen Keller and Corina Heri (2015) (n98) 288, arguing that the speedy nature of these proceedings justifies a departure from the usual requirement of a holistic evaluation of the child's best interests.

[156] Rhona Schuz (2015) (n39) 625.

[157] n75.

[158] See *Maumousseau and Washington v. France* (n86) [44]; *Iglesias Gil and AUI v. Spain* (Application No. 56673/00) 29 July 2003 [28]; *Maire v. Portugal* (Application No. 48206/99), 26 June 2003 [56].

[159] n75.

[160] n75.

[161] (n75) [48]; cf. *Neulinger and Shuruk v. Switzerland* [Chamber] (Application No. 41615/07) 8 January 2009 [36-39] and *Maumousseau and Washington v. France* (n86) [43-44], where the starting point was the HCCA.

[162] Peter McEleavy (2015) (n112) 382.

[163] (n75) [48].

[164] ibid [48-50].

[165] Peter McEleavy (2015) (n112) 383.

[166] See *Iglesias Gil and AUI v. Spain* (n158) [28] and *Maire v. Portugal* (n158) [56].

[167] Peter McEleavy (2015) (n112) 383.

The trend towards prioritising the need of the individual child can be explained by reference to the sociological change in the profile of the abductor, the motives for abduction and the growing importance of respecting children's rights. This prompted ECtHR judges to question the suitability of the HCCA in abductions by the primary carer. Most notably, Judge Pinto De Albuquerque in his concurring opinion in *X v Latvia*[168] advocated for "a more individualised, fact-sensitive determination […] in the light of a purposive and evolutive approach to the Hague defence clauses".[169] He was of the view that "the detailed examination of the child's situation clearly does not replace custody proceedings".[170] This means that the court of the state of refuge can only address those issues relating to the child's immediate future and the child's abduction.[171] Further, judge De Albuquerque maintains the view that the "in-depth" investigation and urgent and expeditious proceedings are not oxymorons.[172] It follows that "a thorough, limited and expeditious investigation is […] feasible if judges strictly control [their] timetable".[173] Academics, however, have been less optimistic, arguing that this is no easy task for national judges.[174]

Judge De Albuquerque calls for the available defences to be "interpreted in the light of present-day social conditions",[175] which he calls "evolutive and purposive interpretation of the [HCCA]".[176] Justification for this interpretation of the HCCA is seen in the sociological shift of the profile of the abductor and the "universal acknowledgement of the paramountcy of the child's best interests".[177] In cases where the restrictive interpretation of the HCCA conflicts with the purposive and evolutive interpretation of the text, the latter should prevail.[178] This is because the former is based on an assumption in favour of the left-behind parent and envisages a punitive approach to the taking parent.[179] This view is in line with Schuz's criticism that the HCCA is parent orientated, as discussed in Chapter 1.

The trend towards a more child-centred approach is seen most prominently in the recent jurisprudence of the ECtHR. For example, in the general principles section of cases of *Thomson v Russia*[180] and *Vladimir Ushakov v Russia*,[181] the ECtHR mentions that state obligations in the area of international child abduction imposed by Article 8 ECHR must be interpreted in light of the HCCA and the

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[168] Judge Pinto De Albuquerque agreed with the majority on finding a violation of Article 8 ECHR but disagreed with the principles set out by the majority, see *X v Latvia* (n76) 36.

[169] ibid 41-42.

[170] ibid, 39.

[171] ibid.

[172] *X v Latvia* (n76) Judge De Albuquerque's concurring opinion, 46, see footnote 37 of the opinion.

[173] ibid.

[174] Thalia Kruger & Liselot Samyn, 'Brussels II bis: successes and suggested improvements' (2016) 12(1) Journal of Private International Law 132, 156.

[175] *X v Latvia* (n76) 42.

[176] ibid, 44.

[177] ibid, 47.

[178] ibid, 45.

[179] ibid, 45-46.

[180] (Application No 36048/17) 30 March 2021.

[181] (Application No. 15122/17) 18 June 2019.

UNCRC.[182] This is an interesting development because, except for *G.S. v Georgia*,[183] earlier case law does not mention the UNCRC as part of the general principles applicable in international child abduction.[184]

In the case of Ushakov,[185] the left-behind parent complained that the decision of the Russian court not to return his child to Finland violated his right to family life under Article 8 ECHR.[186] The majority agreed, stating that the City Court had failed to genuinely consider and give a sufficiently reasoned decision on whether an exception to the immediate return of the child has been established.[187] This decision follows the test adopted in *X v Latvia*[188] but it is somehow reversed. In *X v Latvia*[189] the Latvian authorities did not consider carefully enough the allegations for the existence of a grave risk of harm if the child is to be returned. In this case, the Russian authorities accepted too readily that such risk exists upon return. This shows the careful balance required by the ECtHR.

In *Thomson v Russia*,[190] the Russian courts refused to order the return of a child, wrongfully removed from Spain to Russia by her mother. The decisions not to return the child were based on the existence of grave risk that child would be placed in an intolerable situation upon return.[191] The taking mother objected to the return of the child, as she refused to go back to Spain, because of absence of an income and a residence of her own in Spain.[192] The taking mother believed that returning the child would lead to their separation, which amounts to an intolerable situation for the young child.[193] In deciding that these reasons fell short of the requirements of Article 13(b) of the HCCH,[194] the ECtHR relied on the 2020 Guide to Good Practice, issued by the HCCH.[195] The ECtHR emphasised that the mother was not precluded from entering Spain again, nor she would have faced criminal sanction;[196] thus accordingly, the parent should not be allowed to establish the existence of a grave risk of harm to the child, by removing or retaining the child abroad and then refusing to return.[197] This case is interesting because the Russian court relied on Principle 6 of the United Nations 1959 Declaration to conclude that a child of tender years should not be

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[182] ibid [77]; n180 [74].

[183] (Application No. 2361/13) 21 July 2015 [42].

[184] See, *Adžić v Croatia* (Application No. 22643/14) 12 March 2015; *G.N. v Poland* (Application No. 2171/14) 19 July 2016; *O.C.I. and others v Romania* (Application No. 49450/17) 21 May 2019.

[185] n181.

[186] ibid [55].

[187] ibid [103].

[188] n76.

[189] ibid.

[190] n180.

[191] ibid [63].

[192] ibid [66].

[193] ibid.

[194] ibid [67].

[195] HCCH, Guide to Good Practice Child Abduction Convention: Part VI - Article 13(1)(b) (2020). Hereafter GGP (2020).

[196] *Thomson v Russia* (n180) [69].

[197] See GGP (2020) (n195) [72].

separated from his or her mother. Apart from the non-binding nature of the 1959 Declaration, the ECtHR emphasised that this approach would allow taking mothers to disregard not only the HCCA, but also the UNCRC.[198] This case shows that domestic courts should not rely on outdated considerations of parenting but instead, similarly to the case of *Ushakov*,[199] carefully examine the existence of grave risk.[200]

The case of *O.C.I. v Romania*[201] is remarkable from a child's rights perspective because the ECtHR found that the "grave risk" exception was not examined in a manner consistent with the children's best interests.[202] The applicants in this case were the two children and their mother, the taking parent.[203] They complained that the decision of the Romanian authorities to return the children to Italy breached the applicants' rights to family life, guaranteed by Article 8 ECHR.

The taking parent alleged that the left-behind parent had been violent towards the children, in particular, that the left-behind parent often got angry with the children when they did not obey him, which led to violent disciplining methods.[204] Because of this, the taking parent argued that the grave risk exception under Article 13 b) of the HCCA applies. The first applicant substantiated these allegations by submitting recordings of past episodes of abuse and the father also admitted that he used physical force to discipline his children.[205] Despite this, the Romanian authorities considered that the children had only be subjected to occasional acts of violence, which did not occur "often enough to pose a grave risk".[206] What is more, the Court of Appeal considered that the children's right not to be subjected to domestic abuse was "to a larger or lesser extent debatable".[207]

The ECtHR was critical of the decision adopted by the Romanian courts, especially in light of the decision in *D.M.D. v Romania*[208] which clearly states that corporal punishment of children cannot be tolerated and accordingly it has to be prohibited in law and practice.[209] It follows that the risk of domestic violence cannot be seen as a mere inconvenience, which children are reasonably expected to bear.[210] Accordingly, the ECtHR decided that the domestic courts should have given more consideration to the potential risk of ill-treatment for the children if they were returned to Italy.[211]

In 2020 the HCCH published a Guide to Good Practice specifically dedicated to Article 13 b) of the HCCA. The GGP specifically lists domestic abuse against the child or the taking parent as an example of

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[198] ibid [71].

[199] n181.

[200] Further on this topic see Olga Khazova, 'Principle 6 of the 1959 Declaration of the Rights of the Child in the Context of the Hague 1980 Convention on the Civil Aspects of International Child Abduction' (2021) IFL 79-84.

[201] n184.

[202] ibid [47].

[203] ibid [6].

[204] ibid [10].

[205] ibid [41].

[206] ibid [14].

[207] ibid.

[208] (Application no. 23022/13) 3 October 2017.

[209] ibid [50-51].

[210] *O.C.I. v Romania* (n184) [43].

[211] ibid [46].

a factual situation when the exception to prompt return can be established.[212] In these cases, the domestic courts are urged to consider the availability, adequacy and effectiveness of protective measures. The ECtHR in *O.C.I. v Romania*[213] expressly mentioned that neither the HCCA, nor the Brussels II *bis* Regulation, addressed in chapter 3 below, require domestic courts to return the child to their state of habitual residence only because the authorities there are capable of dealing with domestic abuse.[214] This means that the court of the state of refuge should not readily assume that the protective measures in the state of habitual residence will be adequate to protect the child from instances of domestic abuse.

The analysis in this chapter showed that many Strasbourg judges are cautious to uphold that the best interests of the individual child should be sacrificed to protect the summary nature of the Hague proceedings. This is seen in several dissenting opinions, most notably by judge Dedov,[215] judge De Albuquerque[216] and judges Nicolaou, Wojtyczek and Vehabović,[217] all of whom acknowledge that in abductions by the primary carer, a more careful balance must be struck between protecting the best interests of the child and respecting the integrity of the HCCA. The remaining parts of the thesis aims to show how this balance can be achieved.

4. Chapter 3: Ensuring the best interests of the child through participation

This chapter approaches the concept of the best interests of the child through the lens of child participation. Building on the link between Article 3(1) and Article 12 UNCRC the thesis argues that the best interests of the individual child in parental abduction cases can be respected if child participation in these proceedings is ensured. The chapter analyses the child's objection exception in Article 13 of the HCCA and argues for a broader approach to child participation, where the views of the child are relevant not only when the child objects to being returned, but also in cases alleging the settlement exception and the grave risk exception.

The last part of this Chapter looks at the proposed recast of the Brussels II *bis* Regulation, the Brussels II *ter* Regulation, applicable within the European Union,[218] which seems to strengthen the child's right to participation. This proposed change shows that there is great support for hearing children, where appropriate, within the context of abduction proceedings. Thus, the chapter concludes that enhancing child participation in child abduction cases will not interfere with the summary nature of the proceedings while ensuring that the best interests of the child are considered.

4.1. Participation and the best interests of the child

Stalford submits that discussion with the child is an essential means of establishing what is in their best interest.[219] Judicial endorsement of this view is found in a case of the Supreme Court of the United

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[212] HCCH, GGP (2020) (n195) [57-59].

[213] n184.

[214] ibid [45].

[215] In *Adžić v Croatia* (n184), 27-29; *Ushakov v Russia* (n181), 28-32.

[216] In *X v Latvia* (n76), 36-49.

[217] In *R.S. v Poland* (Application No. 63777/09) 21 October 2015, 20-25.

[218] Hereafter the EU.

[219] H. Stalford *Children and the European Union: Rights, Welfare and Accountability* (Hart Publishing 2012) 110.

Kingdom, where Lady Hale and Lord Wilson stated that "although children do not always know what is best for them, they may have an acute perception of what is going on around them and their own authentic views about the right and proper way to resolve matters".[220] It follows that the best interests of the child can be ensured by respecting their views.

The CRC Committee has also expressly acknowledged the link between the best interests of the child and the child's right to be heard.[221] The Committee stated that the two articles have a complementary role, whereby "one establishes the objective of achieving the best interests of the child and the other provides the methodology for reaching the goal of hearing […] the child".[222] Indeed, Article 3 cannot be correctly applied if Article 12 is not respected.[223] Similarly, the Explanatory Report to the HCCA states that the views of the child "may be conclusive"[224] to the outcome of the case and "in this way the Convention gives children the possibility of interpreting their own interests".[225] These statements serve to show that in parental abduction proceedings, hearing the views of the child could ensure that the best interests of the abducted child are taken into account. This argument is also supported by a recent study, which shows that in half of the cases where the child was heard, the hearing contributed to the assessment of the child's best interests.[226] This study is analysed in section 4.2. below.

In the context of child participation, the evolving capacities of the child[227] are an important consideration. The CRC Committee has stated that respect for the child's evolving capacities means that the more the child knows, has experienced and understands,[228] the more adults should treat their views as equally important. The notion of evolving capacities recognises that the development of the child does not occur at a fixed point in their life. This is also recognised by Article 12 UNCRC. In this context, the CRC Committee has interpreted the word "capable" not as a limitation,[229] but rather that the State is required to presume that the child has that capacity, and the burden of proof is on the State to show that the child does not have the capacity to form their views.

Within the Hague proceedings, however, one could envisage circumstances where to hear the child might not be in their best interests. This includes a situation where the child is asked to choose a parent[230] or where the child is pressured to express their views. However, Fenton-Glynn questions this protectionist approach, pointing out that child participation in return proceedings is not different from child participation in custody proceedings.[231] Indeed, Parkes has argued, that the possibility of harm cannot be the sole

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[220] *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27, [2011] 2 WLR 1326 [16].

[221] CRC Committee, GC No. 12 (2009) (n7) [70-74]; CRC Committee, GC No. 14 (2013) (n26) [43-45].

[222] CRC Committee, GC No. 12 (2009) (n7) [74].

[223] ibid.

[224] Pérez-Vera Report (n16) [30].

[225] ibid.

[226] Laura Carpaneto et al, 'The Voice of the Child in International Child Abduction Proceedings in Europe: Case law Results' (2019), 100.

[227] Article 5 UNCRC.

[228] CRC Committee, GC no. 12 (2009) (n7) [84].

[229] ibid [20].

[230] Pérez-Vera Report (n16) [30].

[231] Claire Fenton-Glynn (n47) 6.

reason to deny the child their right to express their views.[232] Instead, measures should be taken to ensure a child friendly environment. Schuz argued that the child should not be asked which parent they prefer, but what are their views about being returned to the country of habitual residence.[233] This corresponds to the underlying idea of the HCCA that the child is returned to their habitual residence, not necessarily to the left-behind parent, pending the resolution of the custody dispute.

Further, the possibility of the child being influenced by the taking parent always exists,[234] because of loyalty and dependence on the taking parent.[235] However, the risk of undue influence in a child's testimony does not justify not hearing that child.[236] Further, it is suggested that the judge should nevertheless hear the child and he or she can consider how much weight should be given to the child's views depending on the possibility of influence or manipulation.[237] In this way, the court will satisfy the requirement in Article 12 UNCRC. It must be emphasised that Article 12 is a right, not an obligation,[238] which means that the child is always free to decide not to express their views.

In the context of parental child abduction, the views of the child on the matter can help the judge see the situation through the eyes of the child,[239] which in turn can help them decide what better reflects the best interests of the child. There is ample evidence to suggest that children value being heard and want to be part of decision-making about their lives.[240] In the context of parental abduction, research shows that children who feel that their opinion has been taken into account are better able to come into terms with the final decision, even if it did not reflect their wishes.[241] Further, studies show that children want to be heard in judicial proceedings affecting them.[242] It follows that society should not be overly protective of children and recognize that in accordance with their evolving capacities, children are able to participate on equal footing in decisions affecting them.

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[232] Aisling Parkes, *Children and International Human Rights Law: The Right of the Child to Be Heard* (Routledge 2013) 91.

[233] Rhona Schuz (2002) (n43) 423.

[234] Tine Van Hof et all, 'To Hear or Not to Hear: Reasoning of Judges Regarding the Hearing of the Child in International Child Abduction Proceedings' 2020 53(4) Family Law Quarterly 327, page 7 of 16, available at https://www.proquest.com/docview/2451173719?accountid=8155 [accessed: 21.05.2021].

[235] This raises the entire parental alienation debate, which however is outside the scope of this thesis.

[236] Linda D Elrod, 'Please Let Me Stay: Hearing the Voice of the Child in Hague Abduction Cases' (2011) 63 Okla L Rev 663, 687.

[237] ibid.

[238] CRC Committee, *GC No. 12* (2009) (n7) [16].

[239] Sara Lembrechts et al, 'Conversations between children and judges in child abduction cases in Belgium and the Netherlands' February 2019 Family & Law, available at http://www.familyandlaw.eu/tijdschrift/fenr/2019/02/FENR-D-18-00007 (accessed: 21.05.2021].

[240] See Michael Freeman *The Moral Status of Children: Essays on the Rights of the Child* (Dordecht: Martinus Nijhofff, 1997) 36 on child's capacity to participate in decisions affecting them; See also C. Smart, 'Children's narratives of post-divorce family life: from individual experience to an ethical disposition' (2006) 54(1) The Sociological Review 155-170; F. Raitt, 'Hearing Children in Family Law Proceedings: Can Judges Make a Difference?' (2007) 19(2) Child and Family Law Quarterly 204-224.; P. Parkinson and J. Cashmore, 'What Responsibility do Courts have to Hear Children' (2007) 15(1) International Journal of Children's Rights 43-60.

[241] Rhona Schuz (2013) (n17) 115.

[242] Thalia Kruger, *International Child Abduction: The Inadequacies of the Law* (Hart Publishing 2011) 200.

Although the Hague proceedings are judicial proceedings affecting the abducted child, the HCCA does not grant the child the right to be heard. Instead, there is a limited opportunity for the child to express their views, when the taking parent raises the child's objection exception.

4.2. Child's objection exception in the Hague Convention on Child Abduction

Article 13(2) of the HCCA provides that if the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of their views, the judge has a discretion to refuse the return order.

In accordance with the Explanatory Report, all exceptions to prompt return, including the term "object", has been given a restrictive interpretation.[243] As such, expressing a mere preference to live with one or another parent is not enough to constitute "objection" within the meaning of the HCCA.[244] The child must be objecting to going back to their country of habitual residence. An objection is understood as "a feeling beyond ordinary wishes"[245] which maintains the distinction between the summary return proceedings and the substantive custody hearing.[246]

It seems, however, misleading to refer to this exception to prompt return as the "child's objection", because it is the taking parent who raises this "defence" and not the child him or herself. McEleavy submits that because of the association of the objection with the abductor, this may create a negative impression in the mind of the court.[247] This could lead to circumstances where the interests of the child are overlooked because they are combined with the arguments presented by the abductor.[248] This can be seen in cases where the taking parent has influenced the views of the child and/or with their actions has alienated the child from the left-behind parent. In these cases, the preventive aim of the HCCA, combined with the idea that the taking parent should not benefit from their illegal conduct, can create a situation where the child is punished for the sins of the taking parent.[249]

Further, a view has been expressed that the objecting child has a voice under the HCCA, but not a veto.[250] This is because the judge still has the discretion to order a return even if the child objects. However, the Explanatory report recognizes that it is difficult to accept that a fifteen-year-old young person should be returned against their will.[251] The HCCA does not provide for a minimum age at which the views of the child could be taken into account, because it was recognised that this would be artificial and arbitrary.[252] Such an approach is in line with the evolving capacity of the child[253] and the wording of Article

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[243] Pérez-Vera Report (n16) [34].

[244] Adriana De Ruiter, '40 years of the Hague Abduction Convention on child abduction: legal and societal changes in the rights of a child' (Policy Department for Citizens' Rights and Constitutional Affairs, 2020) 14.

[245] Claire Fenton-Glynn (n47) 5.

[246] ibid.

[247] Peter McEleavy, 'Evaluating the Views of Abducted Children: Trends in Appellate Case-Law ' (2008) 20 Child & Fam L Q 230, 231.

[248] ibid. Lady Hale expressed the same concern in *re D (A Child) (Abduction: Rights of Custody)* [2007] 1 AC 619 [59].

[249] See Rhona Schuz (2015) (n39) 612, arguing that this should never be the case.

[250] Benedetta Ubertazzi, 'The hearing of the child in the Brussels IIa Regulation and its Recast Proposal'(2017) 13(3) Journal of Private International Law 568, 582.

[251] Pérez-Vera Report (n16) [30].

[252] ibid.

[253] Article 5 UNCRC.

12 UNCRC, which requires the judges to take into account the age and maturity of the children only when deciding how much weight is to be attached to these views. This requires an individual assessment, which can prolong the proceedings, contrary to the prompt return objective of the HCCA.

Indeed, because of concerns that hearing the child might cause delay[254] and because of the attitude that there is no point in hearing children's views if their views will not influence the outcome,[255] Schuz argues that there is a policy of not hearing children routinely in abduction cases.[256] Examples are seen in cases where the child's strong objection to being returned has been discovered only during the enforcement of the order[257] or where the child requested a separate representation to appeal against a return order.[258] A further example is seen in a Canadian case where a fourteen-year-old girl was handed over to her mother and taken back to Mexico, but later the child escaped to Canada.[259] In this respect, the International Social Service has expressed concern over the fact that a minimal focus is given to the child in legal proceedings under the HCCA, despite the UNCRC.[260]

This problem can be illustrated by reference to a study. The survey was prepared in consultation with the HCCH and concerns all applications received by Central Authorities in 2015. The statistics show that 35 children were involved in the 27 applications in which the child's objections were the sole or partial reason for refusal.[261] In these cases, the average age of the child was 11 years, with 4 years being the lowest age in one case, which however involved two older children.[262] The 2015 statistics show that there has been an increase in children under the age of 8, whose objection to returning has been taken into account, but these cases also involved older siblings.[263] Additionally, there has been a large increase in the proportion of children aged over 13 compared with 2008, whose objection was a factor in the decision to refuse the return.[264] However, there was a significant decrease in the proportion of children aged 11-12 years, whose objections were the sole or partial reasons for refusal, with 42% in 2008 and only 23% in 2015.[265] These data show that there is a trend for considering the views of older children, whereas the views of children below 13 years old are routinely not taken into account. To address this problem, child participation should be broadened in parental abduction cases.

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[254] L. Silberman, 'The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues' (2000) 33 International Law and Politics 221, 244.

[255] Rhona Schuz (2015) (n39) 618.

[256] ibid.

[257] See *Re M (A Minor)(Child Abduction)* [1994] 1 FLR 390.

[258] See *AJJ* v *JJ & Others* [2011] EWCA Civ 1448.

[259] *A.M.R.I. v K.E.R* [2011] ONCA 417.

[260] ISS comments on the questionnaire concerning the practical operation of the Hague Conventions 1980 (on child abduction) and 1996 (on parental responsibility across borders and measure on the protection of children) (2011) 2, available at https://assets.hcch.net/upload/abduct2011iss1.pdf [last accessed 22.05.2021].

[261] N. Lowe (2018) (n70) [90].

[262] ibid.

[263] ibid [91].

[264] ibid.

[265] ibid, see graph "the age of the 'objecting children' compared with previous surveys".

4.3. Broadening child participation in parental abduction cases

The discussion so far demonstrated that there is a clear link between hearing the child in abduction proceedings and ensuring their best interests. This part of the thesis argues that the abducted child should be heard, and their views should be relevant also in cases where the settlement exception (Article 12(2) HCCA) and the grave risk exception (Article 13(1)(b) HCCA) are raised. Hearing children in these proceedings can assist with the assessment of their best interests.

Support for this argument is found in a recent study. This study analysed decided cases between 1 March 2005 and 31 December 2017 in seventeen countries in the EU, including case law from the ECtHR and the European Court of Justice (CJEU). The research showed that the child was heard only in 194 cases out of 938 national cases.[266] In terms of country division, Bulgaria is leading, where the child was heard in 90% of the cases, followed by Latvia and the Netherlands (57%) and Germany (54%).[267] The report shows that children were asked whether they want to return to the state of origin or stay in the state of refuge, and also about the living circumstances in both countries and their relationship with both parents.[268]

The report shows that in the majority of the cases where the child was not heard, the children were between one and ten years old and they were not heard because of the child's low age, degree of maturity or both.[269] It is important to note here, that Article 12 UNCRC require states to hear the views of *all* children, regardless of their age or maturity. The age and maturity of the child become relevant only when considering the weight given to these views. In this way, Article 12 UNCRC grants participation rights to all children, who wish to express their views. In this context, the CRC Committee has stated that the full implementation of Article 12 UNCRC requires the courts to consider non-verbal forms of communication too, through which very young children demonstrate understanding, choices and preferences.[270] It seems, however, unlikely that the high threshold of the term "objection" within the meaning of the HCCA can be met by non-verbal expression.[271] Indeed, the ECtHR has found that hearing a child of 4½ years old at the time of the domestic proceedings "would not have served any purpose".[272] Because of this, ascertaining the views of very young children indirectly should be considered. This point is addressed in section 4.3.2. below.

The study found that in 35 cases, the views of the child were the decisive factor for the final decision of the court.[273] In 16 of these cases, the hearing of the child resulted in an application under Article 13(2) HCCA, where the age of the objecting child was between seven and fifteen years old.[274] Further, in eleven of these cases, the child's views were relevant for the establishment of the grave risk exception under Article

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[266] Laura Carpaneto et al (2019) (n226) 96.

[267] ibid, see Table 8.

[268] ibid, 97-98.

[269] ibid, 106.

[270] CRC Committee, *GC No. 12* (2009) (n7) [21].

[271] Cf. cases where the child becomes anxious and/or physically ill.

[272] *Eskinazi and Chelouche v Turkey* (Application No. 14600/05) 14 December 2005 [22].

[273] Laura Carpaneto et al (2019) (n226) 101.

[274] ibid.

13(1)(b) and in one case the hearing of the child showed that the child had settled in the new environment.[275]

This data shows that courts on occasion consider the voice of the child in a broader way, including to gain insight into what is in the best interests of the child.[276] This is an important development because a mere preference of the child to live with one parent, or resistance to returning to the state of habitual residence, although not enough to constitute an objection under Article 13(2) HCCA, could indicate whether return would put the child in an intolerable situation, in the context of Article 13(1)(b) HCCA.[277] Such determination is important for the overall welfare of the child and because of this the child should have the opportunity to express his or her views regardless of whether an objection to return has been raised.[278] Furthermore, children find living conditions, relationship with the parent and overall happiness to be important considerations for their future,[279] but such considerations are unlikely to be decisive, or even relevant, for the application of Article 13(2) HCCA. Because of this, academics have questioned the validity of differentiating between a preference and an objection.[280] However, the argument for a broad interpretation of the child's objection is unlikely to succeed, given the clear guidance for a restrictive approach to the exceptions to prompt return. Instead, the next sections aim to show how the views of the child could be incorporated into the interpretation of the other exceptions to prompt return.

4.3.1. The settlement exception

Article 12(2) HCCA recognises that where a lengthy period has passed (12 months) and the child has settled in their new environment, the return will not be in the child's best interests. It is important to note, that in contrast with the other exceptions, this provision does not seem to confer discretion upon the court to return a settled child. This is demonstrated by the wording of the HCCA[281] and the Pérez-Vera Report.[282] The concept of settlement has been interpreted to involve a physical element of being established in an environment and an emotional element, denoting security and stability.[283]

A too narrow interpretation of Article 12(2) is inconsistent with child's rights, especially Article 5 and Article 12 UNCRC. To assess whether a child has settled in their new environment, a child-centred approach should be adopted,[284] where under this approach, older enough children should themselves say

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[275] ibid.

[276] ibid, 112.

[277] Sara Lembrechts et al (2019) (n239).

[278] Marilyn Freeman, 'The Child Perspective in the Context of the 1980 Hague Convention' (Policy Department for Citizens' Rights and Constitutional Affairs 2020) 18.

[279] Sara Lembrechts et al (2019) (n239).

[280] See Rhona Schuz (2013) (n17) 327-335.

[281] Article 12(2) states that return "shall also" be ordered "unless" the child is settled.

[282] See [109] 'it cannot be denied that such an obligation [to return the child] disappears whenever it can be shown that 'the child is now settled in its new environment'.'

[283] See *Re N. (Minors) (Abduction)* [1991] 1 FLR 413 [INCADAT cite: HC/E/UKe 106]; *Wallace v. Williamson* 2020 ONSC 1376 (Ontario Superior Court of Justice), where the emotional element of settlement was found to be more significant.

[284] Rhona Schuz (2013) (n17) 237-238; see also the House of Lords in *Re M. (Children) (Abduction: Rights of Custody)* [2008] 1 AC 1288, [INCADAT cite: HC/E/UKe 937], which adopted a child-centric assessment of settlement.

if they have settled.[285] Schuz explains that this approach requires the emotional element of settlement to be tested from the perspective of the child, not the adults and that the child's degree of attachment to the new environment is assessed from their point of view in light of their daily life.[286] These factors include, *inter alia*, the length of time the child has lived in the new environment,[287] the language the child speaks,[288] the child's relationship with people outside of the home,[289] and whether the child attends school.[290] This inevitably requires that the child is given the opportunity to be heard, which will enable the child to give their own perspective and interpret their own best interests. In cases where the child has attained the appropriate age and level of maturity, proper weight should be given to these views. It follows, that the child-centred approach to the settlement objection requires that Article 12(2) HCCA should be interpreted in light of Article 12 UNCRC. Under the child-centred approach, even in the case of young children, all facts should be considered from the perspective of the child.[291]

The establishment of the settlement exception, however, becomes more difficult when for a long time the taking parent has been successful in concealing the whereabouts of the child. [292] The recent case from New Zealand, *Simpson v Hamilton*,[293] illustrates this problem. In this case, the mother, who was the taking parent and primary carer of the child,[294] spent two years in hiding with her daughter, aged 7 at the time of the abduction,[295] before the left-behind parent was able to locate them in New Zealand.[296] The Family court declined to issue a return order for the child because the child objects to being returned and because of the passage of time, the child has now settled into her new environment.[297] In this case, the Central Authority for New Zealand under the HCCA was given leave to intervene because the appeal raised issues of general public importance, particularly that the objectives and purposes of the HCCA are not weakened.[298]

The Court of Appeal began by analysing whether the court of the first instance was right to determine that the child has indeed settled in New Zealand. In doing so, the court noted that the child has frequently

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[285] Rhona Schuz (2013) (n17) 242.

[286] ibid, 242.

[287] See *Perrin v Perrin* [1994] SC 45 [52] where the court found that although the child was in Scotland for 14 months, Camille strictly enjoyed her new environment there for only three or four months.

[288] See the *French case of CA Paris*, 19 octobre 2008, No 06/12398 [INCADAT cite: HC/E/FR/1008], where the children 3 and 5 years old only spoke French.

[289] See *Collopy v Christodoulou*, No 90 DR 1138 (D Colo May 8, 1991) [INCADAT cite: NC/E/USf210] where the court considered the relationship of a 20-month old child with the taking mother's wider family.

[290] In *DW v MB* [2020] JMSC Civ 230 [INCADAT cite: HC/E/JM 1497] the court did not find that the child had become settled in Jamaica based on the fact that there was no evidence that the child was attending school, had interactions with family members or had made close friends or become part of a social group.

[291] Rhona Schuz (2013) (n17) 232.

[292] Recognised by Thorpe LJ in *Cannon v Cannon* [2005] 1 WLR 32 [56-61].

[293] [2019] NZCA 579, [INCADAT cite: HC/E/NZ 1484].

[294] ibid [10].

[295] ibid [12].

[296] ibid [5].

[297] ibid [6].

[298] ibid [8].

moved to different addresses and has been enrolled in different schools.[299] Despite this, the child speaks English fluently and has settled well with her studies, made friends and participated in school clubs.[300] The court, however, stated that although the child has adjusted to her surroundings, "that does not mean she was settled".[301] This was because the settlement defence was founded on a strategy of concealment and deceit.[302] Indeed, the child has been living at her current address for only three months and the family has been issued with a deportation notice.[303] Moreover, the child's objection to being returned to Germany was founded on an entirely false premise.[304] Because of these findings, the Court of Appeal considered that a return order should have been made.[305]

However, the Court acknowledged that at the time of judgment two years have passed since the Family Court decision and the child has lived more than a third of her life in New Zealand.[306] What is of crucial importance is the actions of the left-behind father shortly after the application for return was refused. It is reported that together with a man and a woman, the child's father uplifted her from her classroom and took her away.[307] The child was returned to her mother later the same evening, but this experience left the child traumatised and suffering from Post-Traumatic Stress Disorder.[308] The Court considered that at the time of the judgement, the child was 12 and strongly objected to being returned to Germany because of the incident with her father.[309] Because of this, the Court considered that the return of the child to Germany cannot be justified by any prospective benefit in terms of the HCCA.[310]

Indeed this is "a very sad case",[311] but it is admirable that the Court did not lose sight of the best interests of the abducted child and did not sacrifice them to uphold the objectives of the HCCA. This is important because what the taking mother did in this case was precisely what the Convention aims to discourage and prevent. Indeed, it could be argued that she benefited from her illegal conduct. It must be noted, however, that but for the father's actions, the court would have reached a different conclusion. Lady Hale was right to point out that "the further away one gets from the speedy return envisaged by the [HCCA], the less weighty those general convention considerations must be".[312] Therefore, although delay occasioned by the appeal process will not generally justify declining to make an order for return if no exception was established,[313] a significant change of circumstances would.

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[299] ibid [49].

[300] ibid.

[301] ibid [53].

[302] ibid [54].

[303] ibid.

[304] ibid [63].

[305] ibid [64].

[306] ibid [77].

[307] ibid [79].

[308] ibid [80].

[309] ibid [84].

[310] ibid.

[311] ibid.

[312] *Re M (Children) (Abduction)* [2007] UKHL 55, [2008] AC 1288 [44].

[313] Pérez-Vera Report (n16) [108].

This case has also demonstrated the significance of the child's views. Once her objection to return was based on fear of her father and not only on fear of going back to Germany without her family, the court considered her views as relevant in assessing that return is no longer in her best interests.

4.3.2. The grave risk exception

Under Article 13(1)(b) the court of the state of refuge is not bound to order the return of the child to their habitual residence if "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation". In 2020 the HCCH published a Guide to Good Practice[314] exclusively devoted to the interpretation and application of this exception. The restrictive interpretation is again emphasised,[315] but the Guide also addresses child participation in the proceedings. It is commendable that the Guide encourages domestic courts, where appropriate under their domestic legislation, to consider appointing a separate representative for the child.[316] Separate representation for the child in Hague proceedings is advocated also in the academic literature.[317] The use of family reports (tailored to the limited scope of return proceedings) is also encouraged as tools to assist the court in determining how much weight should be placed on the child's views.[318] However, the Guide is also clear that the use of expert evidence should be limited to the narrow scope of the grave risk exception.[319]

The use of family reports and/or expert evidence could be relevant for ascertaining the views of younger children. For example, it is argued that the weighty emphasis placed on the psychological report in *X v Latvia*[320] may be read to signify the inclusion of the child's views despite the child's very young age.[321] In this case, the taking parent presented a certificate prepared by a psychologist stating that the child is likely to suffer psychological trauma if separated from the mother.[322] The Regional Court, however, refused to examine it,[323] because it considered that its findings concerned the merits of a custody issue.[324] This was even though the conclusion of the psychological report was directly linked to the best interests of the child in light of the grave risk exception.[325] The certificate was based on an examination of the child, which stated that given the child's age – three years and ten months – she is unable to say which place of residence she prefers.[326] The certificate, however, concluded that precisely because of the child's young

[314] See n195.

[315] ibid [25].

[316] ibid [88].

[317] See Claire Fenton-Glynn (n47); Rhona Schuz (2002) (n43) 430-432.

[318] HCCH, GGP (2020) (n195) [88].

[319] ibid [90].

[320] n76.

[321] Kaitlin M Ball, 'The Rights-Bearing Child's Best Interests: Implications of the European Court's Rejection of a Child-Return Order in X v. Latvia' (2015) 1 J Glob Just & Pub Pol'y 163, 193.

[322] *X v Latvia* (n76) [22].

[323] ibid [113].

[324] ibid [114].

[325] ibid.

[326] ibid [22].

age, separation of the child from the mother will likely cause the child to suffer psychological trauma.[327] This corresponds to Article 13(1)(b), namely that return would expose the child to psychological harm. Indeed, the Grand Chamber was clear that the refusal of the Latvian authorities to consider the psychologist's certificate concluding that there existed a risk of trauma for the child, was contrary to Article 8 ECHR.[328]

Consideration of the views of the child, through the psychological report, is important for ensuring compliance with Article 12 UNCRC in cases where national laws do not permit the hearing of younger children. In this context, the word "views" is given the broadest possible interpretation to include non-verbal communication, as advocated by the CRC Committee[329], as well as emotions and behaviour. Further, in cases of older children, preferences expressed by children, although not strong enough to constitute an objection under Article 13(2) could be relevant to assessing their best interests in light of the grave risk exception to prompt return under Article 13(1)(b). In this context, the child's preference to stay in the country of refuge with the taking parent might be relevant in determining whether return would place the child in an intolerable situation.[330] Lastly, hearing the child might reveal a violent situation at home.[331]

4.4. The Brussels II *ter* Regulation

The Brussels II *bis* Regulation[332] on jurisdiction, recognition and enforcement of judgements in matrimonial matters and matters of parental responsibility is considered to be the cornerstone of judicial cooperation in family matters in the EU.[333] After 10 years of its application, the European Commission assessed its practical effect and two years later proposed its recast on 30th of June 2016. Three years later the Recast Regulation was adopted unanimously by the European Parliament, becoming the Brussels II *ter* Regulation.[334] This Regulation shall apply as of 1st August 2022.[335]

Given the vast scope of the Brussels II *ter* Regulation, this section only looks at its relevance in respect of parental child abduction, as complementing the application of the HCCA in the EU.

4.4.1. The added value of the Brussels II *ter* Regulation

[327] ibid.

[328] ibid [116-117].

[329] CRC Committee, *GC No.12* (2009) (n7) [21].

[330] Sara Lembrechts et al (2019) (n239).

[331] See Voorz. Rb. Antwerpen 26 april 2010, nr. 09/8332/A. The case was part of a survey, see n226.

[332] Council Regulation (EC) No 2201/2003 of 27 November 2003 [2003] OJ L 338/1, repealing Regulation (EC) No 1347/2000.

[333] Boriana Musseva, 'The recast of the Brussels IIa Regulation: the sweet and sour fruits of unanimity' (2020) 21 ERA Forum 129, 129.

[334] 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 [2019] OJ L 178, pages 1-115. Hereafter Brussels II *ter* Regulation.

[335] ibid, Article 100(1).

It is submitted that the Brussels II *bis* Regulation enhanced the goals of the HCCA within the EU in several ways.[336] These include the obligation to give the child the opportunity to be heard, the obligation to respect the six weeks time limit and the obligation to assess whether the risk for the child upon return can be addressed by the authorities in the state of habitual residence.[337] Despite this, the Brussels II *bis* Regulation needed to be improved.

A welcome improvement in the proposed recast is a clarification on the six-week time limit. Under the new Regulation, each court instance should conclude their case within six weeks, except in exceptional circumstances [338] and the decision should be enforced within six weeks.[339]

Further, the court of refuge cannot refuse the return of a child solely based on Article 13(1)(b) of the HCCA, if the court is satisfied that adequate arrangements have been made to secure the protection of the child upon return.[340] It is submitted that this obligation requires the court to seek arrangements that could affect the outcome of the case.[341] Further, such an obligation requires the court to order a return despite the establishment of the grave risk exception. Although Article 13(1)(b) of the HCCA indeed gives the domestic courts the discretion to do so, phrasing this discretion as an obligation is at odds with the HCCA. In section 3.3. above in the case of O.C.I. v Romania,[342] it was shown that the ECtHR is critical when the court of refuge too readily assumes that protection will be adequate in the state of habitual residence.

4.4.2. Child participation in abduction proceedings

Brussels II *ter* improves the current regime by broadening the obligation to hear children in all cases. Article 11(2) of Brussels II *bis* provided for the right of the child to be given the opportunity to be heard "unless this appears inappropriate having regard to his or her age or degree of maturity". In contrast, the Brussels II *ter* Regulation adopts the wording and the structure of Article 12 UNCRC, namely that a child who is capable of forming his or her own views must be provided with a genuine and effective opportunity to express them.[343] The age and maturity of the child are relevant only for the weight attached to these views.[344] This is a welcome development[345] because it does not seem to arbitrarily exclude young children, by attempting to protect them from potential harmful consequences. It is further argued that the new instrument has a child-orientated tendency,[346] by stating that the child *has the right* to express their

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[336] Thalia Kruger & Liselot Samyn (2016) (n174) 158.

[337] ibid.

[338] See Articles 24(2) and (3).

[339] Article 28(2).

[340] Article 27(3). Recital 45 gives example of such protective measures.

[341] Boriana Musseva (n333) 137.

[342] n184.

[343] Article 21(1) of the Brussels II ter Regulation. Article 26 provides that Article 21 applies also in return proceedings.

[344] ibid, Article 22(2).

[345] Thalia Kruger, 'Brussels IIa Recast: moving forward' (2017) 4, available at https://repository.uantwerpen.be/docman/irua/774580/147867.pdf [last accessed: 26.05.2021].

[346] Sladana Aras Kramar, 'The Voice of the Child: Are the Procedural Rights of the Child Better Protected in the New Brussels II Regulation?' (2020) 3 Open J Legal Stud 87, 92.

views, as opposed to the right of the child *to be heard.* Moreover, the fact that the new article adopts the wording and spirit of Article 12 UNCRC could mean that the provision should be interpreted in light of the CRC Committee's guidance, discussed above. This view is supported by Recital 39, which explicitly mentions that the right of the child to express their views freely in accordance with Article 12 UNCRC plays an important role in the application of the Regulation.

Further, Recital 39 is important for the general theme of this Chapter, namely – the link between the best interests of the child and respect for their views. The Recital states that "when assessing the best interests of the child, due weight should be given to [the child's] views" in proceedings in matters of parental responsibility and return proceedings. However, this should not be read too broadly to suggest that the Regulation requires (full) assessment of the best interests of the child in return proceedings. Given the restrictive approach to the best interests of the child adopted by the ECJ,[347] it will probably be construed in a restrictive manner.

Recital 39 also expressly provides that "while remaining a right of the child, hearing of the child cannot constitute an absolute obligation", instead it "must be assessed taking into account the best interests of the child." This wording can be seen as undermining the right of the child to be heard. Even though the recitals are non-binding, the Regulation is to be interpreted in light of its recitals. This could lead to situations where a child who is capable of formulating his or her views is denied the opportunity to be heard because the hearing is deemed to be against their best interests. Such a conclusion, however, requires a careful balance between the child's participation and protection rights.

Brussels II *ter* Regulation does not prescribe who should hear the child and how the child should be heard.[348] This consideration is left to the Member States provided the child is given a genuine and effective opportunity to express their views.[349] It is suggested that this entails that courts should take all appropriate measures for the arrangement of the hearing, having regard to the best interests of the child and the circumstances of each individual case.[350] As Regulations are directly applicable and the Member States have divergent legal traditions in respect of hearing children in court proceedings,[351] it is clear why the Regulation does not prescribe how and by who a child should be heard. It is nevertheless hoped that those divergent rules will be subjected to the uniform general principle in Articles 21 and 26 and Recital 39.

Lastly, the Proposal for the Brussels II *ter* Regulation contained an obligation for authorities to document their considerations regarding the child's views in the decision.[352] Regrettably, there is no such obligation in the adopted Regulation. The position of children would have been improved if such an obligation existed, as it would ensure that courts take children's rights seriously. Kruger argues that this would have enhanced mutual trust between the Member States, as there would be a basis to trust that the

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[347] See (C-491/10 PPU) *Aguirre Zarraga v Pelz*; L Walker and P Beaumont (2011) (n) 231, arguing that "the ECJ is placing too much confidence in the principle of mutual trust and not ensuring sufficient protection for the best interests of the child."

[348] See Recital 39.

[349] See Recital 39 and Article 21(1).

[350] Boriana Musseva (n333) 135; see also *Aguirre Zarraga v Pelz* (n347).

[351] On the different ways in which children are heart in EU Member States, see The European Union Agency for Fundamental Rights, 'Child-friendly justice. Perspectives and experiences of children involved in judicial proceedings as victims, witnesses or parties in nine EU Member States.' (2017 Luxembourg: Publications Office of the European Union).

[352] Thalia Kruger (2017) (n345) 4.

authorities in one Member State have fulfilled their obligation.[353] Indeed, as conflicts have risen in the past as to the interpretation of "the opportunity to be heard",[354] such an obligation would have facilitated any future inquiries as to whether the child was provided with a genuine and effective opportunity to express their views, as required by Article 21 and 26 of the Brussels II *ter* Regulation. The questions for the future are what would be a genuine and effective opportunity for the child to express their views in cases of parental abduction and whether it would be possible to design a common minimum standard for such hearing, taking into account Article 12 UNCRC and the CRC Committee's interpretation of its implementation.

This discussion showed that the Brussels II regime encourages states to hear children in proceedings affecting them. The Regulation requires, on the one hand, that the child is given an opportunity to express his or her views, while on the other hand, the courts are obliged to respect the six weeks time limit for reaching a decision. It follows that the EU legislature considered that hearing the child in abduction proceedings will not cause unnecessary delay, meaning that this will not compromise the summary nature of the Hague proceedings. Therefore, it is submitted that by hearing children in these proceedings, domestic courts can assess their best interests, as has been demonstrated throughout this chapter, without resorting to a full-blown analysis of the child's welfare, thus respecting the summary nature of the Hague proceedings. This approach would achieve a better balance between respecting the best interests of the child and the summary nature of the Hague proceedings.

5. Chapter 4: The role of the United Nations Committee on the Rights of the Child in the interpretation of the Hague Convention on Child Abduction

This chapter looks at the role of the CRC Committee in the interpretation of the HCCA. Based on the discussion so far, this chapter provides recommendations to the CRC Committee as to how to deal with Communications related to parental child abduction.

5.1. The role of the CRC Committee

The former Secretary-General of the HCCH, Hans van Loon, famously stated that "the CRC family and the Hague family are visibly linked to one another".[355] This close connection was also acknowledged by members of the CRC Committee.[356] This is mostly seen in CRC Committee's Concluding Observations to some states, recommending that their governments should harmonise their laws with the HCCA[357] and decriminalise international child abduction to make it easier for the taking parent to return to the state of

[353] Ibid.

[354] *Aguirre Zaraga v Pelz* (n347).

[355] H. van Loon, 'Protecting children across borders: the interaction between the CRC and the Hague's Children's Conventions' in T. Liefaard and J. Sloth-Nielsen (eds) *The United Nations Convention on the Rights of the Child* (Brill/Nijhoff 2016) 33.

[356] See Olga A. Khazova, 'International Children's Rights Law: Child and the Family' in U. Kilkelly, T. Liefaard (eds.) *International Human Rights of Children* (Springer 2019) 178-179; Olga A. Khazova and Benyam D. Mezmur, 'UN Committee on the Rights of the Child. Continued Reflections on Family Law Issues in the Jurisprudence of the CRC Committee: The Convention on the Rights of the Child @ 30 (part 2)' in M. Brinig (ed.) *International Survey of Family Law 2020* (Intersentia 2020) 341.

[357] See CRC/C/JPN/CO/4-5 Japan, para. 31.

habitual residence with the abducted child.[358] This connection can also be seen in the individual communications submitted to the CRC Committee in cases of parental child abduction.

As children's rights "are of little use if they cannot be enforced"[359], the CRC Committee adopted the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, under which child rights violation can be brought as individual complaints.[360] As of July 2021, two communications concerning parental child abduction were found inadmissible,[361] one communication found that Paraguay violated the rights of the individual child[362] and there are currently four pending cases.[363]

In the inadmissible communication against Spain,[364] the father has alleged that his two children were removed to Switzerland without his consent, which violated the right of his children to maintain personal relations and direct contact with their father. Although inadmissible, this Communication is relevant for this thesis because the CRC Committee stated that its role is only limited to ensuring that the assessment of the national authorities was not "arbitrary or tantamount to a denial of justice and that the best interests of the child were a primary consideration in that assessment".[365] It is for the national authorities to examine the facts and evidence and to interpret and enforce domestic law.[366] This is important in cases under the HCCA, because these proceedings assume that prompt return is in the child's best interests and detailed examination of the best interests of the individual child are incompatible with the summary nature of these proceedings. This assumption, as illustrated throughout the thesis, is no longer valid in many cases, especially in cases of parental abduction by the primary carer. Because of this, it is interesting to see how the CRC Committee will assess the application of the HCCA by domestic courts in these cases.

5.2. Recommendations to the CRC Committee

In a pending communication, the taking parent alleges that the decision of the Irish court to return the child to Canada did not take into account the best interests of the child.[367] Provided that the communication is found admissible, the CRC Committee is likely to comment on this issue only if the domestic courts did not consider the best interests of the child. It is noteworthy, that the CRC Committee found that the best interests of the child were not taken into account by domestic authorities in an asylum

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[358] See CRC/C/ITA/CO/5-6 para. 26.

[359]Ann Skelton, 'International Children's Rights Law: Complaints and Remedies' in U. Kilkelly, T. Liefaard (eds.) *International Human Rights of Children* (Springer 2019) 66.

[360] ibid, 73.

[361] J.S.H.R. v Spain (CRC/C/81/D/13/2017, 17 June 2019); Y.F. v Panama (CRC/C/83/D/48/2018, 28 February 2020).

[362] N.R. v Paraguay (CRC/C/83/D/30/2017, 12 March 2020). This communication, however, did not concern Hague Abduction proceedings.

[363] CRC Committee v Luxembourg (138/2021); CRC Committee v Ireland (94/2019); CRC Committee v Chile (121/2020) and (129/2020).

[364] J.S.H.R. v Spain (n361).

[365] Ibid [9.5].

[366] ibid.

[367] See table of pending cases before the Committee on the Rights of the Child, available at https://www.ohchr.org/Documents/HRBodies/CRC/TablePendingCases.pdf 94/2019 Ireland (n363) [accessed: 03.07.2021].

case where the child was not given the opportunity to be heard.[368] It is recommended that the CRC Committee finds that the child should be given the opportunity to be heard also in cases of parental child abduction. Such recommendation is in line with the discussion in sections 2.2. and 4.3. above, as well as with General Comment No. 12. The promptness of the return proceedings cannot justify the violation of the right of the child to be heard.[369] Indeed, it is submitted that although the proceedings can be prolonged, this is preferable to the court expeditiously reaching the wrong decision.[370] Thus, based on the findings of this thesis, that the hearing of the child in parental abduction cases could contribute to the assessment of the best interests of that child, it is recommended that the CRC Committee finds that the domestic authorities did not take into account the best interests of the child if the child was not heard during the proceedings.

Further, in cases of parental abduction, the CRC Committee might find that the decision to return the child was arbitrary if the domestic courts did not sufficiently reason their decision. For example, in a parental abduction case, the Human Rights Committee has observed that although the Supreme Court of Paraguay found that returning the children to Spain would not be in their best interests, the court did not explain what evidence was considered in concluding that there is a grave risk of psychological harm if the children are returned and hence that the return is not in the best interests of the children.[371] The issue of a sufficiently reasoned decision echoes the requirement imposed by *X v Latvia,*[372] discussed in section 3.2. and 3.3. above. Thus, it is recommended that the CRC Committee requires domestic courts to provide a reasoned opinion explaining on what basis a certain exception to return is established or not. In this way, the Committee can assess what factors were relevant for the court's decision and if these included the elements relevant to assessing the best interests of the child discussed in section 2.2. above and based on General Comment No. 14. Further, it is recommended that the CRC Committee requires national courts to adopt more child-friendly language in their judgements, especially when the judge explains why the views of the child were not relevant or a decisive factor.[373] Lastly, it is recommended that the CRC Committee finds that the exceptions to prompt return in the HCCA are interpreted in light of the UNCRC. Such an approach would be consistent with recent jurisprudence by the ECtHR, discussed in section 3.3. above.

In the communication against Chile,[374] the mother alleges that the decision to return a child with autism to Spain did not consider the best interests of the child and the risk of irreparable harm. Provided that the case is admissible, the views of the CRC Committee will provide valuable guidance as to how to approach cases, where the abducted child is in a particularly vulnerable position. It is recommended that the CRC Committee should carefully assess whether the domestic authorities sufficiently evaluated the best interests of the child since the case concerned a child with autism. Thus, it is recommended that the CRC Committee finds that, in cases such as this one, the domestic courts should engage in a more

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[368] A.B. v Finland (CRC/C/86/D/51/2018, 4 February 2021).

[369] Article 12 UNCRC.

[370] Eran Sthoeger, 'International Child Abduction and Children's Rights: Two Means to the Same End' (2011) 32 Mich J Int'l L 511, 529.

[371] Martínez v Paraguay (CCPR/C/95/D/1407/2005, 24 April 2009) [7.3].

[372] n76.

[373] See Helen Stalford and Kathryn Hollingsworth, '"This case is about your future": Towards Judgments for Children' (2020) 83(5) MLR 1030-1058.

[374] See table of pending cases (n367) 121/2020 (n363).

detailed examination of the welfare of the child when determining if the return would be in the best interests of that child.

Another issue that should be relevant for the CRC Committee's approach in parental abduction cases is the right of the child to maintain personal relations and direct contact with both parents, as guaranteed by Articles 9(3) and 10(2) UNCRC. The Committee has stressed that the domestic authorities must ensure that court orders to this effect are enforced in a timely and effective manner.[375] Such consideration should apply both in cases where the return is refused, so the child can maintain contact with the left-behind parent, provided this is in the best interests of the child, and where the child is returned, especially in cases where the child is heavily dependent on the taking parent. It is recommended that in line with the Committee's concluding observations that countries should not criminalise international child abduction, the Committee should require that domestic courts should ensure that when adjudicating custody matters, the taking parent is not being punished for his or her actions. Such punishment in practice hurts the child and deprives them of their right to maintain contact with both parents when this is in their best interests.

A related aspect of the right of the child to maintain personal relations with both parents is the child's rights to identity.[376] Parental abduction, especially in cases of parental alienation and concealment, can have a negative impact on the abducted child's sense of identity and belonging. Indeed, it is argued that "abduction identity may, over time, become the child's primary identity".[377] For example, interviews with people who have been abducted as children show that during the period of abduction their identity has been changed, as a result of which they have suffered an identity crisis.[378] Thus, it is recommended that the CRC Committee stresses the importance of preserving the child's identity in cases of parental abduction.

5.3. Final remarks

The views of the CRC Committee in the cases of parental child abduction could provide an authoritative interpretation on how the HCCA can be applied in a more child-orientated manner. It is the CRC Committee that can influence contracting parties to rethink their approach in cases of parental abduction to be more in line with the rights and interests of the individual child.

Such child-centred interpretation of the application of the HCCA is needed because as argued throughout the thesis, the new pattern of primary carer abductions questions the HCCA's assumption that the best interests of the child are served by return. This assumption was based on the notion that the state of refuge offered little in the interests of the child.[379] Given the "unfortunate new twist"[380] in the profile of the abductor and evidence that in cases of abduction by the primary carer, children do not see such

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[375] N.R. v Paraguay (n362) [8.8].

[376] Article 8 UNCRC.

[377] U.S. Department of Justice, 'The crime of family abduction: a child's and parent's perspective' (2010) 10, available at https://www.ojp.gov/pdffiles1/ojjdp/229933.pdf [accessed: 07.06.2021].

[378] M. Freeman, *'Parental Abduction: the Long-Term Effects'* (International Centre for Family Law, Police, and Practice 2014) 29.

[379] Alana Messent, 'Uprooting Child - Again: The Case for a Child-Oriented Approach to the Settlement Exception under the Hague Convention on International Child Abduction' (2008) 14 Canterbury L Rev 1, 25.

[380] Linda Silberman (2000) (n254) 223.

actions as abductions,[381] an argument is made for a more careful examination of the best interests of the child. Through its views in parental abduction cases, the CRC Committee can advocate for such an approach, which can be achieved by providing the child with an opportunity to express their views. These views, depending on the age and maturity of the child should be given due weight when considering the exceptions to prompt return based on the child's settlement in the new environment, the existence of a grave risk of harm if returned to their previous habitual residence and the child's objection to return.

In cases of the grave risk exception, it is recommended that the Committee should require domestic courts to interpret this exception also in light of Article 19 UNCRC and General Comment no. 13,[382] which gives the term "violence" the broadest possible interpretation. Such interpretation would be consistent with the ECtHR's decision in O.C.I. v Romania,[383] discussed in section 3.3.

In the case of the child's objection exception, it is recommended that the CRC Committee advocates for a broader interpretation of the term "object". If, however, this proves impossible in light of policy considerations around the HCCA, it is recommended that the CRC Committee should urge domestic courts to make sure that the child understands the difference between preference and objection. This entails appreciating that the understanding of the child depends on the information the child receives.[384]

6. Conclusion

The thesis explored the phenomenon of parental child abduction from the perspective of the best interests of the abducted child. The discussion began by presenting the HCCA and the UNCRC and the tension between these instruments in light of children's rights (Article 3(1) and 12 UNCRC) and social developments since the drafting of the HCCA. The analysis showed the difficult balance that needs to be struck between respecting the rights of the abducted child and respecting the summary nature of the Hague return proceedings.

In showing how a better balance can be achieved, the thesis analysed leading ECtHR jurisprudence in the field of parental child abduction, showing that there is a trend among some ECtHR judges to prioritize a more detailed examination of the best interests of the abducted child, especially in cases of primary carer abductions. Recent case law provides a more child-centred interpretation of the HCCA, which is a way to better balance the best interests of the abducted child and the policy objectives behind the HCCA.

Given the link between the best interests of the child and the right to be heard, the child-centred interpretation requires strengthening child participation in parental abduction cases. This argument is based on recent research proving that the views of the child are relevant for assessing their best interests in the context of Hague proceedings. Further, relying on the changes that the Brussels II *ter* Regulation will bring about in the EU concerning child participation, it was shown that hearing the child will not necessarily prolong the proceedings. Thus, the better balance between upholding the best interests of the child and the summary nature of the Hague proceedings can be achieved by ensuring that the abducted

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[381] M. Freeman (2014) (n378) 32. Nevertheless, children still experience adverse long-term effects, for a recent study, see Marilyn Freeman & Nicola Taylor, 'Domestic violence and child participation: contemporary challenges for the 1980 Hague Child Abduction Convention' (2020) 42(2) International Journal of Social Welfare and Family Law 154-175.

[382] *(2011): The right of the child to freedom from all forms of violence*, 18 April 2011, CRC/C/GC/13 [7a)].

[383] n184

[384] See Article 13(1) UNCRC and CRC Committee, *GC no.12* (2009) (n7) [25].

child is given the opportunity to express their views and their views are taken into account in accordance with their age and maturity.

The fourth chapter explored the role of the CRC Committee in the interpretation of the HCCA and provided recommendations on how the Committee should deal with Communications related to parental child abduction, based on the findings of the thesis. Accordingly, it is recommended that the CRC Committee should find that the best interests of the individual child were not considered by the national authorities if the child was not given the opportunity to be heard. Further, the CRC Committee should require domestic courts to provide a sufficiently reasoned decision, in a child-friendly manner, especially in cases when the views of the abducted child were not considered to be relevant by the court. In light of the findings of the thesis relating to recent ECtHR jurisprudence,[385] it is recommended that the CRC Committee advocates for a child-centred interpretation of the HCCH, in light of the UNCRC. This entails that the grave risk exception should be interpreted in light of Article 19 UNCRC and GC no. 13, whereas the child's objection's exception should be interpreted in light of Article 12 and GC no. 12. Moreover, in cases when the child is particularly vulnerable, a more detailed examination of the child's situation is needed. Lastly, it is recommended that the CRC Committee requires domestic courts to ensure that the child involved in abduction proceedings maintain meaningful contact with both parents, when this is in the child's best interests,[386] regardless of whether the child is returned to their habitual residence or remains in the country of refuge. This is important for the child's overall development[387] and identity.[388]

In conclusion, in the 41 years since the drafting of the HCCA, the societal developments in terms of the change of the profile of the taking parent and the growing importance of respecting children's rights call for a more detailed consideration of the rights and interests of the abducted child. The battle against parental child abduction should continue but it should not turn into victims the very children it seeks to protect – the abducted children.

[20 000 words]

[385] *Thomson v Russia* (n180) and *Ushakov v Russia* (n181).

[386] Article 9(3) and 10(2) UNCRC.

[387] Article 6 UNCRC.

[388] Article 8 UNCRC.

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