MASTER´S THESIS IN INTERNATIONAL LAW AND HUMAN RIGHTS

Sara Lindström

INTERNATIONAL CHILD ABDUCTION – BALANCING ON A THIGROPE BETWEEN PROCEDURAL EFFECTIVENESS AND THE PROTECTION OF HUMAN RIGHTS – The Hague Child Abduction Convention and the European Court of Human Rights

Master´s Thesis in Public International Law

Master´s Programme in International Law and Human Rights

Supervisor: Catarina Krause

Åbo Akademi 2020

ÅBO AKADEMI – FACULTY OF SOCIAL SCIENCES, BUSINESS AND ECONOMICS

Abstract for Master´s Thesis

Subject: Public International Law, Master's Degree Programme in International Law and Human Rights	
Author: Sara Lindström	
Title of the Thesis: International child abduction – balancing on a tightrope between procedural effectiveness and the protection of human rights – The Hague Child Abduction Convention and the European Court of Human Rights	
Supervisor: Catarina Krause	

International child abduction cases consist of complex and sensitive issues that have become more common alongside globalisation and increased international interaction between people. Cases can be considered difficult to unravel as they implicate various actors and legal instruments with differing interpretations of the Hague Convention objectives, regulating international child abduction. These regional legal instruments in Europe (the region this thesis will limit itself to) have other requirements of their own that States are expected to adhere to.

The purpose of the Hague Convention is to mandate Contracting States to promptly return wrongfully removed or retained children back to their State of habitual residence unless an exception to this return obligation is established. There is no obligation to return an abducted child if it can be demonstrated that return will expose the child to physical or psychological harm once returned. Other exceptions to return might be mature children that oppose return or if it is demonstrated that the child has settled in the State of abduction. For the objectives of the Hague Convention to work extensive and demanding requirements must be met by the Contracting States and the exceptions are to be interpreted strictly. The European Court of Human Rights (ECtHR) operates under the European Convention of Human Rights (ECHR) and its case-law is binding for States that have acceded to the institution. ECtHR has mostly supported the objectives of the Hague Convention, foremostly the prompt return and State of abduction to refrain from examining any custody related issues as the State of habitual residence is seen as the most suitable for this. However, recently the ECtHR has changed is perception on how States of abduction are to proceed in proceedings, calling for States to examine the circumstances and giving exceptions to return greater regard as a way to protect the human rights and interests under ECHR.
Overall, the ECtHR has been inconsistent in interpreting the Hague Convention, making it difficult for States as are placed on a tightrope between the procedural requirements of the Hague Convention and more subjective requirements of ECHR, foremostly under Article 8. States have to be efficient and correct when performing an assessment of the entire situation, while ensuring that there is no violation of the rights of the child, the abducting parent or the left behind parent – and the preference is to perform this assessment promptly within six weeks' time. Some have argued for adoption of an additional protocol to the Hague Convention, which could complement the existing framework that would improve enforcement of return orders, the protection of human rights as well as the overall function of the Hague Convention. However, this is partly opposed, and adoption of new framework will take time. Therefore, a protocol is no solution for the near future.

The current interpretation of the existing legal framework is therefore the most reasonable solution. If correctly applied, an effective examination of defences to return could strike a suitable balance between the prompt return mechanism and the best interests of the child.
Key words: International child abduction, Hague Convention, European Court of Human Rights, Article 8 ECHR, human rights, best interest of the child

Date: 17.6.2020	Number of pages: 80 (69 + 11) Number of words (excl. bibliography and annexes): 27 602
The abstract is approved as a maturity test:	

TABLE OF CONTENT

ABBREVIATIONS

Brussels II Regulation – Brussels IIa Regulation

ECHR - European Convention on Human Rights

ECtHR - European Court of Human Rights

EU - European Union

Hague Convention - Hague Convention on the Civil Aspects of International Child Abduction

UNCRC – United Nations Convention on Rights of the Child

UNCRC Committee - UN Committee on the Rights of the Child

1. INTRODUCTION

1.1. Background

In a globalized world the international interaction between people has increased enormously in just a few decades and is expected to increase even further. As a result, marriage and partnership with foreigners have become more common. As in any other relationship, conflicts may occur which later can lead to possible divorce and separation, and especially when children are involved, the context of the separation is more complicated. A problematic aspect connected to divorce and separation of parents with different nationalities are issue of visiting rights and questions of where the child should live if the other parent wants to return to their home country. In some escalated cases this can lead to child abduction. International child abduction refers to a situation where a parent unilaterally removes the child from the State of habitual residence without the knowledge and permission of the other parent/custodian.[1]

By abducting the child, the abducting parent violates the custody rights of the parent who is left behind in the State of habitual residence (the State which the child was removed from). A prerequisite for child abduction is that the parent who is left behind in the country habitual residence has rights of custody, either sole or shared with the abductor.[2] The child is most likely removed from a familiar environment to an unfamiliar one where the child might encounter linguistic or social problems. In addition, the abduction dissolves the child's relationship with the left-behind parent as well as with State of habitual residence. Therefore, the abduction in general violates the child's right to maintain contact and communicate with both parents. [3] The situation is also distressing for the left-behind parent.[4] Abduction can be motivated by various factors. Some abductors leave due to homesickness towards their native country and culture, while some might abduct their

[1] In the context of international private law 'child abduction' is basically synonymous to a unilateral removal or retention of children by parents, guardians, or close family members. Beaumont & McEleavy. 1999. p 1.
[2] According to Article 5(a) of the Hague Convention, rights of custody "…shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence"
[3] Article 9(3) UNCRC, "*States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests*".

[4] Beaumont & McEleavy, 1999. p 1.

child just to inflict pain and suffering on the other parent/custodian. [5] Others may leave the habitual residence of the child and the abductor as a result of domestic violence and threats and therefore leave for the sake of their and the child's best interest and safety.[6]

The area of international child abduction and abduction committed by parents, is mainly regulated by the Hague Convention on the Civil Aspects of International Child Abduction (hereinafter the Hague Convention)[7] ratified in 1980. It was the first international instrument to regulate this specific type of abduction, and its main purpose is to ensure the prompt return of a wrongfully removed children to their habitual residence, the country they were originally taken away from. The underlying objective of the Hague Convention is to prevent and deter international child abduction.

The thought behind the principle of prompt return is to minimize the harmful effects that a child might experience as a result of unilateral action of removal or retention from a familiar environment and is seen as being in the best interests of children.[8] Therefore, it is important that the proceedings in the State of abduction are not to be transformed into a substantive examination of the underlying custody issues and welfare of the child, as according to the Hague Convention these questions are simply to be examined and determined by the State of habitual residence.[9]

The Hague Convention contains these few exceptions for a reason, and it would be incorrect if allegations of a risk were not properly examined by national courts in the State of abduction. Thus, one of the main challenges faced by national courts in applying the Hague Convention has been to protect children from being seriously harmed by return, without violating the integrity of the Hague Convention. Speed is of essence in international child abduction proceedings as return will become increasingly difficult to enforce the longer the child spends in the State of abduction. Hence, the exceptions of return under the Hague Convention are to be interpreted in a strict manner, as a too liberal interpretation will endanger the purpose of the Hague Convention which means to return

[5] Sthoeger. E, 2011. p 512–513.
[6] Beaumont & McEeavy. 1999. p 11.
[7] Hague Conference on Private International Law, Convention on the Civil Aspects of International Child Abduction, the Hague, 25 October 1980
[8] Schuz. 2014. p 28.
[9] McEleavy. pp 367. See Perez-Vera, Explanatory Report on the 1980 Hague Child Abduction Convention, 1982, 19, p 18. www.hcch.net/upload/expl28.pdf

the child to the State of habitual residence in a prompt manner. There is a fear that otherwise abductors might benefit from the wrongdoing.[10] However, there is also the risk of a too strict interpretation of an exception, possibly resulting in returning the child back to an environment that might entail a grave risk of harm or an intolerable situation for the child.

When discussing international child abduction within Europe, it has become difficult to do so without considering the case law of the European Court of Human Rights (ECtHR). More and more applications by both abducting parents, and the left behind parents have found their way to the ECtHR. It so happens that the ECtHR has been inconsistent in its past case law judgements, making it difficult for States to know how to actually proceed in decision-making and how to find an overall balance in abduction cases in a way that fulfils the requirements, both under the Hague Convention and the European Convention for the Protection of Human Rights and Fundamental Freedoms (here in after the ECHR). The State of abduction has to find a balance between both the procedural requirements, such as prompt return, set out by the Hague Convention and the more subjective aspects required by the ECHR, particularly Article 8 and *the right to respect for family life*. Additionally, all European Union (EU) Member States are obligated to adhere to the Brussels IIa Regulation[11] (Brussels II Regulation) introducing additional rules to proceedings.[12]

One could assume that it would be easy to come to a conclusion in terms of abductions and wrongfully removed children - the child is to be returned unless exceptions are established. However, return proceedings seldom have a straightforward solution, as the circumstances are complex and sensitive, as States are placed on a tightrope between balancing the relevant interests of the ones concerned, both those of children and parents' interest in either return or non-return. The struggle to find balance then raises an additional substantive issue. One of the other main issues, both in the past and today, are the drastic delays in the return proceedings due to problems of enforcement of return orders.[13] Cases

[10] As children might be seen as having become settled in the new environment if long enough time is spent in the State of abduction. See. Schuz. 2014. p 13 and 28.
[11] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

[12] However, applies only to Member States of EU.
[13] McEleavy. p 369.

handled by national courts in the State of abduction often find their way to the ECtHR due to alleged violations of rights under the ECHR, especially as a result of differing opinions regarding judgements delivered or drastic delays in enforcement of return orders. There are many examples in previous case law showing failure of the State of abduction to adhere and prioritize the prompt return objective. Additionally, States of abduction are confused by the inconsistency of the ECtHR and the approach taken in international child abduction proceedings.

1.2. Aim and limitation

The aim of this thesis is to try to come to a conclusion and answer the following research question: How can Contracting States to the Hague Convention and the European Convention of Human rights at the same time live up to the requirements and obligations set forth in these two Conventions?

In theory the Hague Convention is a good international instrument with a clear message; abducted children are to be returned in a prompt manner to the State of habitual residence unless exceptions are established. Additionally, during return proceedings custody questions are not to be investigated in the State of abduction. It is unnecessary to go further than Europe to realize that States of abduction struggle to find a balance in interpreting the Hague Convention and enforcing effective enforcement of returns orders to the State of habitual residence on basis of the amount of cases brought before the ECtHR.[14] The ECtHR decisions have been contradicting the prompt return and overall objectives, which are essential for deterring child abduction. The ECtHR has entailed requirements on "*…domestic courts to conduct an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature…*"[15] These types of requirements inflicted confusion in interpretation and procedure in addition to States already, to some extent, having differing legal systems with

[14] European Court of Human Rights. Factsheet – International child abductions. 2020. https://www.echr.coe.int/Documents/FS_Child_abductions_ENG.pdf
[15] *Neulinger and Shuruk v. Switzerland [GC], (no. 41615/07), 2010.* para 139.

own characteristics of application of the Hague Convention affecting the general interpretations and coherence.[16]

Child abduction cases constitute of highly personal, controversial, and difficult situations where return proceedings in States of abduction are not drift into becoming custody proceedings but should only examine exceptions to return under the Hague Convention without violating rights under the ECHR. This is to be executed in a prompt manner while reassuring that there are protective measures in the State of habitual residence if the child is to be returned. Requirements for prompt return, non-examination of the underlying custody issues and cooperation mandated by the Hague Convention in relation to protection of human rights and freedoms required by the ECHR make it difficult for Sates find a balance between these different aspects. In addition, serious delays inflicted by abducting parents unwilling to cooperate and ineffective measures taken by national authorities result in disparities in abduction proceedings.

This thesis focuses on the return of abducted children carried out by their own parents and excludes other international child abductions. There are two types of cases under the Hague Convention, in addition to *return* the Hague Convention regulates *access*. With return meaning cases where the left-behind parents request for their abducted child to be returned to their habitual residence and to themselves, meanwhile right to access refers to the left-behind parent having the right to contact with the child during the proceedings for return.[17] As this thesis focuses specifically the return to the habitual State, access will not be discussed further in this text. As already mentioned, the Hague Convention includes exceptions that, if established, can result in a non-return of the child. These exceptions will be presented to get a comprehensive understanding of how the Hague Convention essentially works. Exceptions to return will often be referred to as they are an important part of the procedure, however, exception to return under Article 20, where the child's return may be refused if return would not be permitted by the fundamental principles of the State of abduction relating to the protection of human rights and fundamental freedoms.

[16] Keller and Heri. p 276.
[17] Kilpatrick Townsend. 2012. p 5.

This exception will only be explained briefly and not analysed further as this exception to return is difficult to prove and therefore rarely used.[18]

As more and more international child abduction cases find their way to the ECtHR, the available case-law concerning international child abduction is quite extensive and it will be impossible to examine them all. Therefore, just a handful of cases will be examined and used as exemplification to how the ECtHR has interpreted the Hague Convention in the light of most essential articles of the ECH concerning child abduction, namely Article 8 and 6. The focus of this thesis will be more on the interpretation of Article 8 ECHR. Article 6 ECHR will be discussed more narrowly the section of delayed proceedings, as the Article has mostly been referred to these types of cases.

Why this thesis focuses on this topic is due to the interesting complexity and relevance. International child abductions occur all the time and in most cases the custody issues have already been decided in the State of habitual residence. The fact that these issues, that should be clear and simple, seem to cause great amount of hardship is interesting to examine. The reason for examining the child abduction from a European perspective is due to the excessive amount of cases brought before the ECtHR. Furthermore, since the ECtHR has delivered interesting and contradicting judgments concerning the return of wrongfully removed children in relation to the objective of the Hague Convention, it makes the examination of international child abductions from a European perspective attractive.

1.3.Methodology and sources

This thesis will follow the legal doctrinal method and the findings will be based on analysing the existing law, *de lege lata*, provided through procedural and human rights treaties and relevant case law. The focus will mostly be on the Hague Convention and the ECHR. The Brussels II Regulation will be used as support in examining the relationship of the Hague Convention and ECHR. Previous case law from the ECtHR will be important for the interpretation and application of the Hague Convention from a European perspective. Especially ECtHR Grand Chamber cases *Neulinger and Shuruk v.*

[18] Due to its highly restrictive interpretation. See section 2.1.4.4.

Switzerland[19] and *X v. Latvia*[20] will be reflected upon in more depth, as these cases have been extensively discussed due to their reflective approach in relation to the Hague Convention. In addition, these cases have had a great influence on subsequent international abduction case law in Europe. Other cases will also be referred to in order to analyse the background for the differing interpretation of the Hague Convention by the ECtHR. Conclusions will be made through critical reviewal of relevant existing legal grounds for return and non-return of abducted children. Previous research in the scope of international child abduction and the relationship between the Hague Convention and the ECHR will be of fundamental importance for this thesis. Different guidelines will also be referred to as these demonstrate the hoped application of provisions.

This thesis will start by introducing the relevant issue, namely the conflict of promptly returning the child to the State of habitual while ensuring that children are being returned to a safe environment without making a too excessive examination of the merits of custody and defences to return. The reason why this topic is important and relevant is due to the fact that international child abduction committed by parents is becoming more common and a coherent approach among States interpreting the exceptions is crucial to reach in order to combat the wrongful removal of children. The second chapter will firstly discuss the framework of the Hague Convention, its objectives and difficulties encountered in upholding these objectives followed by a description of the habitual residence, the Central authority and the defences to return, namely the exceptions to mandatory return of the child. In addition to discussing the Hague Convention, the ECHR, the ECtHR as well as the Brussels II Regulation will be introduced in the second chapter to get a better understanding of the parallel frameworks considered in child abductions. The third chapter will go further into discussing the protection of children in international child abductions, within Europe. Especially the approaches taken by the ECtHR and the requirements that ECtHR has set on States of abduction in return proceeding will be discussed and analysed. These approaches will then be examined from the perspective of the exceptions and examine the effect that they have had in protecting children. This thesis will be concluded with a discussion of critical character on how States should go about to reach a balance

[19] *Neulinger and Shuruk v. Switzerland [GC], (no. 41615/07), 2010*
[20] *X v. Latvia [GC], (no. 27853/09), 2013*

between procedural requirements of the Hague Convention and human rights aspects of ECHR as suggested by the ECtHR.

2. NORMATIVE FRAMEWORK

2.1. The Hague Child Abduction Convention

The Convention on the Civil Aspects of International Child Abduction is an international treaty, concluded in 1980 at the Hague Conference on Private International Law, with the aim to protect children from harmful effects of international abduction. To this date the Hague Convention has 101 Contracting States[21] (including all EU Member States) and the number of parties has increased steadily since the Hague Convention was concluded, and the number is expected to rise.[22] As a procedural legal instrument the Hague Convention sets out the tools for States on how to proceed to unravel private international law issues. For instance, questions on the most appropriate forum for resolving disputes and the choice of law that is to be applied. In other words when it comes to international child abduction the Hague Convention mandates the State of abduction to return the child to their habitual residence, as it is seen as the most appropriate forum to determine their future in terms of custody, unless exceptions to return are established. The reason for the State of habitual residence being seen as the most appropriate forum, *forum convience*, is partly due to the fact that the information relating to the children, but also the parents, will be most easily available in the habitual residence and the courts in that country will be most familiar with the social and cultural background of the child.[23]

The Hague Convention does not apply to domestic abductions, meaning abductions committed within the territory of one single State,[24] as the abduction must have occurred between two State borders, were both States are parties to the Hague Convention. However, the States need to have had accepted each other accession to the Hague

[21] HCCH Status Table. https://www.hcch.net/en/instruments/conventions/status-table/?cid=24. 19-VII-2019
[22] European Court of Human Rights. Factsheet – International child abductions. 2020. https://www.echr.coe.int/Documents/FS_Child_abductions_ENG.pdf
[23] Silberman. p 7.
[24] Abductions within one single country are internal affairs meant to be dealt only by authorities of that State.

Convention.[25] According to Article 4 the Hague Convention applies to any child who was habitually resident in a Contracting State immediately prior to the abduction and ceases to apply when the child reached the age of 16 years old. [26]

Prior to the adoption of the Hague Convention the world was in desperate need of a legal regime that would regulate the international abduction of children carried out by parents, which grew more and more common because of international interaction. Hence the establishment of the Hague Convention was seen as a substantial development, in addressing the issue of international abduction, by creating versatile and effective tools for cooperation among Contracting States, their administrative and judicial authorities and institutions in order to reassure the return of abducted children.[27]

The Hague Convention does not contain an international monitoring organ to oversee the application of the Hague Convention in the Contracting States. Instead there is a Special Commission consisting of legal experts from the Contracting States who specialize in the area. The Commission meets every four to five years to oversee the practical operation applied in the Contracting States. [28] The absence of a monitoring organ and the fact that states enjoy procedural autonomy[29] can be seen as reasons for differing proceedings, treatment of evidence, types of appeals permitted, and the oversight given these appeals in the Contracting States. Additionally, the enforcement of return orders may differ from State to State depending on their legal system. [30] As there are no official guidelines how the Hague Convention should be applied, the Explanatory Report by Eliza Perez-Vera functions to some extent as guidance of how the Hague Convention should operate and be applied in the Contracting States. In addition to the report by Perez-Vera there are series of Guides to Good Practice prepared by the Permanent Bureau that could be applied to different aspects of proceeding with the following topics: Central Authority, Practice, Implementing Measures,

[25] Article 38 Hague Convention 1980.
[26] Article 4 Hague Convention 1980.
[27] Keller & Heri 2015. p 271.
[28] McEleavy. 2015. p 371.
[29] "*In the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the right which citizens have from the direct effect of Community law, it being understood that such conditions cannot be less favorable than those relating to similar actions of a domestic nature*." The principle of national procedural autonomy was introduced by the European Court of Justice in its *Rewe* case in 1976. https://www.concurrences.com/en/glossary/procedural-autonomy.
[30] McEleavy. 2015. p 371.

Preventative Measures, Enforcement, Cross Border Access, and Mediation.[31] These soft-law guides have been of remarkable assistance for States when applying the Hague Convention.[32]

2.1.1. Objectives of the Hague Convention

The primary aim of the Hague Convention is to "…*protect children internationally from the harmful effects of their wrongful removal or retention*…".[33] In order to ensure this protection the Contracting States has to secure the abducted child a prompt return to the State of habitual residence as well as respect the laws of rights of custody and access of other Contracting States.[34]

The primary thought behind the prompt return protecting children comes from the underlying aim of firstly, re-establishing the *status quo ante*[35] and secondly, deterring potential abductors in the future. [36] It is considered that if States support the prompt return of abducted children this will deter potential acts of unilateral removal or retention amongst parents, with plans of abduction, as the child is most likely sent back to the State of habitual residence for custody procedures .[37] From a practical perspective, differences in the ways the Hague Convention is interpreted and applied might reduce the deterrent effect of the Hague Convention and leads to a lack of predictability and certainty. This serves as an encouragement to both parties to litigate reducing the chances of a voluntary return or other agreed settlements. The prompt return also seeks to achieve other subsidiary objectives, like protecting the best interest of the child whose interests have been altered by removal, and additionally bring justice between parents by protecting parental rights of the left-behind parent. When it comes to the best interest of the child, the aim of the Hague

[31] Schuz. 2014. p 41.
[32] Ibid. 2014. p 41. However, as soft law provisions hold no legally binding effect, making them only optional guidelines.
[33] Hague Abduction Convention 1980. Preamble.
[34] Article 1 Hague Convention 1980.
[35] '*the state of affairs that existed previously'*, see Merriam-Webster. https://www.merriam-webster.com/dictionary/status%20quo%20ante

[36] as Eliza Perez-Veran puts it in her explanatory report,[36] "…the prompt return of the child answers to the desire to re-establish a situation unilaterally and forcibly altered by the abductor …"and secondly, deter potential future abductors.As Eliza Perez-Veran puts it in her explanatory report,
[37] Perez-Vera, 1980. p 430.

Conventions is to protect children's interest in general, as a return is seen to be in the best interest of children in general.[38]

The contracting States are expected to take all appropriate measures to secure this prompt return by relying on the most expeditious procedures available. [39] Article 3 of the Hague Convention defines the wrongful removal or retention, which determines the application of the Hague Convention. It states that removal or retention is wrongful when:

> *a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and*
>
> *b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.*

The removal of the child outside from the child habitual resident, without the consent of the parent holding shared or sole custody of the child, constitutes an act of wrongful removal *"...and this wrongfulness derives in this particular case, not from some action in breach of a particular law, but from the fact that such action has disregarded the rights of the other parent which are also protected by law, and has interfered with their normal exercise."*[40] If the child is abducted as a breach of the custody right of the left-behind parent, as determined by the State of habitual residence, the State of abduction is under obligation to return the child to State of habitual residence in a prompt manner. This is to be done without a time-consuming investigation as this will promote the child's best interests, unless one of the exceptions to return applies.[41] This mandatory return is a method of the Hague Convention to uphold the rule of law and places emphasis for the State of abduction not to intervene in active custody arrangements.[42]

---

[38] Walker. 2010. pp 649.
[39] Article 2 Hague Convention 1980.
[40] Explanary report E Perez-Vera, "Explanatory Report on the Hague Convention on the Civil Aspects of International Child Abduction, 1980", Acts and Documents of the XIVth Session of the Hague Conference on Private International Law, Vol III, 1982, 426, 447-48.
[41] Sthoeger. pp 515-516.
[42] in the sense of not allowing a person to benefit from taking the law into his own hands. See Schuz. 2014. p 28.

To prove that a removal was wrongful, the left-behind parent needs to demonstrate that the child has been taken in breach of the existing custody agreement, therefore constituting a violation of custody rights. It is crucial to be able to prove the timing for when the removal occurred, as it can weight significantly in the following procedures in the State of abduction when the courts decide if there are grounds for refusing the prompt mandatory return based on the time period. According to Article 12 of the Hague Convention[43] the application for the return by the let-behind parent must be made within a period of less than a year from the date when the child was wrongfully removed. If a year has elapsed from the date of removal, and if no application for return has been made by that time, the State of abduction can use its discretion not to return the child if its demonstrated that the child has settled in the new environment. Hence date of the wrongful removal can be a relatively crucial detail. Usually the date when the child crossed the border to another country is seen as the date of removal.

The application of the Hague Convention is subject to the condition that the child is habitually residence in the State to which he or she is to be returned. The Hague Convention does not specify to whom the child should be returned and it does not require the return of the child to the care of a left-behind parent, neither does the Hague Convention specify to what location in the State of habitual residence the child should be returned. This flexibility is deliberate and reinforces the objective that once the child the underlying custody related issues are to be determined by the competent court or authority in the State of habitual residence in accordance with the law governing rights of custody, including any order that may apply as between the parents or other interested persons.

The Hague Convention defines custody rights as *"rights relating to the care of the person of the child and, in particular the right to determine the child's place of residence"*[44]. Custody rights are determined by decisions made based on judicial and administrative grounds or legal agreements under the national law of the State of habitual residence. Hence, Hague Convention does not set out any provisions or guidelines according to which the right

[43] "Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith. The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment..." Article 12 Hauge Abduction Convention. 1980.
[44] Article 5(a). Hague Convention

of custody should be determined as custody issues are not to be involved in return proceedings.[45] The reason for this is that the Hague Convention regulates child abduction so as to prevent the abductor from benefiting from the unilateral removal or retention of the child by removing the child to another country with more favourable custody legislation in order to hopefully gain another outcome in custody arrangements in that State. Many abducting parents choose to and find themselves *forum shopping*, meaning that the parents believe that by abducting their child to another country, especially to their native home country, they will receive more favourable custody settlements that will end up in their advantage.[46]

To conclude the objectives of the Hague Convention, the mandatory return mechanism is based on a number of assumptions: (1) that immediate restoration of the *status quo ante* without a time-consuming investigation will best promote the child's best interests, unless where one of the exceptions applies; (2) prompt return will deter potential abductors, as the child will most likely be returned to the State of habitual residence where custody maters will be determined (3) and disputes between parents in relation to their children should be decided in the State habitual residence which is regarded as the most appropriate forum to make the decision concerning custody.[47]

2.1.2. Habitual residence

Under that Hague Convention the nationality of the abducted child is irrelevant if the child was habitually resident in one of the Contracting States prior to the abduction. Interestingly, the Hague Convention does not officially determine or give a definition to the concept of habitual residence. [48] However, a common perception is that a child's habitual residence is the State where the child's most important established relationships and other important aspects to the child identity are.[49] As there is no exact definition to the

[45] "…the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice." Article 16 Hague Convention.
[46] Schuz, 2015. p 37.
[47] Beaumont and McEleavy. p 30.
[48] Schuz. 2015. p 6.
[49] Atkinson. 2011. p 649.

habitual residence, in principle, it is possible that the child's habitual residence can change, in this case as result of child abduction, if the child spends long enough time in the State of abduction and integrates into the now environment and therefore loses connection to the previous habitual residence. This could be considered to be more likely to occur with younger children, who more easily adapt and get attached to new environments. However, in the case of an abduction, the child will most likely have important ties to the habitual residence, so changing habitual residence overall takes a long time.[50] Nevertheless, the longer a child spends in the State of abduction, usually the harder the restoration of status quo ante will become.

As the child has been taken to another country as a result of an abduction, the left-behind parent, when requesting for the return of the child, usually has to prove to the national authorities in the State of abduction that the child was a habitually resident in that Contracting State immediately before the removal. [51] There should be an obvious connection between the child and the habitual residence.[52] In the absence of an in-depth investigation of underlying custody merits, which is banned by the Hague Convention, the assessment of purpose for the stay in the State of abduction plays an important role in determining whether the State of abduction could eventually be seen as habitual residence. There is no time limit set out for when the country of abduction could become the new habitual residence, it will be assessed on a case-by-case basis. Temporary stays in a State of abduction does not constitute a habitual residence.[53]

2.1.3. The Central Authority

As previously mentioned the objectives of the Hague Convention were created as methods for upholding the rule of law,[54] not giving the abducting parent the privilege of "taking the law into his/her own hands" by choosing the State and legislation to determine custody, and

[50] Beaumont & McEleavy, p 92.
[51] Schuz. 2015. pp 6.
[52] Beaumont & McEleavy 1999, p 101.
[53] Ibid, p 103/ Freedman, 2014. p 160.
[54] Schuz. 2013. p 274.

in that way benefitting from the removal of child.[55] This is also why the Hague Convention expects utter level of cooperation between the Contracting States to enforce a prompt return.

Every Member State to the Hague Convention is to designate a Central Authority[56], consisting of competent authorities to oversee the inter-communication with Central Authorities in other Contracting States when an abduction has been recognized.[57] The main purpose of the Central Authority is to locate the abducted child that has been wrongfully removed or retained followed by the aim of trying to execute a secure return of that child to the State of habitual residence. The Central Authority is to provide judicial and administrative advice for the purpose of the Hague Convention in cases of wrongfully removed or retained children.[58]

Usually first scene in an abduction is the realization that the child has been taken. The left-behind parent discovers that the child is missing, they will most likely start searching within the State of habitual residence for the missing child and after realizing that the child has been taken across borders, accordingly to Article 3 of Hague Convention, contact is made with the Central Authority of the habitual residence who thereafter informs the State where there is evidence that the child has been taken too and requests for return.[59]

The Central Authority in the State of abduction has an obligation to take all appropriate measures in order to secure the return of the child. If a voluntary return fails and if any of the exceptions are provoked, the case will entail legal proceeding in the State of abduction. The structure of the Hague Convention promotes ensuring that as many cases as possible can be resolved by intergovernmental co-operation at an administrative level. In addition, the Central Authority of a Contracting State should cooperate with all national authorities responsible and involved in child abduction cases. International cooperation is important for the overall best interests of the children, for investigating the whereabouts of the child and providing background information about the child. Both these in order to return the

[55] Schuz. 2015. p 28.
[56] Articles 6–10 Hague Convention 1980.
[57] Hague Convention. Article 7.
[58] Hague Convention Article 7.
[59] Loo, H. 2016. https://www.peacepalacelibrary.nl/2018/02/the-hague-abduction-convention-nice-in-theory-difficult-in-implementation/.

child to the country of origin as soon as possible and as international cooperation between the authorities must be swift and effective accordingly to the Hague Convention.[60]

2.1.4. Exceptions to the mandatory prompt return of children

The Hague Convention offers some defences to the mandatory return that can establish a situation where the child does not necessarily have to be returned. Namely, if the circumstances in the abduction case meets any of the Articles 12, 13 and 20 conditions under the Hague Convention, the return does not necessarily have to be ordered. There is a common practice among the States applying the Hague Convention, namely the exceptions are to be interpreted in restrictive manner in order to maintain the very objectives and purpose of the Convention, namely returning wrongfully removed and retained children.[61] The reason for the strict interpretation is to avoid the proceedings from becoming too excessive, but also to preserve a unified front in terms of cooperation and consistent interpretation of the instrument.[62]

Exceptions to return are a way for the courts in the State of abduction to examine the relationship between the parents and the child/children in question, in order to reach a condition where they can be sure they made a decision where the child is not sent to intolerable situation, grave risk of harm or violate rights under the ECHR.[63] This examination can though only be executed to an certain extent and where allegations of circumstances under these exceptions are introduced. Also, as mentioned, Sates enjoy procedural autonomy, meaning they have the right to use their discretion in determining whether if the child is to be returned if any of the exceptions are established.[64] An order for non-return in cases where exceptions are established is not a failure of adherence to the Hague Convention in spite of all the emphasis that is put on mandatory return of the child, but it rather shows that the Hague Convention is working as intended. The exception to return allow a more nuanced approach to the abduction cases. A prima facie wrongful removal or retention could be in the best interest of a child and "*a justification for such an*

[60] Walker. 2010. p 660.
[61] Sthoeger. p 518–19.
[62] Perez-Vera, pp 434/ para 34.
[63] Sthoeger. E, 2011. p 513–14.
[64] Beaumont, et al. 2015. p 39.

interpretation could be found in the Preamble of the Hague Convention which shows the Contracting States desire to protect children not from wrongful removal or retention but from the harmful effect of such situations"[65]

In cases where exceptions have been raised, in order to the child not to be returned to the habitual residence, the burden of proof lies with the person resisting the return. This person is usually the parent who wrongfully removed the child and as seen as the more "guilty" party until proven otherwise where the defence for non-return is established, as they are the ones trying to benefit from violating the custody arrangements in the State of habitual residence. As a matter of logic and common sense, the court in the State of abduction is first required to determine whether the abductor has custody rights before considering the defences possible.[66]

2.1.4.1. The child has settled in the State of abduction

If a child has been wrongfully removed or retained, as a breach of custody rights of the left behind parent, Article 12 of the Hague Convention states that

> *"...the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith".*

The return of abducted child should also apply to situations where the application for return is made after the expiration of one-year period, unless the authorities in the State of abduction demonstrate that the child has become settled in the new environment. However, where over one year has passed the State of abduction has to give sufficient reason for the non-return. The settlement is more likely for younger children than older ones as they more easily adapt to new situations. [67] For someone to become settled into a new environment would entail both physical and emotional ties to the surroundings. By this meaning that the child relates to the community and takes part in the daily environment, for example attend kindergarden

[65] Beaumont and McEleavy. 1999. p 29
[66] Sthoeger.E, 2011. p 517–518.
[67] Sthoeger. E, 2011. p 517.

or school, take part in free-time activity and being emotionally attached to the surroundings that make them feel secure and stable. [68]

2.1.4.2. Grave risk of harm or intolerable situation

The exception in Article 13(1)(b) provides that the State of abduction is not bound to return the child where it is shown that there exists *"a grave risk that return would expose the child to physical or psychological harm or otherwise place him in an intolerable situation*". What constitutes a grave risk? Neither the grave risk nor intolerable situations are defined by the Hague Convention. A grave risk could mean that the child would be physically, sexually or in some other way abused by the left behind parent or be exposed to spousal abuse if the left-behind parent abuses the abducting parent if returned alongside the child.[69] However, the risk of harm needs to be 'grave' in order for the child not to be returned to the habitual residence and can only be established where it is considered that the potential harm is such that the child cannot reasonably be expected to tolerate it.[70]

Physical harm can be difficult to prove and use as a defense. Mostly due to the restrictive amount of evidence available, but also because of the need to make a full-scale examination of the circumstances, which is not intended for the State of abduction to execute. Additionally, where the grave harm has been established, it could be considered that courts in the State of abduction assume and rely on that State of habitual residence to be able to protect the child in this case. Therefore, in relatively unusual circumstances has a return actually been refused based upon the grave risk of physical harm 13(1)(b) of the Hague Convention.[71] Concerning the establishment of the grave risk exception, as stated before, the burden of proof lies with the parent resisting the return, in most cases the abductive parent.

The grave risk of harm and intolerable situation go hand in hand as it is often considered that where there is no grave risk of harm it is seen that the return will not place the child in an intolerable situation. It is difficult to satisfy the court of an intolerable situation without referring to some sort of physical or psychological harm. An intolerable situation could be

[68] Schuz. 2015. p 10.
[69] HCCH, Guide to Good Practice. Article 13(1)(b). p 31.
[70] Schuz, 2013. p 424
[71] Schuz, 2013. p 425.

constituted if the parent that the child is to be returned to is not in the best interest of the child, is not in a position to take care of the child, or the child is placed in some other care than in the care of the left-behind parent that would not be in the best interest of the child.[72]

In stereotyped cases, as thought by the drafters, the abductor would be a parent dissatisfied by the fact that they enjoyed no custody rights. As stated before, in these types of cases the Hague Convention is well-suited. One issue that occurs where allegations of grave risk under Article 13(1)(b) of the Hague Convention is that courts in the States of abduction are placed in a situation between the need to ensure that abducted children are returned promptly. This without making a too excessive investigation of the merits and the need to protect children who would be harmed by being returned.[73] Yet, allowing the exception of grave risk of the Hague Convention to prevent return in all similar cases where the grave risk allegations are provoked would substantially weaken the Hague Convention. Additionally, as most abductions are carried out by the primary caretakers,[74] it is more difficult to return the child where the primary caretaker would refuse to return alongside the child[75] as the child would be separated from the most familiar person. [76] Then, the return would fail to fulfil the originally envisioned re-restoration of *status quo ante*[77], and by separating the child from the primary caretaker undoubtedly fit less easily into the return mechanism as this can be reviewed as an intolerable situation. Therefore, in cases where there is reason to believe that the child would be placed in a situation of grave harm the mandatory return mechanism supported by the Hague Convention might not necessarily be the best solution. As it is more likely that the abductor will have a stronger tie to the State of abduction, the possibility of the abductor to return with the child will be weakened, especially in cases of alleged domestic violence. This can make the objective of prompt return more difficult to achieve as there is a possibility that the State of abduction will have greater sensitivity towards the abductor where allegation of domestic violence is

[72] Shcuz. 2013. p 427.
[73] McEleavy. 2015. p 367.
[74] McEleavy. p 365.
[75] Noah L. Browne. p 1195.
[76] Schuz. 2015. p 13.
[77] The state that existed before. Merriam Webster. https://www.merriam-webster.com/dictionary/status%20quo%20ante

presented. This might open the door to exploitation of the return mechanism and lead to prolonged procedures.[78]

2.1.4.3. The child opposes the return

In certain circumstances, the opinion of the child can affect the outcome of return. According to Article 13(2) of the Hague Convention the administrative and judicial authorities in the State of abduction may refuse to return the abducted child "*if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views".* This is also supported by Article 12 of the United Nations Convention on Rights of the Child (UNCRC) stating that States *"shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child*". Article 12 UNCRC elaborates further by mentioning that children are to be given the opportunity to be heard in all judicial and administrative proceedings affecting them, either directly or through a representative, in accordance with procedural rules of national law. Article 11(2) of the Brussels regulation basically repeats the existence of this right.[79]

The Hague Convention gives children the opportunity to express their views and thus their own interests. However, at the time of the conclusion of the Hague Convention, it was considered impossible to set an age limit for when it would be appropriate to consider the opinion of the child as States have jurisdictional differences regarding age and maturity, so the application of Article 13(2) Hague Convention was left to the discretion of the national authorities in the State of abduction. However, this allows for variations in the practices between the Contracting States. In some jurisdictions, judges hear the children directly (civil law) where it is seen that children are of mature age and understand the situation they are heard, while in common law States, it is a common law practice for judges to hear experts, but this has also changed to a more direct approach policy. [80]

[78] Momoh. p 646.
[79] "When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity"
[80] Schuz. 2015. p 23.

2.1.4.4. Protection of human rights and fundamental freedoms

Lastly, Article 20 refuses return if the requested State does not permit the return due to the fundamental principles of that State when related to the protection of human rights and fundamental freedoms. Basically, the exception could be applied were the return would violate the relevant rights of the child or abductor. This exception Article under the Hague Convention that is principally important, but in practice very rarely used [81] as its interpretation is to be highly restrictive according to Perez-Vera,

> "to be able to refuse to return a child on the basis of . . . Article 20, it will be necessary to show that the fundamental principles of the requested State concerning the subject matter of the Convention do not permit it; it will not be sufficient to show merely that return would be incompatible, even manifestly incompatible, with these principles."[82]

2.2. Brussels II Regulation

When a child is wrongfully removed or retained within the EU the Brussels II Regulation is applicable. The regulation came into force in 2004 and prevails over the Member States national law and is therefore of legally binding character.[83] Article 11 of the Brussels II Regulation sets out the rules that are to be utilized in cases of wrongful removals within the EU. As regards the operation of the Hague Convention in relations between Member States, the rules of the Brussels II Regulation prevail over the rules of the Convention in so far as it concerns matters governed by the Brussels II Regulation. The Brussels II Regulation is basically a complemented version of the Hague Convention as there are some differences to the return mechanism which enables the Hague Conventions continued function for abductions within the EU. The additional requirements in the Brussels II Regulation become effective when exception of Article 13 Hague Convention is applied. As the Hague Convention expects that the national authorities to reach a decision and deal with applications within six weeks regarding the prompt return, the Brussels II Regulation

[81] Schuz. 2013. p 544.
[82] Perez-Vera Report, Proceedings of the 14th Session of the Hague Conference Oct 1980, www.hcch.net/upload/expl28.pdf, para 118.
[83] Beaumont et al. 2015. p 40.

transformers this technically into a rule.[84] The Hague Convention requires the child to be returned unless exceptions are established. The Brussels Regulation has a stricter approach to the return and protecting the best interest of the child by restoring the control to the State of habitual residence. This is achieved by a combination of the review or 'trumping' mechanism in Article 11(7)-(8) Brussels II Regulation, the strict jurisdiction rule in Article 10 and the automatic enforceability rule in Article 42. These are explained in the following parts.

Under Article 10 of the Brussels II Regulation, jurisdiction remains with the court of the Member State where the child was habitually resident immediately before the wrongful removal or retention, unless it is seen that the child has settled in another Member State. In circumstances where a Member State court would refuse the return the abducted child under the grave risk of harm exception, the national authorities in the State of abduction are required to provide an clarification of the reason for refusal to the corresponding authority in the State of habitual residence.[85] This seems logical as the court in the State of abduction has to inform their decision nonetheless to the State habitual residence. However, the presented explanation "file" remains open for a certain period of time,[86] during which the authorities in State of habitual residence have a chance to challenge the judgement of non-return. This challenge can override the decision of non-return according to Article 11(8) so that the left behind parent obtains custody and return of child. This challenge can be complemented by a *certificate for enforcement*[87] under Article 42 of the Brussels Regulation which is immediately to be enforced in the State of abduction.[88]

2.3. European Convention on Human Rights

The most central human rights instrument in Europe is the Convention for the Protection of Human Rights and Fundamental Freedoms better known as the European Convention on

[84] McEleavy. p 372.
[85] Silberman, 2005. p 28-29.

[86] The file will stay open for three months. See Silberman. 2005. p 29

[87] Certificate provided by a judge in the State of Habitual residence in under Article 42 Brussels II Regulation, that demands the child immediately to be returned.
[88] Silberman, 2005. p 28–29.

Human Rights (ECHR). It was opened for signature in 1950 and came into force three year later in 1953.[89] The ECHR protects basic human rights and the civil and political rights of everyone under their jurisdiction in the Contracting States.

The implementation of the ECHR in the Contracting States is overseen by the ECtHR, a Strasbourg based court established in 1959 which oversees the application and protection of the rights guaranteed by the ECHR. The ECtHR gives rulings based upon applications issued by one or several Member States of the Council of Europe, who have agreed to the ECtHR, or by citizens of those Member States.[90] The ECtHR has 47 Member States who are subject to its rulings which are binding and there is no challenge available on the State level to a decision made by the ECtHR. In other words, ECtHR case law is binding for the national courts in Member States of Council of Europe and the courts are expected to take regard to its previous case law while making new judgements.[91]

For a long time the ECtHR upheld a strict interpretation of the Hague Convention and the prompt return in abduction cases brought before it and held that the ECHR is to be interpreted in the light of the Hague Convention and underlined the duty that States had to return abducted children to their habitual residence and that these return proceedings were to be prompt and efficient without excessive examination of the circumstances. This approach still exists to some degree but has been amended to some extent. Approximately one decade ago, in 2010, the ECtHR took a totally different approach to the Hague Convention, by stating in the case of *Neulinger* that Article 8 ECHR is to be interpreted not only in accordance with the Hague Convention but with the UNCRC as well.[92] This judgement was ground-breaking and confused States on how to balance competing interests in abduction proceedings which resulted in disparities of interpretation and application of the Hague Convention, present still today. More about this issue in chapter 3. But first an introduction of the Articles of ECHR that are relevant in international child abductions, namely the right to family and right to fair trial.

[89] European Convention on Human Rights. https://www.coe.int/en/web/human-rights-convention.
[90] European Court of Human Rights. https://ijrcenter.org/european-court-of-human-rights/
[91] Freedman, 2014. p 155.
[92] McEleavy. p 381.

2.3.1. Right to respect for family life

A central aspect in international child abductions committed by parents is family and family life as this is greatly affected by the removal or retention. Right to respect for family life is protected by the ECHR under Article 8. This makes Article 8 the most relevant Article of ECHR when it comes to international child abductions. Article 8 ECHR is also the most common Article to be referred to in terms of violations in abduction proceedings as its application can be two folded. Both parties in the case, namely the abducting parent and the left behind parent can refer to the Article 8 as a violation of their right to family life. The left behind parent tend to argue that if the child is not returned this would entail that their right to family life with the child is violated under Article 8.[93] Similar claims have also been introduced by the abducting party where complaints usually circle around insufficient examination of exceptions to return. Article 8 specifically states that:

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

Article 8 of the ECHR inflicts both positive and negative obligations on States, in this case on the State of abduction.[94] The negative obligations protect individuals from unreasonable interference by public authorities. The ECtHR has found that these positive obligations include "*the parent's right to have measures taken with a view to being reunited with his or her child and an obligation on the national authorities to take such measures.*"[95] In this context, States must strive to meet a fair balance to the interests of

[93] Kvisberg. p 92.
[94] McEleavy. 2015. p 373.
[95] *M.A. v. Austria, (no. 4097/13) ECHR 2015*, para 105

those concerned – child, parent and whole community[96], and State enjoys a certain margin of appreciation in relation to this balance.[97]

When alleged violation of right to family occur, both the left-behind parent and the abductive parent can turn to the ECtHR. The right to be reunited with their children is usually the right left-behind parent's refer to as that the State has a duty to return the wrongfully removed or retained child to them. Where the proceedings in the State of abductions have been insufficient to fulfil the requirements under the Hague Convention, and serious delays are encountered is usually where the ECtHR has seen that the State of abduction has failed to meet the positive requirements and a violation of Article 8 ECHR.[98] However, the positive obligation is not absolute as States to some extent enjoy a certain margin of appreciation where exceptions are established. The ECtHR has considered a violation of Article 8 ECHR where the State of abduction has failed to give sufficient assessment to the exceptions to return.

2.3.2. Right to fair trial

"*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a public and fair hearing within a reasonable time by an independent and impartial tribunal established by law…*"[99] Like Article 8 ECHR, Article 6 has also been referred to in abduction cases as of the reasonable time reference made within paragraph 1, namely, where proceedings last longer than attributed it can be seen as a violation of Article 6 ECHR.[100] ECHR underlines the importance of administering justice without delays which might jeopardise its effectiveness and credibility.[101] If return proceedings in the State of abduction become prolonged, the national authorities shall provide a satisfactory explanation to the State of habitual residence for the reason of the duration. However, in the absence of such an explanation, the ECtHR can determine that a breach under Article 6(1) ECHR has taken place as the State of abduction has failed to

[96] Kvisberg. p 97.
[97] McEleavy. 2015. p 384.
[98] Walker. 2010. p 650.
[99] ECHR Article 6(1).
[100] Walker, 2010. p 674.
[101] Guide on Article 6 of the ECHR – Right to a fair trial. point 401.

present a conclusion within reasonable time. [102] The ECtHR has held that the length of the proceedings and the reasonableness of duration must be assessed in relation to the circumstances of the particular case in question. Special consideration must therefore be given to certain criteria, namely "*the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute*." [103] An evaluation of the criteria can determine whether the duration has constituted a violation of the applicants, in most cases the left behind parents right to fair trial under Article 6 ECHR.

3. PROTECTION IN CHILD ABDUCTIONS UNDER EUROPEAN COURT OF HUMAN RIGHTS

During the last decades the ECtHR har received extensive amounts of cases to consider by individuals who allege that their rights under ECHR, mostly Article 8, have been violated by judgements in the State of abduction as they have ruled to return or non-return the child. These cases have been brought before the ECtHR by both by the left-behind and the abducting parents and in some cases together with their children.[104] Most cases have been brought against the State of abduction, but there have also been cases against the child's habitual residence. [105]

As a procedural instrument, the Hague Convention defers its enforceability on the Contracting States to execute meanwhile Article 8 ECHR can be authoritatively enforced. This creates a power problem between the two instruments which is being issued by the ECtHR. ECtHR has used this power to support the interpretation of the Hague Convention, as it should be interpreted, where States have failed to take adequate measures to return the abducted child under the Hague Convention, ECtHR has found there to be a violation Article 8 ECHR. As the Hague Convention is lacking a monitoring authority, the ECtHR

[102] The right to trial within reasonable time under Article 6 ECHR. A practical handbook. 2018. p 23.
[103] *Hoholm v. Slovakia, (no. 35632/13), ECHR 2015. para 44*.
[104] Keller and Heri. p 272.
[105] Kvisberg. p 92

plays an important part, especially where differing interpretations of the Hague Conventions by States have emerged.[106]

3.1. The ECtHR approach to Hague Convention

As mentioned earlier, at the early stage of international child abduction cases brough before the ECtHR the Court frequently stated that cases of abduction are to be interpreted with consideration made to the Hague Convention. ECtHR further stressed that national authorities must ensure that they obtain the objective of the return mechanism, meaning rapid return decisions to return the child unless exceptions are established. ECtHR case law and practice gave weight and authority to the return objective, that abducted children are to be returned to their habitual residence, which also contributed to the influence of the Hague Convention and its objectives overall. [107]

The support for the Hague Convention is demonstrated in the first case brought to the ECtHR, namely case of *Ignaccolo-Zendine v. Romania.*[108] Following the divorce of the parents, the children were handed to live with their mother in France. The children spent their summer holiday with their father, who lived in United States. At the end of the holiday the father refused to return the children as agreed. The mother appealed to the Central Authority in France who in turn contacted the Central Authority in the US to return the children. However, the father managed to change his address several times and after four years of avoiding the authorities the father managed to travel to Romania, as a dual citizen of France and Romania, together with the children.[109]

The First Instance Court in Bucharest issued the children to be returned to their mother who had only seen her children once after the abduction (after seven years) by the help of the Romanian authorities. Despite the order for children to be returned to the habitual residence the enforcement turned out to be unsuccessful.[110] As a result, the mother complained to the ECtHR that her right to family life under Article 8 ECHR had been

[106] Keller and Heri. p 276.
[107] Kvisberg. p 91.
[108] *Ignaccolo-Zenide v. Romania, (no. 31679/96) ECHR 2001.*
[109] *Ignaccolo-Zenide v. Romania, (no. 31679/96) ECHR 2001.*
[110] European Court of Human Rights. Factsheet – International child abductions. 2020. https://www.echr.coe.int/Documents/FS_Child_abductions_ENG.pdf p 2.

violated by the Romanian authorities due to their failure to take measures to have the children returned accordingly to the return order issued. The ECtHR saw that there had been a violation of Article 8 due to the failure of Romanian authorities to take adequate and effective efforts to enforce the return of the child and the applicant's right to be reunited with her children.[111]

As one can see, the ECtHR found there to be positive obligations on States to take all necessary steps to facilitate the enforcement of return orders under the Hague Convention. That is to apply the Hague Convention in an effective manner, to make adequate and effective efforts to enforce a left behind parent's right to the return of his child as well as the child's right to be reunited with the left behind parent and interpret provisions in accordance with international norms.

Another case where the ECtHR adhered to the traditional application of Hague Convention is in *Maumousseau and Washington v. French.*[112] A child was born into marriage of a citizen of United States and a French national and the pair lived in the United States. The mother travelled to France with the child for an agreed visit but refused to return with the child at the end of it. This led to an application for return by the father which was referred to the French Central Authority the usual order. The mother refused to return the child and claimed that return entitled a violation of ECHR Article 8 and the child's right to family due to the child young age and could therefore not be returned without her as she would not return to the United States. She based this refusal on the grave risk of harm exception according to the Hague Convention Article 13(1)(b).

The child was ordered to be returned to USA despite the mother's allegations as a result of a 'detailed' examination of the family situation and the best interest of the child carried out by the French authorities.[113] The mother filed an appeal to the ECtHR claiming that the national court in France had violated her rights under Article 8 ECHR, claiming that the national authorities interpretation of exception to return under Article 13(1)(b) of the Hague Convention was too restrictive and so the return order was not in the best interest of child and would put the child in an intolerable situation due to the separation from her.[114]

---

[111] Walker. 2010. p 651.
[112] *Maumousseau and Washington v. France, no. 39388/05, ECHR 2007.*
[113] Walker. 2010. p 665.
[114] *Maumousseau and Washington v. France, no. 39388/05, 2007. para 64*.

Finally, the ECtHR found that as the French court had investigated the situation in detail. Therefore, there was no reason to believe that there had occurred a violation of the before mentioned rights under Article 8 ECHR as the national authorities had taken adequate measures and that it was in the best interest of the child to be returned to the habitual residence, that is United States. [115]

Article 13(1)(b) of the Hague Convention and the intolerable situation was not fulfilled by the fact that the child was to be separated from the abducting parent.[116] The separation from the abductor could not be the sole reason for non-return. The ECtHR held that the ruling made by the national court in France was entirely in agreement with the objective underlying the Hague Convention, namely deterring international child abductions, restoring the status quo ante and leaving the issues of custody to be determined by the courts of the child's habitual residence.[117] The ECtHR also saw that the return order was for the purpose of protecting the child's rights and freedoms under article 8(2) ECHR.[118]

The interesting perspective about the decision that the ECtHR gave considering the *Maumosusseau,* was neither the rejection given to the mothers application non-return the child nor that the ECtHR was of the opinion that the best interest of the child was to be examined by the court in the habitual residence of the child, but rather that it saw that the best interest examination had already been conducted by the French authorities,[119] which came to the conclusion that it would be best for the child to be returned to the USA. Interestingly the ECtHR did not hold the detailed examination done by the State of abduction, the French authorities, as necessary but neither did it deny the fact that such a procedure had been unlawful in Hague Convention procedure, which theory it was as the examination of the welfare and so the best interest of child is intended to be executed in the habitual residence according to the Hague Convention. One could assume, based upon the ECtHR decisions, that if the French authorities had excluded to conducted such an detailed examination of the circumstances of the case and the best interest of the child, then they

[115] McEleavy, 2015. p 374.
[116] Walker. 2010. p 664.
[117] *Maumousseau and Washington v. France, no. 39388/05, 2007. para 69.*
[118] *Maumousseau and Washington v. France, no. 39388/05, 2007. para*
[119] Keller and Heri, p 280.

would have acted in violation of Article 8 ECHR. That is precisely what the ECtHR held three years later.[120]

The next subchapter discusses the cases that amended the perceptions that previously existed in the international child abduction as it is important to understand the origin of the reflection of Hague Convention that ECtHR introduced through its judgments in cases of *Neulinger and Shuruk v. Switzerland* and *X v. Latvia*.

3.1.1. Reflection on the best interest of the child – case of *Neulinger*

As previously discussed, the ECtHR interpretation of the Hague Convention has largely been strict and it has adhered to the objectives accordingly, but this took a U-turn as the most exceptional case judgement by the ECtHR was handed down in 2010, namely in the case of *Neulinger and Shuruk v. Switzerland.*

The parents had met and were married in Israel where they also had a child in 2003. The mother was a national of Switzerland and the father from Israel. Later the parents got separated. Already before the separation the father had joined a radical religious movement and in the fear of him taking the child away to the community of that same religious group the mother applied for a *ne exeat* order which was to expire when the child would no longer be a minor.[121] Later, in the aftermath of interventions made by the Israeli social workers, assault accusations alleged by the mother and visitation restrictions established against the father the mother request for a withdrawal of the ne exeat order which was denied. Hence, despite the order of non-removal of child outside State premises, the mother wrongfully removed the child to Switzerland in 2005.[122]

After being unable to locate the child the father contacted the Israeli Central Authority who, nearly a year after the removal of the child, was able to locate the child in Switzerland. The father filed an application for the child to be returned to Israel under the Hague Convention. However, the application was dismissed by both the trial and appellant

[120] Freedman, 2014. p 156.
[121] 'Restriction order', a right of veto and a way for the non-custodial parent to restrict the parent with custodial rights from leaving the country with the child, so that this cannot be done without a court order. In the case of *Neulinger and Shuruk* the mother was the primary custodian. See Schuz. 2014. p 258.
[122] *Neulinger and Shuruk v. Switzerland [GC], (no. 41615/07), 2010. para 20.*

court in Switzerland as it was seen that the return would entail a grave risk of psychological harm to the child under Article 13(1)(b) of the Hague Convention.[123] In addition to the grave risk of harm, the mother claimed that she would not be able to return with the child, as she would face imprisonment if she ever returned to Israel. Regardless of these argued defences for return presented in the State of abduction (Switzerland), the father's appeal was later approved, and the child was ordered to be returned to Israel by a Swiss Federal Court.[124]

The following month the mother approached ECtHR, claiming violations of her right to a fair trial, her right to freedom of religion, and foremostly her right to a family life.[125] The mother also requested interim measures against the return order, which were granted by the ECtHR before the child's return order was managed to be enforced. The case of *Neulinger* was the first return order by a State of abduction under the Hague Convention to be prevented from being enforced by the ECtHR.[126] This resulted in the father making a request for referral to the ECtHR Grand Chamber to take on the case, which it did. The case of *Neulinger* became the first ever child abduction case to be handled by the ECtHR Grand Chamber.

The Grand Chamber case judgement was handed down three years after it had been introduced, which drastically clashed with the return mechanism intended by the Hague Convention to be finalized within six-weeks. The ECtHR decided that enforcing the return order would lead to a violation of the abducting mother's and child's right to family life under Article 8 ECHR.[127] The reason for the *Neulinger* case being so exceptional and why it caused extensive controversy in the legal community was due to the ECtHR Grand Chamber ignoring many years of Hague Convention case law. ECtHR turned the case into a custody proceeding by making an 'in-depth' examination of the family situation which was in conflict with the very purpose of the Hague Convention to promptly return the child

[123] Kvisberg. p 96.
[124] Walker. 2010. p 666.
[125] *Neulinger and Shuruk v. Switzerland [GC], (no. 41615/07), 2010. see https://hudoc.echr.coe.int/FRE#{"itemid":["001-99817"]} point 3.*
[126] Freedman, 2014. p 157.
[127] Kvisberg. p 97.

to the habitual residence where custody issues are to be solved.[128] In addition great emphasis was given to the best interest of child principle.

3.1.1.1. The principle of the best interest of the child

Best interest of child or interests of children is a principle inherent to the rights of the child and Article 3 UNCRC states that

> *"in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". Assessing the best interests of a child means to evaluate and balance "all the elements necessary to make a decision in a specific situation for a specific individual child or group of children".*

The principle as such lacks a specific definition but it *"…consists of evaluating and balancing all the elements necessary to make a decision in a specific situation for a specific individual child or group of children."*[129] Elements that should be taken into account when assessing best interest are for example, child's views; identity; preservation of family relations and environment; care, protection and safety of the child; vulnerability; right to health and right to education.[130] Overall the principle of best interest of child is seen as a tool to be considered when enforcing other rights affecting children, also it functions as a principle for arbitration in conflicts of rights as it is to be considered, and is to be implied in all decisions concerning children. Lastly, when an issue is not overseen by other positive rights, the best interest principle works as a substantive base for evaluation of relevant rules and practices.[131]

The child has various rights that are affected as a result of being removed or retained from a familiar environment such as home, friends, school and removed from the opportunity of maintaining contact with both of the parents[132] which is one important right guaranteed by

[128] Keller and Heri, 2015. p 282.
[129] CRC/C/GC/14. p 12/ para 47.
[130] CRC/C/GC/14. p 13-17.
[131] Peace Palace Library. Lhoest, B. 2018. https://www.peacepalacelibrary.nl/2018/02/the-hague-abduction-convention-nice-in-theory-difficult-in-implementation/
[132] Article 9(3) UNCRC 1990.

the UNCRC. Abduction will most likely have a major impact on the child's mental health. Depression, anxiety, and aggressive behaviour as well as emotional problems can be some of the symptoms that a child can experience in connection with abduction and can carry with them for the rest of their lives.[133]

The engagement of the best interest principle in international child abduction scenarios be contradicting the harmonization of the interpretation of the standards in proceedings, namely the best interest assessment is subjective making it difficult to enable a coherent application of it so in procedural proceedings. The best interest principle has different meanings in different fields, legal contexts, and areas of law. In addition, the determination of the best interest of the child varies from case to case, national authority and other considerations making the harmonized interpretation in general difficult. Therefore, it is important and most realistic for the ECtHR to accept that the child's best interest is to be assessed by the State of habitual residence as delegated by the Hague Convention. It is also important acknowledge that the best interest cannot be a right of its own but rather as a substantive consideration when authorities carry out the task of solving an individual case on the merits of the nature and situation of a case.

Children in abduction cases are an important aspect and their interests are critical due to children being vulnerable, hence they are greatly affected both during and after the abduction. Despite this the Hague Convention is not designed to examine the interests of children in any particular case or question of where the child wants to be resident (as it is neither a question of what the parents want) because the Hague Conventions aims to deter child abduction from occurring. The Hague Convention aims to protects children in general, hence the interests of individual children cases are not technically accounted for. In addition, due to the ECtHR recent case-law, this distinction has been blurred and States could easily drift into proceedings that exceed over to custody proceedings. [134]

3.1.1.2. Best interest of the child and in-depth examination of circumstances

In *Neulinger,* the ECtHR took the approach to prioritize the best interest of the individual abducted child, namely that whatever the decision return or non-return, it should always

[133] Sthoeger. 2011. p 527.
[134] Walker & Beaumont. 2011. p 248.

be in accordance with the best interest of the abducted child.[135] The ECtHR started off by stating that in matters of international child abduction, the obligations that Article 8 ECHR imposes on the Contracting States must be interpreted taking into account both the Hague Convention and the UNCRC.[136] The decisive issue was whether a fair balance had been struck between the competing interests at stake - those of the child, of the two parents, and of public order - bearing in mind that the child's best interests must be the primary consideration.[137] According to the ECtHR the child best interest has two limbs:

> *The child's interest comprises two limbs. On the one hand, it dictates that the child's ties with its family must be maintained, except in cases where the family has proved particularly unfit. It follows that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, if and when appropriate, to "rebuild" the family. On the other hand, it is clearly also in the child's interest to ensure its development in a sound environment, and a parent cannot be entitled under Article 8 to have such measures taken as would harm the child's health and development.*[138]

According to the traditional approach, the Hague Convention is to focus on the maintenance of family ties, such as custody and access and it is left for the State of habitual residence to evaluate whether these family ties are unfit.[139] The approach in *Neulinger* suggested that both limbs are to be considered in the State of abduction. The ECtHR held that in return cases, national courts must assess the situation of each individual child.

> *"It follows from Article 8 that a child's return cannot be ordered automatically or mechanically when the Hague Convention is applicable. The child's best interests, from a personal development perspective, will depend on a variety of individual circumstances, in particular his age and level of maturity, the presence or absence of his parents and his environment and experiences [...] For that reason, those best interests must be assessed in each individual case."*[140]

The thought of setting the best interest of the child their best interest as 'the' primary consideration in all decisions concerning children, as the ECtHR did, relied too much on the general statement that the Hague Convention presents in its Preamble. **A**ccording to the

[135] McEleavy, 2015. p 368.
[136] *Neulinger and Shuruk v. Switzerland [GC], (no. 41615/07), 2010. para 132.*
[137] *Neulinger and Shuruk v. Switzerland [GC], (no. 41615/07), 2010. para 134.*
[138] *Neulinger and Shuruk v. Switzerland [GC], (no. 41615/07), 2010. para* 136.
[139] Keller and Heri. p 280.
[140] *Neulinger and Shuruk v. Switzerland [GC], (no. 41615/07), 2010*. para 138.

Preamble of the Hague Convention, the interests of children are of paramount importance in matters relating to their custody, however, this does not necessarily mean that the best interest of the individual child is a priority in the proceedings under the Hague Convention, as it is one aspect in a much larger picture. The Hague Convention assumes that it is in the best interests of the child to be returned in a promptly manner. Considering the special nature of international child abduction this judgment put matters, and requirements a little too high. 'The' primary consideration is not the same as 'a' primary consideration. Further, while this might be the case in substantive domestic family law, the best interest of child is short from the same effect in international family law, mostly due to its subjective character.[141]

The ECHR makes no reference to the best interests of the child which makes the approach taken by the Grand Chamber in *Neulinger* interesting, due to the weight that was given the principle. The ECtHR made various referrals to the UNCRC in *Neulinger* to support its interpretation in the case and the best interest of the child. Interestingly, no mention was made of UNCRC Article 11 stating that *"States Parties shall take measures to combat the illicit transfer and non-return of children abroad and promote the conclusion of bilateral or multilateral agreements or accession to existing agreements*", the only article in the instrument that straight forward refers to international child abduction.[142]

Majority of the judges believed that

> *"… the Court must ascertain whether the domestic courts conducted an in depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person, with a constant concern for determining what the best solution would be for the abducted child in the context of an application for his return to his country of origin".*[143]

The examination of the defences was turned into a requirement as the States of abduction were obliged to examine in-depth the circumstances before deciding whether if the abducted child was to be returned and each case is to be considered individually. However,

[141] McEleavy, 2015. p 385.
[142] McEleavy. 2015. p 383.
[143] *Neulinger and Shuruk v. Switzerland [GC], (no. 41615/07), 2010*. para 139.

there is a fear that such an in-depth examination, leading to intense scrutiny by national courts in State of abduction, would result in examining merits of the case, like custody issues, which goes completely against the objective of the Hague Convention. The examination, as found earlier is to be executed by the national authorities in the State of habitual residence. They constitute the most suitable forum for merits of the case to be determined as they most likely will have the best resources for this as the child's whole life existed there before abduction. [144] In addition, it was unclear how such an 'in-depth examination' could truly be consistent with the summary return procedure envisaged by the Hague Convention. In *Neulinger,* but also in cases that followed, the ECtHR has mixed procedural and substantive approaches and is drawn to execute a concrete and detailed procedural and material examination of the whole family situation.[145] In a UK Supreme Court case, Lady Hale has expressed that States of abduction are *"not to conduct their own investigation and evaluation of what will be best for the child. There is a particular risk that an expansive application of Article 13(1)(b) exception, focusing on the situation of the child, could lead to this result."*[146] It must be noted that it is outside the ECtHR function to interpret the provisions of the Hague Convention and Contracting States are the ones to execute the interpretation, and if it is seen that they have violated the ECHR while doing so then the ECtHR can consider the Hague Convention. However, in doing so the concentration should be on the ECHR. Additionally, the critiques expressed was in the fear that the decision would jeopardize the speediness of the proceedings under the Hague Convention, which is of paramount importance in child abduction cases and in the best interest of abducted children. The timeframe of six weeks does not leave room for a holistic assessment of the best interest of the child as this would require evidence gathering and detailed expert evaluations, which take time.

The approach that the ECtHR took in *Neulinger,* when it required the best interests of the child to be assessed in each individual case and that this assessment should include an 'in-depth examination of the entire family situation', would require an examination of a series of factors.[147] Although *Neulinger,* according to various scholars and other experts in the

[144] Keller and Heri 2015. p 272.
[145] Keller and Heri. 2015. p 295.
[146] Re D (A Child) (Abduction: Rights of Custody) [2006] UKHL 51, [2007] 1 AC 619.
[147] 'factual, emotional, psychological, material and medical nature' *Neulinger and Shuruk v Switzerland [GC] para 134.* See also Kvisberg. p 97.

field, was a devastating occurrence for the deterrence of international child abduction, those who support the reflection given to the individual child have welcomed this approach as a starter for debate for human rights in abductions to be re-framed. However, as Keller and Heri acknowledged

> *"...the special nature of international child abductions, which requires great procedural expedience, justifies a departure from the usual requirement of a holistic evaluation of the affected child's best interests under the lex specialis, the Hague Convention. It is precisely in light of the vulnerability and dependence of children, and the need to make their best interests a primary consideration, that this characteristic of international abduction cases is justified"*[148]

What the Grand Chamber suggested does not necessarily differ from the examination intended to be performed by the State of habitual residence and could be equivalent to a full examination of the custody merits.[149] To conduct an in-depth examination of the circumstances of a case, like the one required by the Grand Chamber in *Neulinger*, the courts in the State of abduction would need to require excessive amount of time and evidence to be able to prove that it is for the best that the child is not to be returned to the habitual residence. This in-depth examination gives States liberty to interpret the exception to return, namely, as they can use their margin of appreciation and refuse to return the children on the basis of what is perceived to be in the best interest of the child rather than following the strict interpretation of these exceptions of the Hague Convention as expected.

ECtHR Grand Chamber, in its first ever judgement as regards to international child abduction, made such a strong acknowledgement to the principle of the child´s best interest. One could have thought that it would be important for the Grand Chamber to give a strong support to the Hague Convention in order to strengthen the objective of returning a child in a speedy manner to the State of habitual residence instead of a judgement that would be of such misleading character. The emphasis was clearly put on the fact of how return would impact Article 8 ECHR and the best interest of the child. Article 8 ECHR and its interpretation was emphasised in a way that the Hague Convention and its primary objectives of return were placed in a weak position and not prioritized in the same way as the ECtHR had done before. Why the Grand Chamber failed to mention that the

[148] Keller and Heri. p 288.
[149] Beaumont et al. 2015. p 44

application of the best interest was not to be applied in general and in all abduction cases where exceptions were applied is unclear. Nonetheless, as McEleavy suggests, it is not uncommon for the ECtHR to make use of loose language in its judgements.[150] After *Neulinger* the legal community waited in anticipation of the following as the Grand Chamber took on its next case, namely *X v. Latvia*.

3.1.2. *X v. Latvia* – re-assessment of the *Neulinger* approach

The state that existed in the aftermath of the judgment given in *Neulinger* was confused. Especially the balance between Article 8 ECHR and the Hague Convention had been jeopardized. This due to conflicting approach, where the ECtHR held that in order for the State of abduction to apply Article 8 ECHR correctly, States of abduction were expected to make an in-depth examination of the facts surrounding the case prior to return decision. The legal community held its breath as ECtHR Grand Chamber took on its second international child abduction case a few years later, *X v. Latvia*.[151] This was the moment for the Grand Chamber to amend the damage established through *Neulinger*.

In the case a woman, Latvian national, had settled in Australia where she got married. She then had a child with a man while married. She lived together with the father of her child in an apartment that he rented, and they jointly took care of the child, but the father's paternity was not established.[152] As a result of deteriorated relationship, the mother moved to Latvia with the child.[153] Subsequently, the father applied to the Australian Family Court to establish parental rights and applied for the return of the child under the Hague Convention.[154] As the request had been made the mother argued that the father did not enjoy parental rights and that he had been abusive towards the child which could be certified by others as well. Additionally, she claimed that the child had become settled in Latvia and issued a certificate by a psychologist where it was stated that the child would be

[150] McEleavy, 2015. p 385.
[151] Keller and Heri. p 288.
[152] *X. v. Latvia (Application No 27853/09) 2013. para 11.*
[153] Beumont et al.2015 p 42.
[154] *X v. Latvia [GC], (no. 27853/09), 2013. para 11.*

traumatized if separated from the mother. Hence it was not in the child's best interest to be returned to Australia.[155]

Despite the mother's efforts, the Latvian court made an order for the child to be returned to Australia. The mother made an application to ECtHR claiming that the Latvian courts had ordered the return of the child without reviewing Australian law concerning the custody rights of the father and dismissing the arguments raised not to return the child. ECtHR found that there had been a violation of the mother's rights under Article 8 ECHR.[156] In reaching this conclusion, and finding a breach of Article 8 ECHR, the Chamber revisited the judgement given in *Neulinger* stating that the violation came from the fact that the Latvian court had not carried out an in-depth examination of the entire family situation.[157] Furthermore, the Latvian court should have assessed whether there were sufficient safeguards to render the child's return to Australia in her best interests.[158]

Dissenting opinions in *X v. Latvia* did not support the judgment, that there had been an violation of Article 8 ECHR, as they held that the psychologist report did not mean that the child would experience harm from being return to Australia, but from being separated from the abductive mother. They saw that there was no legal obstacle for the abductive mother to return alongside the child as she was an Australian citizen and that the Australian legal system would provide the protection needed in terms of the father. [159]

The ECtHR previously had stated in *Neulinger* that the best interest of the child should be 'the' primary consideration that decision makers should take notice to when making decisions of return, however, a slight change was introduced in the present case as in *X v. Latvia* it was emphasized that the best interest should be 'of' primary consideration but not the only consideration. This slight re-phrasal found in *X v. Latvia* was clearly a move towards an amendment to the prevailing state caused in *Neulinger*. The ECtHR went further on to explain that the best interest,

> *"...cannot be understood in an identical manner irrespective of whether the court is examining a request for a child's return in pursuance of the Hague Convention or*

[155] ECHR Blog. X v Latvia Child Abduction Grand Chamber Judgment, 17 December 2013. https://echrblog.blogspot.com/2013/12/x-v-latvia-child-abduction-grand.html
[156] Ibid.
[157] *X v. Latvia [GC], (no. 27853/09), 2013, para* 78. Beaumont et al. p 43.
[158] Momoh. p 43.
[159] Kvisberg. p 102.

> *ruling on the merits of an application for custody or parental authority, the latter proceedings being, in principle, unconnected to the purpose of the Hague Convention."*[160]

Even though the national authorities have a certain margin of appreciation when determining the best interest of the child in the light of exceptions to return of the Hague Convention. Nevertheless, where exceptions have been applied, States and their judgements are still subject to supervision by the ECtHR.[161] It is noteworthy to mention that ECtHR is not to give its own assessment to national authorities on how to proceed, but only to review decisions that the national authorities have made and whether these judgements have been fair and that the parties had a chance to present their case,[162] and whether the best interest of the child had been protected and that the proceedings overall were in accordance with the ECHR.[163] Although the ECtHR found there to be a violation of Article 8 ECHR, due to lack of an in-dept examination of the entire family situation, it was highly emphasised that national authorities were required to carry out an effective examination of any allegations made in connection with refusal to return the child, foremostly allegation made by the abductor.[164] This was a new and changed approach by the ECtHR and a re-assessment of the previous Grand Chamber judgement in *Neulinger.* McEleavy makes the assumption that despite amending the *Neulinger* judgment in *X v. Latvia* there is a clear desire on the part of many ECtHR judges to direct the interpretation of international child abductions away from prioritizing return, towards a protection first kind of approach, prioritising the individual abducted child.[165]

3.1.2.1. Effective examination of allegation of defences to return

According to the ECtHR Grand Chamber, in *X v. Latvia*, a harmonious interpretation of the procedural Hague Convention and the human rights instrument of ECHR could be achieved if the following conditions are observed, and by performing an *effective*

[160] *X v. Latvia [GC], (no. 27853/09), 2013.* para. 100.
[161] McEleavy. 2015. p 393.
[162] Article 6 ECHR.
[163] McEleavy. 2015. p 393.
[164] Beumont et al. p 43.
[165] McEleavy. 2015. p 397, Momoh. p 644.

examination of arguable alleged grave risks.[166] Firstly, if any of the exceptions to return, foremostly the exception under Article 13(1)(b), under the Hague Convention were to be alleged, then these arguable allegations are to be genuinely considered by the national authorities in the State of abduction.[167] Secondly, when the authorities in the State of abduction have taken into account all allegations, they are to make a decision based upon an examination that is sufficiently reasoned in order to verify that all facts have genuinely been taken into account and examined efficiently.[168] ECtHR considers that *'both a refusal to take account of the objections to return and insufficient reasoning in the ruling dismissing such objections would be contrary to the requirements of Article 8 ECHR and also to the aim and purpose of the Hague Convention'* [169] In addition, this judgement must present specific reasons for the outcome in the light of the circumstances presented in each individual case, whatever the decision, in favour of return or non-return. Further, the decisions for return are not to be stereotyped or, but assessed to the circumstances in question.[170] It is a process of assessing the possible existence of harm, followed by a determination of the excessiveness of this harm and how it will affect the child if returned. This entails procedural obligation on the State of abduction as they must consider any allegations, especially the grave risk of harm possibility, in case the child should be returned. With this the Grand Chamber assumingly wants to eliminate possibilities of the child being returned to the habitual residence, where no evaluation of the risk has been performed. The examination should be narrow and only consider relevant circumstances for establishing whether the alleged exception actually exists.

The new approach of an effective examination referred by the Grand Chamber in *X v. Latvia* shows that the critique from *Neulinger* was taken to heart and effort was made to harmonize the interpretation of Article 8 ECHR to be more in terms with the Hague Convention. Some are of the opinion that the approach taken in *X v. Latvia* does not differ from the one in *Neulinger*, that the approach is the same, just introduced with a new terminology. [171] However, the new approach established in *X v. Latvia*, which requires an

[166] Keri and Heller. p 286.
[167] *X v. Latvia [GC], (no. 27853/09), 2013.* para. 116.
[168] European Court of Human Rights. Factsheet – International child abductions. 2020. https://www.echr.coe.int/Documents/FS_Child_abductions_ENG.pdf. p 2.
[169] *X v. Latvia [GC], (no. 27853/09), 2013,* majority opinion. para 107, McEleavy. 2015. p 394.
[170] Momoh. p 650.
[171] *X v. Latvia [GC], (no. 27853/09), 2013.* Judge Pinto De Albuquerqu, dissenting opinion.

effective examination of any allegations that fall under the exceptions in the Hague Convention, is to be welcomed and the requirement strikes a suitable balance between the prompt return mechanism and the best interests of the child.[172]

3.2. The protection against grave risk of harm

The exception of Article 13(1)(b) of the Hague Convention provides that a court in the State of abduction is not bound to return the child where "*a grave risk that return would expose the child to physical or psychological harm or otherwise place him in an intolerable situation"*. One of the most common allegations used to prevent the return of the child is that the left-behind parent is detrimental to the child. When considering arguable allegations of grave risk of harm and ruling on specific reasons of those allegation, the court in the State of abduction must make the assessment in the light of the circumstances that existed at the time of the removal.[173] The wording of Article 13(1) b) Hague Convention requires that the grave risk of harm is established, just an "assumption" that the allegations are true and then impose protective measures cannot be considered to have adequately terminated the obligation under Article 13(1)(b).

There are two different aspects to the grave risk exception that has raised questions as to the method of how the defence should be considered. Firstly, allegations that the child being abused and second concern over the child due to separation of the primary caretaker who has abducted the child and refuses to return due to domestic violence. The latter, in relation to that it has become more likely that primary caretakers abduct, has become a quite common defence referred, in order to not return the child.[174] In the past it was considered that those who were not enjoying custody rights were the ones more likely to abduct, but the contemporary characteristics are based on the fact that it has become apparent that the primary care taker are more likely to abduct.[175] As its more likely that the abductor will have a stronger tie to the State of abduction. Therefore, the possibility of the abductor returning with the child is weakened, especially in cases of alleged domestic violence. This can make the objective of prompt return more difficult to achieve as there is

[172] Beumont et al. p 43.
[173] Beaumont et al. p 43-45.
[174] Silberman p. 23.
[175] McEleavy, 2015. p 370.

a possibility that the State of abduction will have greater sensitivity towards the abductor where there are signs of vulnerability. This might open the doors to exploitation of the return mechanism and lead to prolonged procedures.[176] In cases where a primary caretaker refuses to return with the child, this could lead to a harmful separation from the one person with whom the child has a strong relationship.

Most courts in the State of abduction in have interpreted the exception of Article 13(1)(b) of Hague Convention in a strict manner in order to uphold the objective of the return and to avoid the Hague Convention from becoming a dead letter.[177] The narrow interpretation of the exception has in some cases been justified by the concept of comity,[178] where the State of abduction returns the child based on perception that there is no reason to not assume that the State of habitual residence would be unwilling to protect the child or have the measures needed in order to do so. Therefore, the non-return would be inappropriate.[179] Hence, it is assumed that the child will only be at grave risk in situations that are out of the State of habitual residences control, such as in the state of war or famine.[180] However, the comity approach could be considered a too restrictive approach towards allegations of grave risk of harm where the State of abduction fails to take or is unable to take measures to protect the child, for example, due to lack of resources.

To assess the effectiveness of the systems in the State of habitual residence in terms of protection, foremostly of the child from but also the abductor if the abductor was to return with the child despite established grave harm would be difficult for the State of abduction, especially in every case of alleged abuse. Additionally, this could be considered inappropriate and may well risk the international comity between States in regional areas like Europe and EU, where States have a close cooperation and inter-dependency.[181] Although comity should be considered a subsidiary consideration in relation to the best interest and protection of the child, it is still important to uphold the effectiveness and cooperation that the objectives of the Hague Convention require. Therefore, it could be considered essential that courts in the State of abduction, when considering return, act

[176] Momoh. p 646.
[177] Schuz. 2013. p 424.
[178] Schuz, 2015. p 50.
[179] Ibid, 2015. p 88.
[180] Schuz. 2014. p 76.
[181] Ibid, 2014. p 49.

under the presumption that the authorities in the State of habitual residence are capable and willing to protect those under its jurisdiction and reduce any existing risk.[182]

To avoid a superficial assessments of the effectiveness of other legal systems, courts cannot be expected to carry out more than a *prima facie* analysis of the capabilities of other legal systems to provide adequate protection to children and mothers returning to the place of habitual residence. However, in domestic violence cases it could be questioned whether an failure to address allegations or insufficient actions could have been taken by the authorities in that State of habitual residence as the abductors has been forced to seek protection in another State. Often State of habitual residence have the means to protect the child, but these measures might be dependent on resources. Another reason could also be that the abductive parent is afraid to report abuse or does not trust the legal system in the State of habitual residence, resulting in seeking protection in their native country.

Children being exposed to domestic violence and spousal abuse might experience psychological harm which might affect their development.[183] With respect for the best interest of the child, some could be of the opinion that return should be rejected if the return will not benefit or promote the best interest of that individual child. However, this would require a broader interpretation of the grave risk exception. Even though the exception is to be interpreted in a strict way, it should be carried in mind that the exceptions are a part of the Hague Convention and should be given meaning deserved.[184] On the other hand, States of abduction might be reluctant to considering the arguments of grave risk of harm and domestic violence due to possibility of these allegations being foul and the abductor only uses these allegations as a reason to prolong the proceedings which prevents the child from having a relationship with the left-behind parent.

A crucial element in return decisions has been the possible separation of the child and the primary caretaker abductor and its effect on the child. If the abductor is the victim of the abuse, to what extent does this constitute a risk towards the child. A general argument is that the child could suffer of psychological harm as a result of separation from the abducting parent, especially if the child and parent have always been close. Returning the

[182] Ibid, 2014. p 69.
[183] Schuz 2015. p 17.
[184] McEleavy. 2015. p 378.

child to the habitual residence and possibly a new custody arrangement would cause stress for the child. If the child is not returned because of this, the abducting parent is given a powerful weapon against the summary return procedure.[185] Judge Dedov[186] pointed out that the return mechanism, that highlights prompt procedures, is not suitable for the assessment of rights under Article 8 of the ECHR, as the Hague Convention does not provide a comprehensive approach to the enforcement and implementation of the return proceedings. He went on to highlight the fact that mothers can be extremely vulnerable and dependent on their husbands, and the vulnerability of children especially young children who would because of separation from the mother suffer from distress. The best interest of a child, from a personal development perspective, would depend on a variety of individual circumstances: the child's age and level of maturity, the presence or absence of his parents as well as his environment and experiences. Judge Dedov believed that separating a child under the age of seven from their mother would most likely always lead to a risk of grave harm where the exception of Article 13(1)(b) is present.[187] Concerning children from 7-13 years old, Judge Dedov went further to consider that a return was more likely, as the separation would not be as critical as it would be for younger children. Not preferable, but still more realistic, unless of course the return would be of grave risk of harm. [188]

Even in cases where serious violence is established, many courts take the view that violence against the mother does not per se present a grave risk to the child or place him in an intolerable situation. [189] Also, in absence of evidence of violence/ threats of violence against the child or clear expert evidence that the child has suffered from post-traumatic stress syndrome due to violence the child is likely to be returned.[190] However, research has shown that there is a link between children and spousal abuse and that courts should take more into account that the child being exposed to violence between parents will cause long-term damage to the child.[191] In this case the separation might entail significant psychological emotional stress to the child, and therefore an intolerable situation, if it were

[185] Beaumont & McEleavy 1999, p. 145.
[186] *Adzic v. Croatia (no. 22643/14) 2015*. Dissenting opinion Judge Dedov.
[187] McEleavy. 2015. p 399.
[188] *Adzic v. Croatia (no. 22643/14) 2015*. Dissenting opinion Judge Dedov.
[189] Schuz, 2013 p 431.
[190] Schuz, 2013 p 431.
[191] Schuz, 2014. p 18.

so that the primary caretaker was in a position not able to return with the child.[192] Therefor a return might not be preferable especially if the abductor, not able to return due to violence, represents a central figure in the child life, both for the child's development and wellbeing. However, denying return as a reason not to separate the child from the mother invades the rights of the child in cases where the grave risk of violence is not directed towards the child. Hence, it would not be in the best interest of the child not to return. Denying the child's return due to conditions of the mother would simply be putting the mother's rights before the child's rights.

Even though most of the judgements have displayed support for the return and the strict interpretation of the Hague Convention exceptions when applying Article 8 ECHR and the right to family life, there is still a sense of confusion after both *Neulinger* and *X v. Latvia*. Like in the case of *Phostira Efthymiou et Ribeiro Fernandes v. Portugal*[193], where the mother refused to return the child after a holiday in Portugal where after a return order was made on a relatively short time frame of four moths. This return order was later rejected as the mother argued that if the child were to be returned and as the mother would be in risk of harm at the hands of the left-behind parent. After the child had spent one and a half years in Portugal the Supreme Court there decided, after a strict interpretation of Article 13(1)(b) to reinforce the order of return previously made. ECtHR found there to have been a violation of Article 8 by the Portuguese authorities. However, the judgments contained differing opinions that emphasised the differences present in *X v. Latvia*.

The majority of judges, who found there to be a violation of Article 8 ECHR, were of the opinion that given that the previous situation of the child was unknown and no additional information concerning the child was sought from the habitual residence[194] it was considered that the return order had been based on a limited amount of evidence. Additionally, evidence had been presented by the mother and a psychologist, neither of these were considered by the national court in the State of abduction. The majority saw that as the proceedings in the State of abduction had lasted an excessive period that the child had settled in the new environment. In contrast, the dissenting opinions held that the State

[192] Beaumont et al. p 53.
[193] *Phostira Efthymiou et Ribeiro Fernandes v. Portugal, (no. 66775/11) 2015*
[194] Information concerning situation of father and his alleged incapability to care for child as alleged by mother. See McEleavy, 2015. p 400 see also European Court of Human Rights. Factsheet – International child abductions. 2020. https://www.echr.coe.int/Documents/FS_Child_abductions_ENG.pdf. p 14-15.

of abduction had acted within margin of appreciation in giving a strict interpretation of Article 13(1)(b). Referring to majority application of general principles in *X v. Latvia,* it was unspoken but clear that exceptions are to be strictly interpreted and burden of proof lies with person opposing return and that if return would be refused every time a psychologist presented a report considered to have emotional consequences for young child then Hague Convention would be watered down of its meaning.[195]

In connection to first investigating the merits of the allegation of the grave risk of harm, there have been some issues concerning the extent of consistency in the examination that has been carried out. In the case of *Karrer v. Romania*[196]*,* the left-behind parent was not given the opportunity to present a defence against the allegations taken against him by the abductive parent.[197] The court in the State of abduction only considered the report presented by the mother where it was alleged that the child would be placed in grave risk of harm if returned to their father. This was seen by the ECtHR as a fundamental flaw in the proceedings as the defence was not sufficiently examined. Therefore, it was not in the best interest of the child and a breach of Article 8 ECHR of both the child and the left behind parent. Fairness in abduction proceedings is required and both parties, against return and for return, must be given the chance to be heard and present their case. Especially the left behind parent needs to be heard in a fair and just proceeding where the allegations made by the abductive parent might be exaggerated and even false.

3.2.1. Assessment of the allegations of grave risk of harm

It is difficult to see how courts in the State of abduction could determine whether the grave risk exists without an excessive examination the facts of alleged abuse. The burden of proof lies with the person alleging that there is a grave risk, meaning the abductor. Article 13(3) is the only part in the Hague Convention referring to examination and it states that *"judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent*

[195] McEleavy. 2015. p 399-400.
[196] *Karrer v. Romania, (no. 16965/10) 2012.*
[197] *Karrer v. Romania, (no. 16965/10) 2012,* press release issues by Registrar of the Court. http://hudoc.echr.coe.int/eng-press?i=003-3853195-4429632 (last visited 9.6.2020)

authority of the child's habitual residence".[198] As the State of abduction most likely lacks of too much information about the child prior to the abduction the State of abduction can examine information of the child provided by the State of habitual residence. On the other hand, as great as this sounds in theory, it will most likely work in practice and is experienced as relatively ambiguous as this exchange of information is only possible if the State of habitual residence regards this as "desirable".[199] As the merits of the case are to be investigated in the habitual residence, the exchange of information about the social background of the child is most likely not possible and rarely occur.[200] Foremostly due to no existing provision or mechanism in Article 13 Hague Convention to ensure this is transaction.[201]

The approach introduced in the case of *X v. Latvia,* in paragraphs 107-108, might therefore be the best option to determine the grave risk of harm as it, as noted in the previously, emphasizes the requirement of efficiently examining the arguable allegations of grave risk. The approach of effective examination, as mentioned before, has two sides, namely the examination of the allegations of grave risk and protecting the child against these risks and making sure that adequate safeguards, protective measures, are provided in the State of habitual residence. In *X v. Latvia*, it was emphasized that the consideration of whether the protective measures are adequate should come after the effective examination of the allegations.[202] In practice, the reason for this sequence is based on the fact that in order to understand what kind of protective measures are required the risk has to be assessed. In other words, first the risk must be assessed to understand the weight of the protective measures required. Of course, the challenges faced here are that contested allegations that cannot be genuinely verified, for example due to difficulties in gathering evidence of the risk and the social background of the child from the State of habitual residence as discussed earlier.

The approach in *X v. Latvia* has a lower burden on the State of abduction than the one in *Neulinger,* where the in-depth examination of the entire family situation required the State of abduction a higher burden in terms of examination on the circumstances of the family

[198] Article 13 Hague Convention.
[199] McEleavy.2015. p 376.
[200] McEleavy.2015. p 376.
[201] Ibid. 2015. p 376.
[202] *X v. Latvia [GC], (no. 27853/09), 2013*. para 108.

situation. In *X v. Latvia* approach, the allegations are to be examined efficiently and based upon this examination it is then determined whether a grave risk exist and that maximum 'effectiveness' of the examination is not appropriate. If this effective examination is carried out properly no human rights are violated.[203] Based on this it would be advisable to use the *X v. Latvia* approach when assessing whether a grave risk of harm exists.

General obligation of uncertain scope, this is what the general principles established by the ECtHR Grand Chamber in *X v. Latvia* caused as for the return orders. By this meaning that obligations directed to the States were quite general and no actual direction were given on how this should be carried out. States should protect individual children from grave risk of harm when returned and the State of abduction must satisfy themselves that 'adequate safeguards are convincingly provided' as wells as that 'tangible protection measures' are at hand where a known risk exists.[204] This could be carried out thru inspection of the living arrangements that would take place as the return would take place as well as by maintaining contact with the child, post-return. However, such inspections concerning the quality of the protective safeguards that possibly would be ensured in the State of habitual residence to be undertaken by the State of abduction would not only lengthen the proceedings but also these types of procedures would expand the scope of authority. The practicality of these types of measures should be questioned as there is no existing mechanism to verify the achievement of such extensive measures. Moreover, the fact that these would require additional time to the proceedings they would also require resources. This is also why the defence should be examined at first hand. If the grave risk is established the impact on the child should be considered short- and long-term risks as assessing the protective measures. For State of abduction to be satisfied that adequate safeguards in the State of habitual residence, leaves a quite broad vision of what this might entail. This might lead to States to turn to the more traditional presumptive concept of simply relying that the State habitual residence has the means for adequate protection of the child and that there are no grounds for doubting the quality of protection that other States provide and have to offer. [205] Inspections by the authorities in the State of abduction

[203] Momoh. p 648.
[204] McEleavy. 2015. p 395.
[205] McEleavy. 2015. p 395.

of how the protective measures would be ensured would undoubtably enable a more well-established protection for the children.

The burden of proof lies with the one resisting the return, in other words the abductor. If the abductor has *prima facie* evidence, then the burden is transferred to the national authorities of the State of abduction, as they are to determine if the alleged risk actually exists. As the State of abduction is to consider the allegations and make an efficient examination thereafter, there is a temptation and risk that this investigation will become more excessive that originally meant, especially when there are allegations of domestic violence and vulnerability.[206] Therefore, McEleavy questions the obligation of States to undertake an examination of the grave risk of harm in relation to the burden of proof that the abducting parent has and that this could lead to the advantage of the abducting parent. This because, it removes the burden of proof from the parent alleging the risk on to the State of abduction as the State must examine these allegations to confirm or exclude the possibility of a risk.[207]

As greater weight is given to the examination of risk it might also open door to exploitation due to the possibility of return proceedings drifting into examination of custody merits. However, to the problem at hand, that being the differing interpretations of Article 13(1)(b) Hague Convention, the effective examination gives a reason to reach an suitable approach of determining the merits of defence on the grounds for a grave risk, like domestic violence. [208] Whilst acknowledging that by examining the merit of the allegations with greater sensitivity there is a danger that this "opens the door to exploitation". [209] However, this danger "*must be balanced against the danger of assuming the facts and prejudicing a left-behind parent in those proceedings and potentially subsequent welfare proceedings".*[210] Of course, the duration of proceedings is in conflict with the procedural aspect of the Hague Convention proceedings, that are to be determined within six weeks, but taken into consideration the complex nature of these abduction cases, it is better than keeping the left-behind parent from maintaining a relationship and on the other hand the abducting parent from having the child sent back before the case is disclosed. After *X v.*

[206] Momoh. p 646.
[207] McEleavy. 2015. p 396-397.
[208] Momoh. p 646.
[209] Ibid. p 646.
[210] Ibid. p 646.

Latvia, national courts undoubtably have greater reflection and sensitivity towards Article 8 ECHR and human rights arguments in international child abductions cases.

In Article 11(4) the Brussels II Regulation states that return of child cannot be refused on basis of grave risk or intolerable situation "*it is established that adequate arrangements have been made to secure the protection of the child after his or her return".*[211] However, there is no mentioning of how this is to be secured or guaranteed or who is responsible for the alleged protection. According to the Practice Guide for the Brussels II Regulation there is an obligation to order the return of the child to cases where a return could expose the child to such harm, but it is nevertheless established that adequate arrangements have been made to secure the protection of the child after the return.[212] The national authorities must guarantee that and demonstrate that they have concrete measures to protect the child once returned. [213] While applying the Brussels regulation in intra-EU abduction cases it is considered good practice by interpreting Article 11(4) of the Brussels II Regulation to have courts first investigate whether adequate protective measures exits to protect the child against the emotional harm arising out of exposure to domestic violence between the parents, when considering a non-return on the basis of allegation of risk under 13(1)(b) of the Hague Convention. [214] This approach can be seen as presuming the existence of harm before an assessment of the grave risk of harm has taken place.[215] However, this approach supports the aim of the Hague Convention as further emphasis is placed on returning the child to the habitual residence and in a way reduces the possibility of abductors who with fault accusations rely on the grave risk of harm exception. As the Article 11(8) of the Brussels II Regulation makes it possible for the State of habitual residence to trump a non-return decision with a certificate for enforcement made possible under Article 42 Brussels II Regulation, in theory the State of abductions has no option but to return the child in this circumstance. Where a State refuses to return the child despite a certificate of enforceability having been issued the case can be reviewed by the European Court of

[211] Article 11(4), Brussels IIa Regulation 2003.

[212] Practice Guide – The Brussels II Regulation.
[213] Momoh. p 636.
[214] Momoh. p 635.
[215] Ibid. p 636.

Justice (ECJ). The ECJ has implied that the best interest of the child can best be applied through strict interpretation of the Brussels regulation and mutual trust between States.[216]

The Brussels Regulation rules are created for a more strictly regulated return regime and seeks to ensure that the child is returned to the State of habitual residence. However, in cases where a risk of grave harm under Article 13(1)(b) would exists, the application of certificate of enforceability is questionable as it could lead the exceptions futility. In theory where the State of abduction has rejected a return based on 13(1)(b) the State of habitual residence could trump this by enforcing Article 42. This was the case in *Aguirre,*[217]where the return of the child was rejected based on the objections of the child. Spain, as the State of habitual residence, responded to this with a certificate of enforceability. The custody proceedings were in Spain and the Spanish court did not hear the child even though she was mature enough and despite that being the enough reason for the non-return. Germany, the State of abduction, hesitated to enforce the certificate of enforceability as the Spanish court had not heard the child before it made the judgement and held that there should be an exception to the enforcement of return on the basis of the certificate of enforceability due to infringement of fundamental rights.[218]

The certificate of enforceability is based on the principle of mutual trust, as it is seen that Member States are "capable of providing equivalent and effective protection of fundamental rights".[219] Despite the fact that the Spanish court did not hear the child and additionally breached both the child's and the mothers right to fair trial, the ECJ held that Germany should enforce the certificate. In the present case the ECJ had the opportunity to rectify and prevent States of habitual residence from taking advantage of the power that the certificate of enforceability entails. The case of *Aguirre* is an exceptional case, the weight that ECJ gave the principle of mutual trust gives opportunity to bad practice if the States of habitual residence would consistently issue the certificate without thought given to the examinations carried out by the State of abduction. In that case the exceptions to return would lose their meaning and children would lose their protection where needed and every return by the ECtHR would become automatic. This is basically the opposite to the *X v.*

[216] Walker & Beaumont. 2011. p 239.
[217] *C-491/10 PPU Joseba Andoni Aguirre Zarraga v Simone Pelz. 2010.*
[218] Walker & Beaumont. 2011. p 241.
[219] Walker & Beaumont. 2011. p 245.

Latvia approach. However, the case law where Article 11(8) has been issued show that in practice the enforced return on basis of the certificate of enforceability is not being achieved and children are rarely returned because of the this.[220]

3.2.2. Interim measures

Interim measures are made possible by ECtHR Rules of Court - Rule 39.[221] Due to the likeliness of the abduction proceedings being prolonged, this might lead to the left-behind parents' being deprived from a relationship with abducted child. The interim measures can issue by the ECtHR and enable continued contact between the abducted child and the left-behind parent possible as the court proceedings are ongoing as well as minimize the risk for parental alienation.[222] Interim measures can be ordered by the ECtHR, *"at the request of a party or of any other person concerned, or of their own motion, indicate to the parties any interim measure which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings*."[223] In theory and possibly in practice the interim measures would make the duration of prolonged proceedings acceptable from the perspective that the relationship of the ones concerned are not necessarily deprived. The advantages of the interim measures are two folded, namely the abducting parent can apply these measures to prevent the child from being ordered to return before the proceedings are completed and left-behind parent can ensure the contact rights with the child during the proceedings. [224]

3.2.3. Undertakings in the State of habitual residence

One option for the State of abduction to protect the child in return decisions is to introduce undertakings. In domestic violence cases these undertakings are to protect the returning child and the abducting parent from the abuse of the left-behind parent. These undertakings

[220] McEleavy.2015. p 373 and 379.
[221] Rules of Court. 1 January 2020. https://www.echr.coe.int/Pages/home.aspx?p=basictexts/rules
[222] Parental alienation is perceived as one parent manipulating the child into becoming estranged to the other parent and not wanting to maintain contact with the other, hence the child might be opposing to the return to the left-behind parent. Schuz, 2013. p 139.
[223] Rules of Court. 1 January 2020, Rule 39(1). https://www.echr.coe.int/Pages/home.aspx?p=basictexts/rules
[224] *Eskinazi and Chelouche v. Turkey, (no. 14600/05) 2005.*

are set out by the State of abduction to the State of habitual residence and can take form through restriction orders where the left-behind parent is not to approach the child or the other parent, once returned, without permission. [225] Other forms of undertakings could be financial support and provision of accommodation for the child and abductive parent, withdrawal of criminal proceedings from being commenced against the abducting parent.[226] However, it is questionable if these undertakings actually are of any value in protecting children and the abducting parent in cases where there is actually some truth behind the allegations of violence. Undertakings are not usually judicially enforceable in the State of habitual residence, making them in theory a great protective measure but less so in practice. [227] In publications released, there are indications that the increased use and reference given to protective measures has led to awareness to the actual dangers that might exist for the child in relation to domestic violation allegations. [228]

3.3. Hearing the child – not right to veto

Article 13(2) Hague Convention makes the hearing of the child's opinion possible as it states that authorities in the State of abduction "…*may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views*". However, as seen by the wording of the Article "States may" indicating that this is not an obligation. The choice of hearing the views of a child is not an option under UNCRC according to which children have a fundamental right to be heard and this right is guaranteed under Article 12 UNCRC. Article 12 UNCRC states that Contracting Stats shall ensure that a child "*capable of forming his or her own views" has the right to express these view in all matter concerning him/her and these views are to be "given due weight in accordance with age and maturity*". According to the UNCRC Committees General Comment No. 12, age and maturity refers to the capacity of the child to form an autonomous opinion and this is to be evaluated on a case-by-case basis depending on the child in question.[229] Overall there is no specific way to assess the capacity of a child and this has to be developed.[230] When

[225] Schuz, 2013. p 441.
[226] Ibid, 2013. p 441.
[227] Ibid, 2013. p 441.
[228] Ibid, 2013. p 433.
[229] CRC/C/GC/12 20 July 2009. point 44.
[230] Ibid. July 2009. point 44.

taking into account the emphasis ECtHR has placed on the principle of the best interest of a child,[231] as one of the important principles to be considered in of child abduction proceedings, it could be assumed that this would naturally mean that importance should also be given to the views of the child. The fact that child's views are to be heard is supported by both the Hague Convention and the Brussels Regulation, the former in its Article 13(2) and the latter in its Article 11(8) - if it is seen as appropriate taking into consideration the age and maturity of the child.

Despite the support given in theory to the opinion of a child in return proceedings, by Hague Convention, UNCRC and the Brussels II Regulation, the opinion of the child might not be so obvious. In *Blaga v. Romania*[232] a mother abducted her three children from USA to Romania, her native country. The children were 8-10 years of age, the twins being eight and the oldest child ten at the time of the abduction. The children were heard in the return proceedings by the national courts in Romania (State of abduction) where they all expressed their will to stay and not to return to USA (State of habitual residence). It was seen that the oldest child's opinion was appropriate to hear.[233] Therefore, it was concluded that the opinions of the two younger children should also be acknowledged, as it would be inappropriate to separate siblings as this would be traumatizing and not in their best interests.[234]

An application was issued by the father to the ECtHR, claiming that the Romanian court solely relied on the opinion of the children with no desire to return the child, hence the court had misinterpreted Article 13(2) Hague Convention.[235] The ECtHR agreed that while children's views concerning a return to the habitual residence must be considered, however, "*their opposition is not necessarily an obstacle to their return*".[236] The ECtHR held that conditions under Article 13(2) of the Hague Convention were not met as a child's views should be considered in coherence with other facts in the case when deciding for

[231] *Neulinger and Shuruk v. Switzerland [GC], (no. 41615/07), 2010* but in *X v. Latvia [GC], (no. 27853/09), 2013* as well.
[232] *Blaga v. Romania, (no. 54443/10) 2014.*
[233] Under Romanian law ten years is the minimum age to take the child's view into account and the older child had turned eleven at the time of the proceedings. *Blaga v. Romania, (no. 54443/10) 2014.* para 20.
[234] Separating siblings would most likely place the child in an intolerable situation as sibling relationship are generally the most enduring of all human relationships and of great importance and value to children. See. Schuz 2013. p 434.
[235] *Blaga v. Romania, (no. 54443/10) 2014* para 21.
[236] *Blaga v. Romania, (no. 54443/10) 2014* para 66.

return or non-return. The ECtHR specified that the Romanian court justified the non-return solely based upon the opinion of the children, therefore, the national authorities in Romania had not met the procedural requirements under this specific provision and there had been a violation of the father's right under Article 8 ECHR.[237] The emphasis placed on the views of the children, the insufficient balancing of the fathers' rights under Article 8 ECHR, the failure to consider the possibility of return and how this would affect the children, were all reason that constituted a breach under Article 8 ECHR.[238] In addition the national authorities had not acted in a prompt manner, adding to the reasons for breaching the procedural requirements.

In the case of *M.K v. Greece*[239], the opinion of child was given great regard. The mother was granted custody of her sons, I and A, after the divorce from her husband. She as well as her ex-husband were settled in Greece when she a few years after the divorce decided to move to France. The custody of the two boys, the mother gave temporarily to her own mother, who also lived in Greece. During this time, the father unsuccessfully tried to change the habitual residence of his sons to be placed with him. Following this incident, a court order confirmed that A, should live with his mother, in France, leaving the brother I. to live with their father in Greece. A subsequent French court order established the habitual residence of A. in France. His father had rights of contact that were to be exercised in Greece.[240]

The circumstances escalated few years later as A. was visiting his father in Greece and the father refused to return him to the mother at the end of that visit. As expected, the mother filed an application to return A under the Hague Convention. This was in May 2015, and in September that same year the competent court in Greece order A to be returned to his mother in France. In the same manner as in many other international child abduction cases,[241] even though the decision for return was final, the order was never enforced by the national authorities in Greece. Hence, A. remained in Greece with his brother I. (who never

[237] European Court of Human Rights. Factsheet – International child abductions. 2020. https://www.echr.coe.int/Documents/FS_Child_abductions_ENG.pdf
[238] McEleavy. 2015. p 389-399.
[239] *M.K. v Greece (application no. 51312/16) 2018.*
[240] Strasbourg observers. Sara Lembrechts March 22, 2018. https://strasbourgobservers.com/2018/03/22/m-k-v-greece-implementing-childrens-rights-in-legal-proceedings-following-an-international-parental-abduction/
[241] For example, *Ignaccolo-Zenide v. Romania, (no. 31679/96) ECHR 2001, Sylvester v. Austria, (no. 36812/97), 2003*.

moved to France together with A in the first place) and his father. Without taking into account that A had a brother, with habitual residence in Greece, French court stated that the custody of A should be exercised jointly by his parents but that A should live with his mother in France and the father would be granted rights of contact. Despite this decision A was not returned to France this time either.

The proceedings went back and forth for around one and a half years during which the mother tried to return A to France and the father in his turn tried to prevent this from taking place. The children were heard by court, social workers and a psychologist, where A repeatedly expressed his will of wanting to remain in Greece with his brother and father and not to return to France.[242] The mother complained to ECtHR that the Greek national authorities had violated her rights under Article 8 ECHR as they failed to facilitate the return of A. despite the custody that she possessed.

As important as the right of the child to be heard is, the right cannot overlook or be separated from the procedural context in which respect for this right must be ensured.[243] The final decision on return had already been made, so the fact that the child's view were used as a ground for re-examining the decision earlier given to return the children is highly controversial as the child's right to express views must operate within the framework of procedures and cannot therefore serve as a justification for re-examining substance issues which have already been decided on. Even though a court decision can be appealed against, the rights of children alone are not a basis for setting aside outcome of a final decision.[244]

Dissenting judge Koskelo, emphasized that

> *"The best interest of a child are a substantive consideration when an authority carries out the task which have been lawfully entrusted to it, but the best interest of a child are not capable of creating competences which an authority does not otherwise lawfully possess, or of doing away with the limits of those competences*."[245]

[242] Strasbourg observers. Sara Lembrechts. March 22, 2018.
[243] *M.K. v Greece (application no. 51312/16) 2018.* Dissenting opinion judge Koskelo. para 19.
[244] *M.K. v Greece (application no. 51312/16) 2018*. Dissenting opinion judge Koskelo. para 20
[245] *M.K. v Greece (application no. 51312/16) 2018*. Dissenting opinion judge Koskelo. para 7.

By this meaning that the best interest and the right to be heard are to be respected but within the jurisdictional framework of the relevant proceeding and not given the prerogative but be maintained within the procedural objective. Article 13(2) of the Hague Convention must be strictly interpreted and cannot solely be invoked as a ground for non-return, due to the issues authorities face with the enforcement of the return order, as a child's opinions are sensitive to the passage of time and can become decisive due to non-enforcement. The more time that passes, the more likely it is for the child's views to become opposing towards return. This becomes clear in *M.K v. Greece* where the child, in 2015, describes the relationship with both parents as good but did not want to be separated from his brother – later the next year the opinion was far more negative towards a return.[246]

The passage of time has critical and irremediable consequences on the relationship between child and the left-behind parent.[247] Under international human rights law, States assure that they will respect the fundamental right that every child can freely express his or her views in all matters affecting them, and that these views will be taken seriously in accordance with the child's age and maturity. In the case of *Blaga v. Romania* the fact that the two younger children had their older sibling who was seen as mature enough to be heard and as it was not in their best interest to be separated as this would lead to them being placed in an intolerable situation, their views were also considered. However, as for young children overall this is not most likely the case, if other aspects do not indicate a non-return. It would be important to facilitate the hearing for all children, especially younger children, through help of experts and increase the sensitivity to the non-verbal expression of relatively young children in cases where there is a believed possibility of exception of Article 13(1)(b) Hague Convention. Overall children are to be provided the help of competent authorities in exercising this right, like teachers, social workers, or psychologist for example.[248]

Even though the view of children are important to acknowledge it must be held in mind that children due to their vulnerability can be easily manipulate by the abductive parent with the aim of trying prevent the return of the child. In this sense Article 13(2) of the

[246] Strasbourg observers. Sara Lembrechts. March 22, 2018.
[247] See amongst others, *Maire v Portugal;* I*osub Caras v Romania; Carlson v Switzerland* and *Adzic v Croatia* - where the passage of time lead to a violation of Art. 8 ECHR
[248] CRC/C/GC/12 20 July 2009. point 42.

Hague Convention could be exploited if a parent uses parental alienation and tries to influence the views of their child. [249] The child should also be able to accept the consequences of his or her decision, namely that he or she is not returned, and this may affect his or her relationship with either the abductive or the left-behind parent. It is difficult to strike a balance between rights of children with the overall proceedings. In addition, it is a difficult and sensitive task to resolve the best interests and opinions of an individual child with other general interests –in particular with the general interest of promoting return, so as to deter parents from unlawfully removing or retaining their children without the consent of the left-behind parent.

3.4. Delays in proceedings

It is not uncommon for children to spend extended periods of time in the State of abduction whilst return proceedings run their course. The more integrated a child becomes, the more difficult it is to actually enforce the return.[250] One common reason for prolonged proceedings are insufficient measures taken by the national authorities in the State of abduction, but also non-cooperating parents who hide the child or refuse to return the child. Possible loss of custody can drive an abductive parent to try to find whatever loopholes to prevent the return of the child. Article 11 of Hague Convention requires judicial or administrative authorities in Contracting States to act expeditiously in proceedings to return children. However, the Article makes no mentioning of the actual enforcement or how this is to be executed. The Hague Convection is only designed to apply to the stage of proceedings where decisions and orders for return are made but there are no provisions that specifically refer to methods that cover the actual enforcement.[251] In reality, this is one essential part of the problem as many States struggle with efficient enforcement of the return order once these orders are made.[252] Significant delays in enforcement can lead to

[249] Beaumont & McEleavy 1999, p 201.
[250] McEleavy. 2015. p 402.
[251] Walker 2010. p 651.
[252] Due to disappearance of child, physical resistance of abductor, lack of response by national authorities, lack of ability of appropriate coercive measures.

conflicting situations where the child is considered to have become settled in the State of abduction.

The ECtHR has always underlined urgent proceedings in abduction cases because "*the passage of time can have irremediable consequences for the relations between the child and the left-behind parent*"[253] and as the passage of time can be used as an argument not to return the child. It is crucial for the competent authorities to be capable to act promptly in such demanding contexts. The passage of time will most likely change the underlying circumstances, therefore a proper conduct in the proceedings under the Hague Convention is crucial. This in order to safeguard rights and interests of those concerned, as prolonged proceedings could benefit the abducting parent as the child could get settled in the State of abduction. Duration in abduction proceedings can only be acceptable if authorities in the State of abduction take all measures expected of them to reach a conclusion in accordance with the Hague Convention. Additionally, duration could be acceptable if authorities enable accordingly, both access and visitation possibilities between the parents and child on a regular basis - interim measures as discussed earlier.[254]

ECtHR has been supportive of the effective enforcement of return orders and holds that "*the adequacy of a measure is to be judged by the swiftness of its implementation*".[255] Unless an exception is established and the State of abduction fails to enforce a prompt returns it will most likely be regarded as a violation of Article 8 ECHR. The ECtHR has noted at an early stage in the case of *Sylvester v. Austria,* that "*a change in the relevant facts may exceptionally justify the non-enforcement of a final return order"*.[256] Here proceedings were initially swift and the State of abduction, Austria, ordered the child to be returned to the habitual residence in USA. During the enforcement proceedings of the return order, the Austrian authorities re-opened the case. About 15 months later the national court reached a decisions where it concluded that the child was not to be returned as they saw that the circumstances had changed fundamentally.[257] As the case was introduced to the ECtHR it held that a change in

[253] *Maumousseau and Washington v France (App No 39388/05) 2008.* para 140.
[254] See section 3.2.2.
[255] *Ignaccolo Zenide v Romania (App No 31679/96) 2000.*
[256] *Sylvester v. Austria, (no. 36812/97), 2003, 37 EHRR 417*, para. 63.
[257] *Sylvester v. Austria, (no. 36812/97), 2003, 37 EHRR 417*, para 40.

the relevant facts might indeed exceptionally justify a non-return.[258] However, despite this statement it went further to note that –

> *"Having regard to the State's positive obligations under Article 8 and the general requirement of respect for the rule of law, the Court must be satisfied that the change of relevant facts was not brought about by the State's failure to take all measures that could reasonably be expected to facilitate execution of the return order."*[259]

The change of relevant facts in the present case was largely due to the uncooperative mother. The ECtHR however, not overlooking the impact that the mother's uncooperativeness had, still held that the national authorities in the State of abduction failed to take reasonable measures expected for them to take in order to return the child a violation of Article 8 ECHR. If the ECtHR would have had accepted the non-return due to the change in the circumstances, which in large were caused by insufficient measures by the authorities, this would have meant that the abducting parent would have benefitted from the wrongful removal only due to passage of time. This would have damaged the function of the Hague Convention and violated the right to family of the left-behind parent and the child.

There are several cases where the abducting parent, unwilling to cooperate, has succeeded to withhold the child from the national authorities.[260] That awakens the question of possible use of coercive measures by the national authorities in the State of abduction in cases where abductive parents refuse to cooperate. However, States are not to use coercive measures to achieve the return of the abducted child to reassess a return because enforcement proves difficult or almost impossible due to uncooperative parties as this is seen as not being in the best interest of the child. Therefore, coercive measures are to be limited, as the use force in such sensitive situations and area of law is not preferable.[261] Sanctions are more desirable in these situations, where the abductive parent is uncooperative. The ECtHR has stated that even though authorities must do their utmost to facilitate cooperation and return, coercive measures are to be limited, as interests, rights,

[258] Walker 2010. p 653.
[259] Walker 2010. p 653.
[260] *Ignaccolo Zenide v Romania (App No 31679/96) 2000, Maire v Portugal (App No 48206/99) ECHR 2003 and PP v Poland (App No 8677/03) ECHR 2008.*
[261] Walker 2010. pp 655.

and freedoms of all concerned must be considered,[262] most importantly the best interest and right of the child as well as rights under Article 8 ECHR.[263] It is important that States strive to maintain, as far as possible, the child's relationship with both parents as this is most likely in the best interest of the child.[264] The Guide to Good Practice on Enforcement,[265] does give a quite round about answer to the question of whether it is acceptable or suitable, and if so, to what extent coercive measures may be used by national authorities in order to enforce a return order. It both recommends States to make that option available if necessary, but also makes a reference to the fact that these measures are not common as this is not in the best interests of the child.[266] When it comes to the ECtHR it makes clear that coercive measures are to be the absolute last resort, as this might cause serious harm and trauma to the child, and therefore should be avoided. [267]

Ineffective measures taken by national authorities in the State of abduction during the return proceedings not only violate the left behind parents right to family under Article 8, but in some cases also their right to a fair trial under Article 6 ECHR. The ECtHR has held that where national authorities in the State of abduction fail to take measures to return the child within reasonable time, resulting in lengthy proceedings of undue delay, this will most likely constitute a violation of Article 6(1) ECHR.[268] The length of proceedings and the reasonableness of the duration must be assessed in relation to the circumstances of a case. Special consideration must be given to certain criteria, namely "*the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute*." [269] In complex cases it could be seen acceptable if the proceedings last longer than expected, but then there should be a reasonable explanation for this, like the need to consult and expert in relation to the child. If neither of the mentioned criteria's cause any excessive problems in the proceeding, then the national authorities should be able to conclude the proceedings within reasonable time. As the length of the proceedings have a major impact on the child and the left behind parent,

[262] *Maire v Portugal (App No 48206/99) ECHR 2003, para 71.*
[263] *Maire v Portugal (App No 48206/99) ECHR 2003, para 71.*
[264] Walker 2010. p 656.
[265] Guide to Good Practice Child Abduction Convention: Part IV – Enforcement.
[266] Guide to Good Practice Child Abduction Convention: Part IV – Enforcement. para 24.
[267] Schuz. 2015 p 25-26.
[268] *Hoholm v. Slovakia, (no. 35632/13)*, 2015

[269] *Hoholm v. Slovakia, (no. 35632/13), ECHR 2015. para 44*.

especially concerning their relationship, the left behind parent has much at stake. Therefore, the objectives of the Hague Convention are to be respected by national courts in the State of abduction. ECtHR has made it clear that national courts are only to examine questions concerning "*whether there has been a removal or retention of a child, whether such removal or retention was wrongful, and whether there are any obstacles to the child's return*".[270] There was especially a fear after the case of *Neulinger*, as States were required to investigate in-depth the circumstances the case, that proceedings would drift into examine the underlying custody merits. This would prolong the proceedings significantly and be against the aim of the Hague Convention, leading to unreasonable examination of the merit of the case and unreasonable measures outside of what is required. Cases would not meet the criteria's that make duration acceptable, leading to violation of Article 6(1) ECHR.

Despite the reality that abduction cases take relatively long time to conclude, abduction cases have in fact a priority in application under ECtHR. Abduction cases fall under urgent application under the Courts Priority Policy Rule 41 of the Court. This means that cases of "*particular risk to life or health of the applicant, other circumstances linked to the personal or family situation of the applicant, particularly where the well-being of a child is at issue, [or the] application of Rule 39 of the Rules of Court"*[271], meaning that they are of urgent application. However, as can be concluded from all the various cases that the ECtHR has taken on, this policy of urgency is not sufficient enough as there are large quantity of cases that endure from duration even though all cases should receive the same priority when processed.[272]

To comply with six-week timeframe it would be necessary to adopt special procedures to reduce prolonged proceedings and perform a sufficient examination accordingly to the ECtHR. The 'effective' examination, as referred to in *X v. Latvia*, could enable a comprehensive - yet limited examination of circumstances, as long as it does not cross the line to investigating the underlying custody merits and so that the duration can be kept to the minimum. To achieve this comprehensiveness, States of abduction must not treat the examination as a 'in-dept' one, it is not required to achieve the full effectiveness in a

[270] *Hoholm v. Slovakia, (no. 35632/13), ECHR 2015. para 47.*
[271] Heri and Keller. p 294.
[272] Ibid. p 294.

process that is to be prompt.[273] Additionally, a comprehensive yet limited examination could be possible if the national courts would strictly follow a timetable. If properly executed and correctly interpreted, an effective examination of arguable risks could be executed so that the Hague Convention and the ECHR are in harmony. The delays would necessarily be less excessive, and rights would be protected as well. According to Beaumont et al, for States to be able to execute a consistent effective examination within the limited time that is provided by the Hague Convention and to avoid delays, a light touch review is needed.[274] The obligation to carry out an effective examination does not mean that the welfare of the child must be investigated, as that is to be carried out in the State of habitual residence. If the time schedule for return is to be achieved, the effective examination must first test the defence to not return the child, then make a judgement in the light of these findings. However, for the judgment to be efficient in terms of present case, in cannot be stereotyped or automatic. As allegations of Article 13(1)(b) grave risk of harm under the Hague Convention are presented States of abduction tend to start by considering the status of protective measures in the State of habitual residence when it would be better to first consider whether there is something behind the allegations presented. First after the examination of the allegation, should the consideration of the protective measures in the State of habitual residence take place, if exception is established.[275] This because the requirement to give a sufficiently reasoned decision will allow the ECtHR to review any applications related to the Hague Convention quickly. Ideally where the judgments of the national court in the State of abduction are obvious and adequately reasoned, applications could be directly proclaimed as inadmissible. Thereby solving the problem of delay before the ECtHR in most applications. The ECtHR should only take a complaint by parents under investigation where it is clear that the judgements in the State of abduction have failed to give adequate reasons for why the exceptions were applied.

Prompt return supports the wellbeing of the child, who is first traumatized by the removal from the familiar environment and family, where after the child spends time in the State of abduction due to delayed proceedings. If proceeding last too long the abducted child might

[273] Beaumont et al. p 45.
[274] Ibid. p 45.

[275] Momoh. p 650.

reach the age of maturity, lose his or her emotional ties to the left behind parent or get settled into the State of abduction to the extent that a return constitutes a disproportionate hardship. If the child then after this long time period is returned to the habitual residence this will once again affect the child negatively as children easily adapt to new situation and once again will be removed to an environment that might have become unfamiliar after so many ears of being away.

4. CONCLUSION AND DISSCUSSION

The direction that the ECtHR took in cases like *Neulinger* and *X v. Latvia* can be regarded as ambiguous and, in many ways, contradicting and unacceptable. However, they demonstrated the issues that have become relevant in the recent times, where removals are carried out by primary caretakers with strong connections to the State of abduction and where a return necessarily might not be as simple due to alleged exceptions to return. In these cases, it is also easier for States to drift from the aim of the Hague Convention, that is prompt return and efficient return proceedings. Therefore, most challenging task that the national courts are faced with, both in theory as well as in practice, is for them to ascertain how to reach an appropriate balance between a strict interpretation of alleged exceptions under the Hague Convention (in order to avoid rewarding the abducting parents for their wrongdoing), while still giving the exceptions a sufficient assessment to make sure that the child is not returned to an environment that could entail risk for them. National authorities are expected to reach a return decision within a short time frame whilst at the same time make a genuine evaluation where an alleged claim of an exception to return under the Hague Convention has been introduced. This is in order to avoid violating rights under Article 8 ECHR. Child abduction proceedings and enforcement of return orders have proven to be different among States, and this has not been eased by the confusing judgement given by the ECtHR like the ones discussed in this thesis, which all more or less suffered from prolonged proceedings due to different reasons. As a result, there have been suggestions about various alternative solutions that could be implemented and taken as part of the procedures to lessen the complications and problems highlighted concerning enforcement of return orders.

One of these essential proposals has been an *additional protocol* that would function as a complementary instrument to the Hague Convention. A protocol could clarify some of the uncertainties concerning specific rules and obligations that the Hague Convention entails, referring to Contracting States at different stages of abduction proceedings. If introduced, a protocol could in addition to possibly reducing the amount of cases that suffer from prolonged procedures due to lack of enforcement, also strengthen the rights of abducted children and left behind parents as well as offer them adequate protection. [276] If appropriate rules are created, then this should greatly reduce the number of cases, where it is no longer suitable to return the child due to the passage of time.[277] The main feature of the protocol would entailed rules which would add to the speed and effectiveness of enforcement proceedings. This could also naturally strengthen the applications of the Hague Convention in all Contracting States. Hague Convention already has various Practice Guides[278] on different aspects. Unfortunately, these guidelines have no legal weight as they impose no obligations on States, only recommendations and suggestions on how to apply the Hague Convention. Therefore, a protocol to determine legal obligations to enforcement would be a step in the right direction for protecting rights of those involved which has become apparent through ECtHR case law.

One of the main purposes would be to ensure that both the abducted child and the abductor could enjoy a safe return to the habitual residence. This is favourable as then the child and the abducting parents will not be separated as this would in most cases not be in the best interest of the child. Currently, when a child is returned, the State of abduction has no legal effect and cannot be sure that protection is ensured in the State of habitual residence. An additional protocol could give return orders legal weight which would also entail better protection for the rights of the child as well as their best interests. In addition to protecting the child's rights after the return the protocol would also entail rights for the abducting parent. By enabling return of both the child and the abductive parent, the child will have access to both parents which is ultimately in most cases in the best interest of the child. Of course, there is no guarantee that the abducting parent wants or is willing to return. However, if willing then the abducting parent could do so without the fear of being

[276] Walker. 2010 p 682.
[277] such as in *Ignaccolo Zenide v Romania (App No 31679/96) 2000, Maire v Portugal (App No 48206/99) ECHR*
[278] HCCH, Guides to Good Practice.

prosecuted or deported, which in some cases has been the risk and why the parents refuse to return the child due to them being unable to return with them.[279] Therefore, if protective measures could be assured for the abductor in in terms of withdrawal of possible persecution once returned, this would ensure that both parents have a chance to attend custody proceedings in the State of habitual residence and this protects both parent's right to family life.[280]

An additional protocol could strengthen the Hague Convention and settle some of the severe uncertainties of quite serious character, that give root to flagrant enforcement problems resulting in violations of various human rights, there are still States that reject the thought of an additional protocol, deeming it unnecessary. The opposing parties have mainly argued that there is nothing unclear in the application of the Hague Convention but only a lack of compliance that could be tackled with better interpretation of the already existing rules and provisions set out by the Hague Conventions as well as the Guides to Good Practice. [281] This is true as introduction and ratification of a new legal framework of international character would take a long time and be rather difficult on an international level. The best solution would be to strive for a coherent interpretation of the already existing instruments on international child abductor discussed in this thesis. The State parties are increasing so it is more important than ever to keep a unified front in order to lessen the outcome of child abduction and to protect the different interest involved, those of the child's and the parents.

The soft law methods available in abduction proceedings, namely the Guides to Good Practice cover a wide range of aspects that are of great guidance on how States should apply and proceed in different situations and arenas of child abduction. [282] Contracting States should be encouraged to make any legislative changes required to introduce administrative and procedural arrangements that will improve the practical operation of the Convention.[283]

[279] *Neulinger and Shuruk v. Switzerland [GC], (no. 41615/07), 2010* but in *X v. Latvia [GC], (no. 27853)/* for example.
[280] Walker. 2010. 682.
[281] Schuz. 2015. p 40.
[282] Ibid. 2015. p 41.
[283] Ibid. 2015. p 40.

ECtHR has set some important requirements that national courts must fulfil in child abduction proceedings. The ECtHR upheld a reasoning in *Neulinger* that the States of abduction were to examine in-depth the circumstances and make decisions with the best interest of the individual child as the primary consideration. This judgement was re-assessed in *X.* v *Latvia* as the ECtHR held that national authorities in the State of abduction should not examine the merits of the underlying custody issues in return cases under Hague Convention, but instead give allegations that could constitute an exception to return a genuine consideration. This effective examination should keep the child's best interests as a guiding principle, not as the only principle. These requirements by the ECtHR give both give authority to and complement the Hague Convention. This double reference enables the ECtHR to ensure protection for human rights in return cases, and not only repeat and apply the regulations of the Hague Convention. This means that when deciding a child abduction case, national courts must respect both the effectivity of the return objective of the Hague Convention and the need to protect each individual child. This gives national courts a broader and more nuanced perspective on abduction cases than what it did before *Neulinger* and *X v. Lativa.* Before these cases, the ECtHR only referred to the Hague Convention instead of a conjunction with the UNCRC. Given the problems with delay before the ECtHR, the new approach given in *X v. Latvia* could be an ideal method for solving these issues in abduction proceedings, if interpreted correctly. This because the requirement to give a sufficiently reasoned opinion will allow the ECtHR to review any applications related to the Hague Convention in a preferable schedule. Ideally where the judgment of the national court is clearly and adequately reasoned, any application could be directly declared inadmissible, thus solving the problem of delay before the ECtHR in most applications. In addition, the Brussels II Regulation, in the region of EU, works as a great complementary framework to the Hague Convention as it has realised the procedural problems that the Hague Convention has and as children are to be returned even though exceptions are established, if the State of habitual residence has the measures to protect the child. The State of habitual residence may, as another way to the restore the control to the State of habitual residence, also trump the non-return decision which the State of abduction shall adhere and enforce.

It might be correct to assert that the best way to protect the rights of the child is to allow a narrow consideration of such allegations and deny return only when it has been established

that the child will be exposed to a grave risk upon return, or when the legal system in the child's place of residence is clearly incapable of protecting the child upon return. However, as discussed, this could be difficult as evidence can be limited, and States might have an underlying tendency to rely on comity in return proceedings and assume that the State of habitual residence can protect the child once returned. Even though this would be the case, it could also be considered inappropriate to solely rely on comity as an excuse to avoid investigating the allegations of whether the State of abduction could adequately protect the returning child. Where domestic violence is alleged it is important to support efficient interpretation of the exception of grave risk of harm and not exercise discretion that is more favorable to order a return, but efficiently examine the excessiveness of the possible risk and if established evaluate the need for protection in the State of habitual residence.[284] Therefore, the 'effective examination' introduced by ECtHR in *X v. Latvia* could be regarded as good option, if properly executed. However, the effective examination introduced here is restricted to States of abduction under the ECtHR jurisdiction. If this approach could be introduced on a wider scale, it could possibly lessen the disparities of proceedings among States.

[284] Schuz, 2015. p. 88.

Bibliography

Monographs and articles

Atkinson, Jeff. 2011. The Meaning of "Habitual Residence" Under the Hague Convention on the Civil Aspects of International Child Abduction and the Hague Convention on the Protection of Children. Oklahoma Law Review. Volume 63/ Number 4. 2011.

Beaumont Paul & McEleavy Peter. The Hague convention on international child abduction. Oxford: Oxford University Press. 1999

Beaumont, Paul., Trimmings, Katarina., Walker Lara., Holliday, Jayne. CHILD ABDUCTION: RECENT JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS. International and Comparative Law Quarterly vol 64, January 2015. pp 39–63.

Browne. Noah L. RELEVANCE AND FAIRNESS: PROTECTING THE RIGHTS OF DOMESTIC-VIOLENCE VICTIMS AND LEFT-BEHIND FATHERS UNDER THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION. Vol. 60, No. 5 (February 2011), pp. 1193-1238. Duke University School of Law

Eekelaar John. The Role of the Best Interests Principle in Decisions Affecting Children and Decisions about Children. INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 23 (2015) pp 3-26.

McEleavy, Peter. 2015. The European Court of Human Rights and the Hague Child Abduction Convention: Prioritising Return or Reflection? 5 November 2015

Momoh Onyoja, 2019. 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", Journal of Private International Law, 15:3, 626-657

Keller, H. & Heri, C. 2015. Protecting the Best Interests of the Child: International Child Abduction and the European Court of Human Rights. *Nordic Journal of International Law, 84*(2) 2015, pp. 270–296.

Kilpatrick Townsend. 2012. Litigating International Child Abduction Cases Under the Hague Convention. National Center for Missing & Exploited Children.

Kvisberg Torunn E. Child Abduction Cases in the European Court of Human Rights – Changing Views on the Child's Best Interests. Oslo Law Review *02 / 2019 (Volum 6)*

Loo, Hanna. 2016. In the Child's Best Interests: Examining International Child Abduction, Adoption, and Asylum. Chicago Journal of International Law. Volume 17.2. 2016

Schuz Rhona. The Doctrine of Comity in the Age of Globalization: Between International Child Abduction and Cross-Border Insolvency. Brooklyn Journal of International Law, Vol. 40, No. 1, 2015. Pages 33-108.

Schuz, Rhona. 2014. Disparity and the Quest for Uniformity in Implementing the Hague Abduction Convention. Journal of Comparative Law. Vol. 9, pp. 3-48

Schuz, Rhona. 2013. The Hague Child Abduction Convention - A Critical Analysis. 2013. Bloomsburg.

Silberman, Linda. 2005. Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence. INSTITUTE FOR INTERNATIONAL LAW AND JUSTICE NEW YORK UNIVERSITY SCHOOL OF LAW. IILJ Working Paper 2005/5.

Sthoeger, Eran. 2011. International Child Abduction and Children's Rights: Two Means to the Same End. Michigan Journal of International Law. Vol 32/3. 2011.

Walker, Lara. 2010. The Impact of the Hague Abduction Convention on the Rights of the Family in the case-law of the European Court of Human Rights Committee: The danger of Neulinger. Journal of Private International Law. Vol. 6 No. 3, December 2010.

Walker, Lara & Beaumont, Paul. 2011. Shifting the Balance Achieved by the Abduction Convention: The Contrasting Approaches of the European Court of Human Rights and the European Court of Justice, Journal of Private International Law, 7:2, 231-249

Treaties and Statutes

2003 - Brussels IIa Regulation. Council Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000. 2003

1989 Convention on the Rights of the Child, adopted 1989, entry into force in 1990.

1980 - Hague Convention on the Civil Aspects of International Child Abduction, signed 1980 entered into force in 1983

1950 - European Convention on Human Rights, signed in 1950, entry into force in 1953.

General Comments and Guidelines

Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration,* CRC/C/GC/14

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

Guide to Good Practice Child Abduction Convention: *Part VI - Article 13(1)(b).* Available https://www.hcch.net/en/publications-and-studies/details4/?pid=6740

Perez-Vera, Elisa. "Explanatory Report on the Hague Convention on the Civil Aspects of International Child Abduction, 1980", Acts and Documents of the XIVth Session of the Hague Conference on Private International Law, Vol III, 1982

Practice Guide for the application of the Brussels IIa Regulation. European Commission. 2014.

Guide on Article 6 of the European Convention on Human Rights. Right to a fair trial. Council of Europe/European Court of Human Rights. 2020. Updated on 30 April 2020

The right to trial within reasonable time under Article 6 ECHR. A practical handbook prepared by Ivana Roagna. 2018. Council of Europe October 2018

ECtHR Case law

M.K. v Greece (no. 51312/16) 1.2.*2018*

Phostira Efthymiou et Ribeiro Fernandes v. Portugal, (no. 66775/11) 5.2.2015

Hoholm v. Slovakia, (no. 35632/13), 13.1.2015

Blaga v. Romania, (no. 54443/10) 1.7.2014

X v. Latvia [GC], (no. 27853/09), 26.11.2013

Karrer v. Romania, (no. 16965/10) 21.2.2012

Neulinger and Shuruk v. Switzerland [GC], (no. 41615/07) 6.7.2010.

Maumousseau and Washington v. France, (no. 39388/05), 15.11.2007

Sylvester v. Austria, (no. 36812/97) 24.4.2003

Maire v Portugal (no. 48206/99) 26.6. 2003

Ignaccolo Zenide v Romania (no 31679/96) 25.1.2000

ECJ case law

C-491/10 PPU Joseba Andoni Aguirre Zarraga v Simone Pelz. 22.12.2010

Other Sources

Concurrences. The principle of national procedural autonomy was introduced by the European Court of Justice in its *Rewe* case in 1976. https://www.concurrences.com/en/glossary/procedural-autonomy. (Last visited 9.6.2020)

ECHR Blog. X v Latvia Child Abduction Grand Chamber Judgment, 17 December 2013. https://echrblog.blogspot.com/2013/12/x-v-latvia-child-abduction-grand.html (Last visited 11.6.2020)

European Convention on Human Rights. A Convention to protect your rights and liberties. Council of Europe. Available: https://www.coe.int/en/web/human-rights-convention. (Last visited 11.6.2020)

European Court of Human Rights. International Justice Resource Center. https://ijrcenter.org/european-court-of-human-rights/ (Last visited 11.6.2020)

European Court of Human Rights. Factsheet – International child abductions. 2020. Available: https://www.echr.coe.int/Documents/FS_Child_abductions_ENG.pdf (Last visited 11.6.2020)

Factsheet - International child abductions. January 2020. European Court of Human Rights. Press Unit. Available: https://www.echr.coe.int/Documents/FS_Child_abductions_ENG.pdf (Last visited 11.6.2020)

Freedman, 2014. Rights of Custody: State Law or Hague Law? Available: http://www.edfreedman.com/wp-content/uploads/2014/09/Journal-of-Contemporary-Law-Hague-Abduction-Convention.pdf (Last visited 11.6.2020)

Guides to Good Practice. Available: https://www.hcch.net/en/publications-and-studies/publications2/guides-to-good-practice (Last visited 12.6.2020)

HCCH Guides to Good Practice. Available: https://www.hcch.net/en/publications-and-studies/publications2/guides-to-good-practice (Last visited 11.6.2020)

HCCH. Status Table. Available: https://www.hcch.net/en/instruments/conventions/status-table/?cid=24 (Last visited 11.6.2020)

Lhoest, B. The Hague Abduction Convention: Nice in Theory, Difficult in Implementation. Published February 15, 2018. Available https://www.peacepalacelibrary.nl/2018/02/the-hague-abduction-convention-nice-in-theory-difficult-in-implementation/ (Last visited 10.6.2020)

Merriam-Webster. Dictionary. Available: https://www.merriam-webster.com/dictionary/status%20quo%20ante (Last visited 11.6.2020)

Rules of Court.1 January 2020. Council of Europe. European Court of Human Rights. Available: https://www.echr.coe.int/Pages/home.aspx?p=basictexts/rules. (Last visited 2.6.2020)

Strasbourg Observers. 2018. M.K. v. Greece – Implementing children's rights in legal proceedings following an international parental abduction. Available: https://strasbourgobservers.com/2018/03/22/m-k-v-greece-implementing-childrens-rights-in-legal-proceedings-following-an-international-parental-abduction/ (Last visited 11.6.2020)