

40 years of the Hague Convention on child abduction: legal and societal changes in the rights of a child



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Abstract

This in-depth analysis has been commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee in the context of the workshop to mark the 40th Anniversary of the Hague Convention on the Civil Aspects of International Child Abduction. It looks into the implementation of the 1980 Convention, as regards the respect of autonomy of parts, validity of agreements and mediation, and describes, from a practitioner's point of view, how the parents and children see the process. The paper concludes that in order to protect the interest of the child, the 1980 Convention should be maintained with restricted exceptions, but more should be done in terms of prevention. The new measures should include, in particular, harmonisation of the relocation proceedings and principles, enforceability of mediation agreements, and increasing of the autonomy of the parties through the inclusion of residence and custody plans in prenuptial agreements.

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AUTHOR

Adriana DE RUITER, Lawyer, *Tulp Abogados*

Chair of the Board of ASIME, the Spanish organisation for lawyers against International Child Abduction

Associate partner with LEPCA I and LEPCA II

ADMINISTRATOR RESPONSIBLE

Eeva PAVY

EDITORIAL ASSISTANT

Fabienne VAN DER ELST

LINGUISTIC VERSIONS

Original: EN

ABOUT THE EDITOR

Policy departments provide in-house and external expertise to support EP committees and other parliamentary bodies in shaping legislation and exercising democratic scrutiny over EU internal policies.

To contact the Policy Department or to subscribe for updates, please write to:

Policy Department for Citizens' Rights and Constitutional Affairs

European Parliament

B-1047 Brussels

Email: poldep-citizens@europarl.europa.eu

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EXECUTIVE SUMMARY

The in-depth analysis on “40 years of the Hague Convention on child abduction: legal and societal changes in the rights of a child” gives an overview of the current state and biggest challenges of the implementation of the 1980 Convention from a practitioner’s perspective. It looks, in particular, into the challenges related to the respect of autonomy of parts, validity of agreements and mediation in a selected Member States and cases and aims to explain, from a practitioner’s point of view, how the parents and children see the process.

The Hague Convention on the Civil Aspects of International Child Abduction was adopted on 25 October 1980. Its purpose was to prevent the abduction of a child by the non-custodial parent, normally, the father, to an unknown destination. The best interest was to return the child to his or her principal carer and habitual environment.

However, since the mid-80s, the abducting parent was usually the custodial parent, in the vast majority of cases, the mother. The place where the child is taken to is, quite often, the country of origin of the mother, generally known by the child, due to an intensive family relation and visits during holidays. On the other hand, the role of the fathers has shifted considerably, as they are now more active and present in the upbringing of their children.

The rights of children have also changed since 1980. In 1989, the United Nations Convention on the Rights of the Child was adopted, together with the enactment of the new international child protection rules in Europe. The international and national courts have played an important role in the application of the new legislation in abduction cases. The hearing of the child is mandatory, even if the opinion of the child is not necessarily decisive. There is no agreement on the way a child should be heard.

The social and legal background in 1980 were completely different from the situation in 2020. In order to actually protect and guarantee the best interest of the child, the Hague Convention should be maintained with restricted exceptions, but more should be done in terms of prevention.

There are three recommendations in this regard; these three innovations would grant full rights to the free movement of citizens within the European Union (EU):

The first recommendation to the EU is the harmonisation of relocation proceedings and principles to allow relocation, in which, of course, the child’s opinion should have an important weight. To guarantee the effective consideration of the child’s opinion, the EU should work on harmonising the methods for children’s hearings, either by regulation or the instruction of the professionals involved, such as judges and psychologists.

The second recommendation is to improve the enforcement of mediation agreements, even if not signed by the judge of habitual residence. A mediation agreement without enforcement is useless and will only deepen the conflict between parents and harm the children.

The third recommendation focuses on the prevention of child abduction. Reaching agreements on children and their future care, including relocation should be possible, even before their birth. Parents should be allowed to refer to a court to verify whether the enforcement of this agreement is in the interest of the child, as the situation could have changed since the agreement was made and of, course, the agreement could not foresee unknown circumstances. However, principles of common agreed care of children may be included and to potentially avoid abduction or frustrated relocation proceedings.

1. DEVELOPMENT OF CHILDREN'S RIGHTS IN THE FIELD OF CHILD ABDUCTION

1.1. The Hague Convention on International Child Abduction

The Convention on the Civil Aspects of International Child Abduction (HCCA) was adopted unanimously by all the states present during the 14th Session of the Hague Conference on Private International Law on 24 October 1980. Four decades later, more than 100 states have signed the Convention, which is therefore considered to be the star convention of the Hague Conference.

According to the HCCA, child abduction occurs when one parent unlawfully removes a child¹ from the jurisdiction of his/her country of habitual residence, infringing the rights to decide over the child's residence of the other parent. The Preamble of the HCCA explains that the Signatory States seek to *"protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access"*. After a child abduction takes place, the HCCA orders the immediate return to the country of habitual residence, with some restrictive exceptions, as we will see.

After 40 years, the question about whether the legal remedies of 1980 satisfactorily meet the sociological needs of 2020, and whether the HCCA remains consistent with the recent legal developments arises.

1.2. Legal definition of Child Abduction in the HCCA

To understand how the HCCA works, it is mandatory to lean on the Explanatory Report to the Convention prepared by Elisa Pérez-Vera. According to this report, the principal aim of the HCCA is to prevent a wrongful removal, and to guarantee the respect for the legal relationships between children and their caretakers. It is considered in the best interest of the child to achieve a prompt return, where an abduction has taken place².

A precise definition in legal terms on when abduction has been committed is not offered by the HCCA, but two elements are present in all cases: the removal from the habitual environment of a child whose custody had been entrusted to a natural or legal person, or the refusal to restore the child to said environment. As clarified by Elisa Pérez-Vera, the child is taken out of the family and social environment in which his or her life had been developing until the moment of the abduction³. The second element mentioned by Elisa Pérez-Vera is that the person who removes the child, normally one of the parents, hopes to obtain a right of custody from the authorities of the country where the child is taken to, or is being retained.

¹ For the purposes of this briefing, a "child" refers to a minor of less than 16 years, in line with the HCCA, even though in the UNCRC, a minor under 18 is considered a child, and within the scope of the EU, the age of under 21 might be used, depending on the instrument.

² Pérez-Vera, E. P., *Explanatory Report on the 1980 HCCH Child Abduction Convention*, paragraph 9 and 10. Available at: <https://assets.hcch.net/docs/a5fb103c-2ceb-4d17-87e3-a7528a0d368c.pdf>.

³ See note 2, paragraph 11.

Thus, the protection against international child abduction is based upon the respect for custody rights, according to Article 3 of the HCCA. Even if international child abduction is not defined in the HCCA, custody rights are explained in Article 5, and include specifically the right to determine the child's place of residence. This right can be assigned to either both parents, or to only one of them, depending on the national laws of the country of habitual residence of the child⁴. Whether this right exists or not, depends on the national legislation of the country of habitual residence of the child.

Where an abduction has been committed, the HCCA foresees the immediate return of the child, in a quick proceeding that should not exceed six weeks. Exceptions are to be applied very restrictively. The exceptions are laid down in Article 12 and 13 of the HCCA. Article 12 allows the denial of the return where the abduction had taken place at least one year prior to the proceeding, and the child is settled in the new environment. Article 13 (1) (a) provides an exception where the parent left behind had failed to actually exercise the custody rights at the moment of abduction, or had consented to the removal, even implicitly, for example, by allowing the registration of the child in a school in the new country.

A more complicated exception in the HCCA is the "Grave risk" exception described in Article 13 (1) b. This concept has traditionally been the door to nationalism in child abduction cases⁵. Therefore, the Hague Conference decided to develop a *Guide to Good Practices* on the interpretation and application of this article. According to this guide, the exception of grave risk must be interpreted very strictly, due to the literal words used in the text, namely, "grave risk", "physical or psychological harm" and "intolerable situation".

Another important exception is mentioned in Article 13 (2) of the HCCA: the objection of the child. Where the child has attained an age and maturity at which his or her views must be considered, the judge may deny the return order based upon the child's objection.

⁴ Dyer, A. *The Hague Convention on the Civil Aspects of International child abduction – towards global cooperation*, The International Journal of Children's Rights 1 :273-292, 1993, Kluwer Academic Publishers, p. 281.

⁵ Lowe, N., and others, *A Statistical Analysis of Applications made in 1999 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, p. 17. Available at: <http://www.hcch.net/upload/abd2001pd3e.pdf>

2. SOCIAL AND LEGAL BACKGROUND OF CHILD ABDUCTION BETWEEN 1980 AND 2020

2.1. Changes in the social background

The preparatory works of the HCCA started in the 1970s and are based on the Dyer Report⁶. The main characteristics of child abduction are, according to Dyer, the abrupt removal of the child from one country to another by a parent, frequently violating custody rights⁷. Dyer describes five situations of child abduction, which are:

- Removal of the child before any custody decisions are taken by the local court;
- Removal of the child contrary to custody orders;
- Retention of the child after a period of legal visiting rights;
- Abduction contrary to legal custody rights, but having obtained the legal custody rights in the new country; or
- Removal contrary to a removal prohibition.

The removal of a child by the custodial parent is mentioned by Dyer as a special case, called “reverse of child abduction”⁸. At the time of drafting, these cases were exceptional and did not seem to worry the authors of the HCCA, as hardly any attention was paid to these “special” cases.

Thus, the situation the HCCA aimed to prevent was that of a parent removing children from their daily and habitual environment and, especially, from the person who had the custody rights, as well as avoiding the abducting parent to obtain custody rights in the country where the child had been taken to. In these cases, the immediate return to the habitual environment was considered as the best interest of the child. This is also highlighted in the Dyer Report, which states that the child “suffers from the sudden upsetting of his stability, the traumatic loss of contact with the parent who has been in charge of his upbringing, the uncertainty and frustration which come with the necessity to adapt to a strange language, unfamiliar cultural conditions and unknown teachers and relatives.”⁹ The aim of the HCCA was to protect the child from a change of environment, the rupture of its caring parent, the change of the native tongue and new cultural conditions and relatives. This implies that the abductor is not the caring parent, the country and relatives are strange or unknown to the child, and the environment is new.

Indeed, at the time of drafting the HCCA, the abducting parent used to be the father (non-custodial parent)¹⁰. However, according to the statistics available on the website of the Hague Conference, nowadays, the large majority (80 per cent) of abducting parents are the primary carers, or the “joint-primary carer” of the child. Where the taking person is the mother, this figure increases to 91 per cent.

⁶ Dyer, A., The Report on International child abduction by one parent (‘legal kidnapping’) (Doc. No 1, August 1977).

⁷ See note 4, p. 11.

⁸ See note 4, p. 40.

⁹ See note 4, p. 21.

¹⁰ Freeman, M., *Parental Abduction, the Long-Term Effects*, International Centre for Family Law, Police, and Practice, 2014, p. 20.

Mothers were the abducting parents in 73 per cent of all cases. In total 58 per cent of taking persons travelled to a state of which they were nationals¹¹.

This change in the situation is probably due to the evolving migration and globalisation movements. Whereas in the years 1960–1970, the protagonists of the migration movement were guest workers, in the last decades, we can appreciate a growing mobility of citizens all over the world and within the European Union (EU). International families are more and more common. Families are formed by citizens of different nationalities, or families from one country decide to change to another country¹².

Another important change in society since 1980 is the shifting role of parents in the family life. Whereas in 1980 women's labor was still a rarity, and fathers' contributions with the caring of the children were limited, in 2020 most fathers do want – and actually have – an active role in the upbringing of their children, which is also welcomed by most mothers¹³. And by doing so, both parents acquire an important role in the daily life of their children.

These figures show how the social background of child abduction has radically changed. Where the Dyer report aimed at preventing children from being abducted by the non-caring parent to an unknown country, the current situation shows it is the primary carer, and particularly the mother, the one who abducts the children, normally back to her own country, leaving the other important parent behind: the father.

2.2. Changes in the Rights of the Child

2.2.1. International instruments before 1980

At the time of drafting the Hague HCCA in 1980, children were not independent right-holders and were rather considered objects of solicitude and care.

The existing international legal context in the Hague Conference was the Hague Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants. This Convention focuses on pure International Private Law matters, such as jurisdiction and applicable laws. No rights for children are recognised in the Convention, nor are children considered independent right-holders.

At a more public international level, we can mention the Universal Declaration of Human Rights of 1948, also applicable to children, which contains different articles that may be understood as rights of children. In its Article 12, no arbitrary interference with family is allowed; Article 16 mentions the protection of the family, and Article 25 (2) obliges to a special care and assistance of childhood.

¹¹ Lowe, N., and others. Part I – A statistical analysis of applications made in 2015 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Global report, The Hague Conference, 2018. Available at: <https://assets.hcch.net/docs/d0b285f1-5f59-41a6-ad83-8b5cf7a784ce.pdf>

¹² Statistics in Focus, 31/2012: "Nearly two-thirds of the foreigners living in EU member are citizens of countries outside the EU-27", Eurostat.

¹³ Oláh, L., and others, *State-of-the-art report – The new roles of men and women and implications for families and societies*, in *Family and Societies, Working Paper Series*, 11 (2014), p. 14. Available at: <http://www.familiesandsocieties.eu/wp-content/uploads/2014/12/WP11OlahEtAl2014.pdf>

2.2.2. Best interest of the child in the Convention of the Rights of the Child

A direct impact on child abduction was introduced with the adoption, in 1989, of the Convention of the Rights of the Child by the United Nations (UNCRC). Article 3 provides the paramount interest of the child in all actions concerning his or her life. This article requires the States to guarantee the protection and care of the children's well-being.

Despite the fact that the "best interest of the child" may be considered a subjective concept that changes depending on the times and countries, the UNCRC, with the purpose of reducing subjectivity, set out a list of rights of the children in the rest of the articles. In addition to more general and basic human rights, such as the inherent right to life, the survival and development of the child, several articles of the UNCRC may be used to apply the interest of the child in cases of child abduction.

The most important article concerning child abduction is Article 11 according to which, states are obliged to take measures to combat the illicit transfer and non-return of children abroad. To reduce child abductions, the UNCRC recommends the conclusion of bilateral or multilateral agreements or accession to the existing agreements. This, of course, is a clear blink to the 1980's HCCA. And indeed, more than 100 out of all the Member States of the United Nations signed the 1980's Hague Convention. However, Article 11 may neither be used in domestic return proceedings, nor as a right to claim the return of a specific child. Article 11 fails to provide assistance in knowing whether the interest of the child is to return or not, or in figuring out if a child abduction has indeed taken place.

Article 12 of the UNCRC claims the right of children to express their views, where they can form their own opinions. The views of the child must be given due weight, in accordance with the age and maturity of the child¹⁴. As we have seen, the Hague Convention also includes the possibility for the child to object the return as a specific exception to the return order.

2.2.3. Best interest of the child in Council of Europe

The best interest of the child has been highlighted not only in the UN Convention, but has also been treated within the scope of the Council of Europe. The 1950 European Convention on Human Rights (ECHR) does not include a specific article dedicated to children, but Article 8, concerning the protection of family life, has been applied in several abduction cases.

In the important *Neulinger* case¹⁵, the European Court of Human Rights (ECtHR) required domestic courts to conduct an in-depth examination of the entire family situation, and to take into consideration a whole series of factors, before determining what the best solution for the abducted child would be. This legal obligation imposed by the ECtHR was received as completely contrary to the spirit of the HCCA by experts and tribunals¹⁶. The return proceeding must be carried out quickly and without any delay, and more importantly, should not evaluate the merits of the case. Exceptions, as we have seen, must be applied very restrictively. However, the ECtHR decided otherwise¹⁷. Experts in child abduction

¹⁴ See General Comment no 12, 2009, *The right of the child to be heard*, Committee on the Rights of the Child, Fifty-first session Geneva, 25 May-12 June 2009. Available at: <https://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf>

¹⁵ *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, ECHR 2010, para 139.

¹⁶ Van Loon, H., *Interaction Between Recent Case-law of the European Court of Human Rights and the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, 17 March 2011, <http://www.hcch.net/upload/coe2011.pdf>

¹⁷ See also *Raban v. Romania*, no. 25437/08, 26 October 2010; *Šneerson and Kampanella v. Italy*, no. 14737/09, 12 July 2011; and *MR and LR v. Estonia*, no. 13420/12, 15 May 2012.

disagreed and foresaw serious problems in the application of the HCCA¹⁸. The interpretation of the EtCHR would create insecurity for parents, but also involve a lengthening of the duration of the proceedings, as a study of the family situation is deemed a study on the merits of the case, which would lead to longer proceedings, that would completely miss the key element of the HCCA, namely, the prompt return of the child¹⁹. The outcome of the Neulinger case could result in abduction cases turning into a fight for residence and custody orders²⁰.

Nonetheless, a few years later, without revoking the principles of Neulinger, in the case *X v Latvia*²¹, the ECHR decided that national courts were not obliged to conduct an in-depth examination of the entire case, but to apply the HCCA, in accordance with the ECHR, where possible exceptions are seriously considered and the decision is sufficiently reasoned. The factors are to be evaluated in the light of Article 8 of the ECHR. The national courts must ensure that the adequate safeguards are provided in the state of habitual residence, especially where there is a known risk.

Article 6 of the ECHR, which guarantees a fair trial, has also been applied on proceedings considering children. In the cases *Iglesias Casarrubios and Cantalapiedra Iglesias v. Spain*²², and *Sahin v. Germany*²³, the court decided that even if there was no obligation to always hear the child, the refusal to do so must be motivated and based upon the circumstances of each case, age, and maturity of the children involved. Otherwise, Article 6 shall be deemed violated.

In addition to the ECHR and the important intervention of the ECtHR within the scope of the Council of Europe, we can also mention the European Convention on the Exercise of Children's Rights, adopted in Strasbourg, on 25 January 1996²⁴, according to which, children have the right to be consulted and express own views. (Articles 3, 4, 6 and 7).

2.2.4. Rights of the children in the EU

The EU has also devoted time and efforts to improve the protection of children. Specific mention to the rights of children was made in 2000, in the Charter of Fundamental Rights of the European Union²⁵. This charter entered into force on 1 December 2009, with the Lisbon Treaty. Article 24 is dedicated to the children and is fully applicable on child abduction cases. It requires the administrative and judicial

¹⁸ Schuz, R. *The Hague Child Abduction Convention, A Critical Analysis*, Hart Publishing, Oxford and Portland, Oregon, 2013, p. 28.

¹⁹ Beaumont, P. "Post Neulinger Case Law of the European Court of Human Rights on the Hague Child Abduction Convention," in *A Commitment to Private International Law, Essays in honour of Hans van Loon*, Intersentia, Cambridge, 2013, p. 30.

²⁰ Celis Aguilar, M.M, *El papel controversial del TEDH en la interpretación del Convenio de La Haya de 25 de octubre de 1980 sobre los Aspectos Civiles de la Sustracción Internacional de Menores: Especial referencia a los casos Neulinger y Shuruk c. Suiza y X c. Letonia*, 2019. Available at: <http://dx.doi.org/10.12804/revistas.urosario.edu.co/acdi/a.8476>

²¹ *X. v Latvia*, ([GC], No. 27853/09, ECHR 2013; para 105.

²² *Iglesias Casarrubios and Cantalapiedra Iglesias v. Spain*, no. 23298/12, 11 October 2016.

²³ *Sahin v. Germany* [GC], no. 30943/96, ECHR 2003-VIII.

²⁴ European Convention on the Exercise of Children's Rights, Strasbourg, 25 January 1996, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/160>

²⁵ The Charter of Fundamental Rights of the European Union. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012P/TXT&from=EN>

authorities to take into account the best interest of the child, and also, to hear and consider the child's opinion²⁶.

Specific mention to child abduction and the civil consequences are included in the International Private Law Regulations: 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 1347/2000²⁷ and Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction²⁸. The latter Regulation shall apply only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to agreements registered on or after 1 August 2022, while Regulation (EC) No 2201/2003 will continue to apply to those decisions given before 1 August 2022. Both regulations complement the 1980 HCCA. We will not study the differences between them both, but rather focus on the most important rules.

First of all, within the scope of the regulations, a decision of non-return based upon Article 13 (1) b or (2) of the HCCA, may be overruled by any decision on the substance of rights of custody resulting from proceedings in the Member State of habitual residence. The return of the child decided by the court of habitual residence is enforceable in another Member State²⁹.

Secondly, and very importantly, the hearing of the child is enforced. According to Article 21 of the Regulation 2019/1111, children have the right to express their views, and courts shall give due weight to the views of the child, in accordance with his or her age and maturity.

However, the question of who shall hear the child and how the child is heard shall be determined by national law and based on the proceedings of the Member States. The examination of the child's wishes may be conducted personally by the judge, or by specially trained experts³⁰. Moreover, even where a child has the right to be heard, this hearing is not an absolute obligation, but shall be assessed taking into account the best interests of the child, as has been confirmed by European case law.

Critics have pointed out possible problems to issue return orders³¹. Based on this Regulation, the child may object to return in the abduction proceeding, but this objection might not be honored in the

²⁶ Judgment of the Court (First Chamber) of 22 December 2010, *Joseba Andoni Aguirre Zarraga v Simone Pelz*, C-491/10 PPU, ECLI:EU:C:2010:828.

²⁷ OJ L 338, 23.12.2003, p. 1. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32003R2201&from=EN>

²⁸ OJ L 178, 2.7.2019, p. 1. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019R1111&from=EN>

²⁹ For the concept "habitual residence", please see Judgment of the Court (First Chamber) of 22 December 2010, C-497/10 PPU *Barbara Mercredi v Richard Chaffe*, ECLI:EU:C:2010:829: the habitual residence of a child corresponds to the place which reflects some degree of integration by the child in a social and family environment and that it is for the national court to establish the habitual residence of the child, taking into account all the circumstances of fact of each individual case.

³⁰ See United Nations, Convention 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 (art. 3, para. 1)*. Available at: https://www.2ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf

³¹ Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 2201/2003, COM (2014) 225 final, Brussels, 15.4.2014). Recommendation minimum common standards concerning the hearing of the child.

custody proceeding in the country of habitual residence. The resolution in the custody proceeding overrules the Hague verdict, creating a contradictory situation for the child involved^{32, 33}.

Notwithstanding the critics, the fact that the hearing of the child has been enforced in the latter regulation is highly welcomed and, according to the international rights of the children, not only to be heard but also to be taken into account.

2.2.5. The 1996 Hague Convention

In 2002, the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children³⁴ entered into force. At this moment, 52 states are parties to this Convention.

This Convention does not affect the operation of the HCCA, but its provisions may be used in abduction cases. The Protection Convention does enforce the jurisdiction of the state of habitual residence, which is a common feature in international private family law.

2.3. Conclusion

In the years between 1980 and 2020, social and legal changes brought changes on the application of the HCCA. In 1980, the best solution to child abduction was his or her prompt return, and there was hardly any consideration for the specific circumstances of the child. Due to changes in social events, international conventions, and case law of international courts, the focus on automatic return has been shifted to the child.

³² See note 10.

³³ Re M. (A Minor) (Child Abduction) [1994] [incadat: HC/E/UKe 56]; T.B. v. J.B. (Abduction: Grave Risk of Harm) [2001] [incadat: HC/E/UKe 419].

³⁴ Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. Available at: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=70>

3. THE CHILD'S EXPERIENCE

3.1. Prompt return revisited

Due to the above-mentioned changes, several voices started to question whether the prompt return of the child would be the best option for him or her. Within the scope of the HCCA, during the Protocol proposed in 2008, the Swiss Delegation pointed out that, based upon the UNCRC and the paramount interest of the child, the practical application of article 13 (1) b of the HCCA should be re-examined. Prompt return may not always be in the superior interest of the minor. The reaction³⁵ of the other countries, however, shows the matter is not without conflict. And indeed, years later, this idea was disregarded in the Guide of Good Practices of Article 13b.

Nevertheless, the Swiss delegation outlined a serious problem, which has also been noticed by other experts. Marilyn Freeman found out that children abducted by their mothers describe them as their primary carer and do not see the mother as an abductor. Even where, in terms of the HCCA, child abduction was committed, the children victims and protagonists of the abduction, do not consider themselves to have been abducted³⁶.

Marilyn Freeman conducted several studies on the effects of child abduction on children and the experiences of children during the proceedings. The findings were heart-breaking. More than 73 per cent of abducted children suffer very significant effects in their adult lives. Common mental health issues include psychotic breakdowns, post-traumatic stress syndrome, depression, and panic attacks. Meanwhile, 20 percent reports less significant but still grieving problems in adulthood, which increase the total amount of people exposed to suffering to over 90 percent³⁷. No difference was reported where the abducting parent was the caring mother. We can thus partially conclude with Dyer that children do suffer, regardless of the actor, *the upsetting of his or her stability, the traumatic loss of contact with the parent left behind, the uncertainty and frustration of their lives*, but maybe not due to a strange language, unfamiliar cultural conditions and unknown teachers and relatives.

Remarkably enough, the return of children also showed to have been experienced as very stressful and upsetting. The return to the place of habitual residence, that was supposed to be in the best interest of the child, was not the happy ending of a nightmare, but just the beginning of a new life phase in which, again, the child is forced to adapt to the new circumstances. Thus, the expected return to the habitual environment failed to take place, as the environment had changed³⁸.

However, another conclusion drawn Freeman's research states that the shorter the duration of abduction is, the less traumatic effects are reported.

The last finding of the work is that to comply with the children's rights to be heard and taken into consideration, they must have the right to actually express themselves. This brings us to the weight of the voice of the child.

³⁵ Questionnaire on the desirability and feasibility of a protocol to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (Prel. Doc. No 2 of December 2010), <https://www.hcch.net/en/publications-and-studies/details4/?pid=5292&dtid=33>. See also note 18, p. 441.

³⁶ See note 10.

³⁷ See note 10, p. 35.

³⁸ See note 10, p. 13.

3.2. Weight of the voice of the child

As we have already highlighted, children have a basic right to participate and to be heard. This right has been enshrined in several international rules and applied and interpreted by international courts. Does this mean that children can decide by themselves where and who they are going to live with? Isn't this a serious risk to involve children in a dispute between their parents³⁹?

Regarding the first question, the answer is clear: active participation should not be confused with self-determination⁴⁰. The Explanatory Report by Elisa Pérez Vera offers no doubt about the right of the children to decide. She warns against the danger of asking direct questions to *“young people who may admittedly have a clear grasp of the situation, but who may also suffer serious psychological harm if they think they are being forced to choose between two parents”*⁴¹.

According to the case law of Member States⁴², there is no agreement on the weight of the children's voice. In some cases, the objection of a child has been interpreted more as a preference of said child to live with the abducting parent, than as an objection to his or her return. In other cases, courts searched for a clear objection to return to a specific country⁴³. The simple preference to live with one or another parent has not been deemed a reason to deny return based on Article 13 (2). Other examples include the physical objection of children, or an illness of a child due to his or her possible return⁴⁴. As we can see, the weight given to the wishes of children may vary from case to case, from country to country.

However, case law and the experience of the abducted children shows that we should not just simply return or not return them based on their wishes. Abducted children need to be listened to in a proper way, and protected from the harmful effects of their abduction. This includes children who are not returned.

³⁹ See note 18, p. 115.

⁴⁰ See note 18, p. 117.

⁴¹ See note 2, p. 30.

⁴² 29 <http://www.incadat.com/>

⁴³ Mc. Eleavy, P. “Evaluating the Views of Abducted Children: Trends in Appellate Case Law, in *Child and Family Law Quarterly*, pp. 230-254.

⁴⁴ CA Rennes, June, 28 2011, 11/02685, INCADAT 1129 34, Re M (A Minor) (Child abduction) [19994] INCADAT HC/E/UKe 56 35, Re S. (A Minor) (Abduction: Custody Rights) INCADAT: HC/E/UKe 87].

4. SOLUTIONS FOR THE FUTURE

Based on the foregoing, and with the purpose of adjusting regulations to the current situation, different solutions may be proposed. The solution should be based on the paramount interest of the children, take into consideration changes in society, and include the protection of children's rights based on their own experiences.

4.1. Relocation

As we have already mentioned, the HCCA and the EU regulations provide for the prompt return to the place of habitual residence but keep silent on possible residence and custody proceedings upon return. It is very important to note that the return order is without prejudice of the residence and custody order. That means that, in the country of habitual residence, the abducting parent may apply for relocation in the custody proceeding.

In this world of globalisation, with millions of movements all over the planet due to very different reasons, it seems at least surprising that parents are free to move their children around without any interference of states or authorities, but that where disagreements between parents arise, the best and only solution seems to be to maintain the child in the place where he or she is.

Within the scope of the Hague Conference, studies to debate whether the rules about relocation should be harmonised in a Convention have started. On 23–25 March 2010, an International Judicial Conference on cross border family relocation was held in Washington D.C.⁴⁵, by the Hague Conference and the International Centre of Missing and Exploited children, where over 50 judges and experts agreed on several principles concerning relocation.

In the end, the Hague Conference seems to have abandoned this idea for the moment.⁴⁶ However, it might be very useful to make an effort within the EU to harmonise the legislation on relocation as a logical consequence of the free movement of citizens. If a family moves from Member State A to Member State B with their children, in accordance with their right to free movement, why shouldn't one of the parents, in case of separation or divorce, be allowed to return with the children to Member State A?

Relocation is not a new issue⁴⁷. It must be decided by a judge of the habitual residence, during residence and custody proceedings. Judges have all available means and time to investigate all matters involved. The applying parent should be allowed to prove why it is in the interest of the child to move to another country; the defendant parent shall prove the same, but vice versa, that is, why the paramount interest of the child is to stay. But even more importantly, the child's view may also be

⁴⁵ International Judicial Conference On Cross-Border Family Relocation Washington, D.C., US, 23-25 March 2010, *Washington Declaration On International Family Relocation*, co-organised by Hague Conference on Private International Law and International Centre for Missing and Exploited Children with the support of United States Department of State, https://assets.hcch.net/upload/decl_washington2010e.pdf

⁴⁶ See note 10, p. 16.

⁴⁷ Cochrane, S., *International Relocation of Resident Parents: A Comparative Discussion and Proposal for Future Direction*, in https://www.abdn.ac.uk/law/documents/International_Relocation_of_Resident_Parents.pdf

considered. And as we have seen, the preference for one or another parent might not be a reason to honour the objection to return in a Hague proceeding, but might be applied to allow relocation.

But it is not enough to require Member States to allow relocation proceedings. In addition to procedural rules, the principles concerning the relocation should be harmonised within the EU. As an example, the principles developed by the Commission on European Family Law may be used⁴⁸. According to principle 3:21, 3, where parents fail to reach an agreement, the court should consider, among others, the following factors: (a) the age and opinion of the child; (b) the right of the child to maintain personal relationships with the other holders of parental responsibilities; (c) the ability and willingness of the holders of parental responsibilities to cooperate with each other; (d) the personal situation of the holders of personal responsibilities; (e) geographical distance and accessibility; (f) the free movement of persons.⁴⁹

4.2. Mediation in abduction cases

Within the scope of the Hague Conference, mediation is being proposed to solve all kind of conflicts, also in cases of child abduction⁵⁰. Within the EU, we can welcome the specific mentions made to mediation in the Regulation 1111/2019. In this vein, in Chapter III, concerning Child Abduction, Article 25 obliges national courts to invite the parties to consider mediation.

However, neither the HCCA, nor the European law provide answers to the enforceability of mediated agreements. We should keep in mind that the return proceedings, whether through the Hague or through European regulations, are only to determine the return or not return of the child. Of course, it is highly improbable that a parent will agree on a non-return or return order, without including other related matters, such as visiting rights or, maybe, payment of the travelling costs involved. In case of non-return orders, the new country shall acquire jurisdiction, which might allow parents to sign a valid agreement in court, but in case of return orders, the "agreements" need to be recognised in the country of habitual residence... And this might not happen. The international private law regulations do not provide security to parents considering the enforcement of these agreements.

The same problem has been mentioned in the Guide of Good Practices on Mediation published by the Hague Conference, according to which, the solution reached by the parents should be binding and enforceable⁵¹.

Where there is no legal security with regard to the enforceability of the signed agreements, no parent can trust the validity of the promises made. Therefore, an instrument to ensure the recognition and enforcement of the agreements reached between the parents, to avoid doubts about the veracity, would be more than welcome.

⁴⁸ <http://ceflonline.net/wp-content/uploads/Principles-PR-English.pdf>

⁴⁹ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELLAR%3A524570fa-9c9a-11e9-9d01-01aa75ed71a1>. Not binding

⁵⁰ LEPCA I and II, in both events, mediation was one of the important topics. Available at: www.lepca.eu

⁵¹ Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Mediation, Chapter 12. Available at: <https://assets.hcch.net/docs/d09b5e94-64b4-4afe-8ee1-ab97c98daa33.pdf>

4.3. Prenuptial agreements and autonomy of the parties

In the same direction, and at least within the EU, a higher autonomy of the parties concerned in the upbringing of their children should be allowed. As long as no conflicts arise, married or unmarried parents are free to make almost any decision regarding their children: where to live, what school to attend, who the caretaker of the children will be..., all without any intervention of the authorities, except in exceptional cases involving any type of child abuse or negligence.

Traditionally, no rules regarding the children, such as their custody or support measures, are allowed to be included in prenuptial agreements. The reason is to protect the best interests of the child, which might not be what parents want. Providing care for children is a matter of public order, so parents cannot previously decide how to organise a child's life. It is impossible to predict what will be best for a child under unknown future circumstances.

Nonetheless, the Hague Conference is working on a new instrument concerning family agreements involving children. At this moment, only a practical guide focusing on solutions offered by the 3 Conventions (1980, 1996 and 2007 Child support) has been published. The reason to explore the possibilities for a new instrument lies in the increased international mobility of families and children, the increased settlement of family matters and disputes through agreement between the parties, and the legal challenges to recognise and enforce these agreements. The Experts' Group recommends a new instrument provided that it is built on the existing conventions, provides a one-stop-shop for agreements, simple rules for recognition, and provides greater party autonomy. Parents should be allowed to select the applicable legal system⁵².

Of course, parental agreements affect children and, as we have stated, children have the right to participate in the decision-making process, and their best interest is paramount in all cases. However, that doesn't mean that parents are limited to making decisions in the very moment of the decision-making procedure. What if two parents decide to move to another country, taking their little children without asking them, and without any public intervention? There is only party autonomy... Why should these parents not be allowed to write down agreements concerning the caring of the children in case of separation and divorce? Including the return to their home country. If such event were to occur, and the other parent considers that the return could harm the interest of the children, he or she could always ask for the intervention of the relevant authorities. That is, the enforcement of previous agreements on possible future relocation of the children may always be submitted to court control.

Married or non-married couples may choose the applicable law to their marriage or cohabitation, economic regime and point out the jurisdiction to decide on possible disputes, according to the above mentioned Council Regulation (EU) 2019/1111 as well as the Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes⁵³ and Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation. Even agreements about the applicable law and election of jurisdiction alimony are allowed, according to Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and

⁵² See Annex A of the report of the 2013 Experts' Group Meeting, C&R No7 (cross border recognition and enforcement of agreements in family matters involving children).

⁵³ OJL 183, 8.7.2016, p. 1. Available at: <https://eur-lex.europa.eu/eli/reg/2016/1103/oj>

cooperation in matters relating to maintenance obligations⁵⁴ and the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations⁵⁵. So why not allow a future parental plan that foresees solutions for the children in case of separation, divorce, or relocation of family members?

⁵⁴ OJ L 7, 10.1.2009, p. 1. Available at: <https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:32009R0004>

⁵⁵ See Council Decision of 30 November 2009 on the conclusion by the European Community of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations (2009/941/EC). OJ L 331, 16.12.2009, p. 17. Available at: <https://eur-lex.europa.eu/legal-content/HR/TXT/?uri=OJ:L:2009:331:R:0017:01>

5. CONCLUSION

As we have seen, the legal and social background of child abduction has radically changed since 1980. The role of parents is no longer based on the traditional family organisation. Children are no longer silent subjects of protection, and freedom of movement is fully enjoyed by millions of European citizens.

Studies on the long-term effects of child abduction evidence that the shorter the abduction period, the less the effects. This underlines the goal of prompt return contained in the HCCA. Still, the prompt return of children may only be guaranteed in an expeditious proceeding, in which no time is given to study the merits of the case, and even if the children have to be heard, their wishes might not be honored. However, where the child returns, the abducting parent may start custody proceedings, including relocation.

That is why the first recommendation to the EU is the harmonisation of relocation proceedings and principles to allow relocation, in which, of course, the child's opinion should have an important weight. To guarantee the effective consideration of the child's opinion, the EU should work on harmonising the methods for children's hearings, either by regulation or the instruction of the professionals involved, such as judges and psychologists.

The second recommendation is to improve the enforcement of mediation agreements, even if not signed by the judge of habitual residence. A mediation agreement without enforcement is useless and will only deepen the conflict between parents and harm the children.

The third recommendation focuses on the prevention of child abduction. Reaching agreements on children and their future care, including relocation should be possible, even before their birth. Parents should be allowed to refer to a court to verify whether the enforcement of this agreement is in the interest of the child, as the situation could have changed since the agreement was made and of, course, the agreement could not foresee unknown circumstances. However, principles of common agreed care of children may be included and to potentially avoid abduction or frustrated relocation proceedings.

The EU has an obligation to act on behalf of these children, who are also citizens and have the same right of freedom of movement. The freedom of movement of children guarantees the freedom of movement of their parents, one of the basic pillars of the Union.

This in-depth analysis has been commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee in the context of the workshop to mark the 40th Anniversary of the Hague Convention on the Civil Aspects of International Child Abduction. It looks into the implementation of the 1980 Convention, as regards the respect of autonomy of parts, validity of agreements and mediation, and describes, from a practitioner's point of view, how the parents and children see the process. The paper concludes that in order to protect the interest of the child, the 1980 Convention should be maintained with restricted exceptions, but more should be done in terms of prevention. The new measures should include, in particular, harmonisation of the relocation proceedings and principles, enforceability of mediation agreements, and increasing of the autonomy of the parties through the inclusion of residence and custody plans in prenuptial agreements.

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