

ТРИДЕСЕТ ГОДИНИ
ОТ ПРИЕМАНЕТО
НА КОНВЕНЦИЯТА
ЗА ПРАВАТА НА ДЕТЕТО



Организационен комитет на конференцията:

проф. д-р Екатерина Михайлова

доц. д-р Катерина Йочева

доц. д-р Ралица Костадинова

доц. д-р Цветалина Петкова

гл. ас. д-р Емилия Димитрова

гл. ас. д-р Силвия Цонева



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ПРЕДИЗВИКАТЕЛСТВА
И ПЕРСПЕКТИВИ**

Сборник доклади
от международна научна конференция,
10 декември 2019 г., НБУ

Тридесет години от приемането на Конвенцията за правата на детето: предизвикателства и перспективи. Сборник доклади от международна научна конференция, 10 декември 2019 г., Нов български университет

Съставител и научен редактор: доц. д-р Цветалина Петкова

Редактор, коректор и преводач на текстовете от/на английски език:
доц. д-р Катерина Йочева

Рецензенти: проф. д-р Веселин Вучков, доц. Тодор Коларов, д.н.

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The Impact of The UN Convention on The Right of The Child on The Hague Convention on The Civil Aspects of International Child Abduction

Ilija Rumenov*

The UN Convention on the rights of the Child (UNCRC) is an international legal instrument aimed in creating minimum standards for the most universal aspect in the human existence, which is producing safe environment for children to develop. This Convention was adopted in 1989 and now represents universal standard that determines the rights of children. On the other hand, Hague Convention on the Civil Aspects of International Child Abduction (Hague Child Abduction Convention) represents a legal instrument of the Hague Conference of Private International Law, created in 1980 aimed in deterring the abductor from unilaterally choosing the forum in which the case will be heard relating to parental responsibilities and mitigation of the harmful effects of the abduction which are reflected on children. Although these two instruments are almost a decade apart, the UNCRC has significant influence in the understanding and the implementation of the Hague Child Abduction Convention and represents a moral ground for most of the solutions provided in the Hague Child Abduction Convention such as: illicit transfer and non-return of children, right of the child to be heard, right of the child to have meaningful relationship with both parents and child's best interest. This article will provide for overview of the Child Abduction regime and the particular influence that the UNCRC has on the Hague Child Abduction Convention with notion that without the UNCRC, the development of the Hague Abduction Regime would be left out without doctrinal and moral grounds.

Keywords: *UN Convention on the Rights of the Child, Hague Convention on the Civil Aspects of International Child Abduction, Right of the Child to be Heard, Right of the Child to have Meaningful Relationship with Both Parents, Child's Best Interest, Habitual Residence*



* Asst. Prof. Ilija Rumenov, PhD, University "Ss Cyril and Methodius", Skopje, Faculty of Law "Iustinianus Primus", Skopje, e-mail: i.rumenov@pf.ukim.edu.mk

Въздействието на конвенцията за правата на детето върху Хагската конвенция за гражданските аспекти на международното отвлечане на деца

Илия Руменов**

Конвенцията на ООН за правата на детето (Конвенцията) е международен договор, целящ да създаде минимални стандарти за най-универсалния аспект в човешкото съществуване, който е да се създаде безопасна среда за развитието на децата. Конвенцията е приета през 1989 г. и днес представлява универсален стандарт, който определя правата на детето. От друга страна, Хагската конвенция за гражданските аспекти на международното отвлечане на деца (Хагската конвенция) е разработена от Хагската конференция по международно частно право, създадена през 1980 г., която цели да възпрепятства похитителя от това едностранно да избере форума, пред който ще се разглежда делото, относно отговорностите на родителите и смекчаване на вредните последици от отвлечането, които се отразяват върху детето. Въпреки че тези два акта са разделени от почти едно десетилетие, Конвенцията има голямо влияние върху разбирането и прилагането на Хагската конвенция и представлява морално съображение за повечето от разрешенията, предвидени в Хагската конвенция, като: незаконен трансфер и невръщане на деца, правото на детето да бъде изслушано, право на детето да има лични отношения с двамата си родители и висшите интереси на детето. Тази статия предоставя преглед на режима за отвлечанията на деца и конкретното влияние, което има Конвенцията спрямо Хагската конвенция с разбирането, че без Конвенцията развитието на Хагския режим за отвлечанията би бил оставен без доктринални и морални основания.

***Ключови думи:** Конвенция на ООН за правата на детето, Хагска конвенция за гражданските аспекти на международното отвлечане на деца, право на детето да бъде изслушано, право на детето да има лични отношения с двамата си родители, висши интереси на детето, обичайно местоживееене*

** Ас. д-р Илия Руменов, Университет „Св. Св. Кирил и Методий“, Скопие, Юридически факултет “Iustinianus Primus“, Скопие, имейл: i.rumenov@pf.ukim.edu.mk

1. General

The UNCRC represents an international human right treaty concluded within the context of the United Nations that is universally applicable between the member states. This Convention was adopted in 1989 and now represents universal standard that determines the rights of children. Thirty years after its adoption, this convention influences different legal sources concluded before and after 1989. Especially this influence is present in international family law conventions produced by the Hague Conference of Private International Law. This institution is the most important private international law organization that works on international legal instruments regarding family aspects in private international law. Several conventions are at its core: Hague 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; Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance and the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations. One convention of the Hague Conference has particular universal success that is the Hague Convention on the Civil Aspects of International Child Abduction from 1980.

The Hague Child Abduction Convention precedes the UNCRC. However, it could be stated that UNCRC lays down the doctrinal and moral grounds for the implementation of the Hague Convention. Their interplay is particularly important because many of the solutions present in the Hague Child Abduction Convention are covered with different rights and principles provided in the UNCRC. The illicit transfer and non-return of children given in Article 11 of the UNCRC is directly influenced by the Hague Child Abduction Convention. On the other hand, the ‘child’s best interest’ provided in Article 3 of UNCRC is of utmost importance for the Hague Child Abduction Convention. This interplay between these two regimes goes in both directions. On the one hand, the understanding of the rights envisaged in the UNCRC, provides for proper understanding of the Hague Child Abduction Convention and lays down the moral and doctrinal aspect of the convention. On the other hand, the understanding of the rules given in the Hague Child Abduction Convention provides for in-depth understanding of several aspects of UNCRC, namely the illicit transfer and non-return of children.

This Article will firstly give an overview of the child abduction regime and its EU context. Secondly, it will cover the interplay between the general and specific rights present in the UNCRC and those provided in the Hague Child Abduction Convention. Lastly, this article will give the concluding remarks.

2. Hague Child Abduction regime and the relationship with the EU instruments

The Hague Child Abduction Convention from 1980 is the most universally used legal instrument for protection of children from the harmful effects which arise as a result from the wrongful removal or retention of children. The importance of this Convention of the Hague Conference of Private International Law can be seen in the number of countries which are parties to it.¹ Contracting parties to this Convention are not only members of the Hague Conference of Private International Law, but also large number of non-members are contracting parties to the Convention.² With such impressive number of contracting parties to the Convention it can freely be said that this Convention is one of the most successful instruments of the Hague Conference and it is the most successful international legal instrument which as a subject has the return of the wrongfully removed or retained children to the place of their habitual residence.

When this convention was drafted there were two groups which had differing opinions about the powers that would be attributed to the judicial authorities. The dividing line was the trust in the foreign judicial system. The first group was aiming to achieve prompt return of a child without possibility of the deciding authority when confronted with return of a child to entertain in issues regarding parental responsibilities. The second group considered that return of the child should be enforced, but with some exemptions in cases where the interest of the child prevailed over the imminent return. The final result that emerged from these two differing groups was a compromising solution according to which a relevant authority would not rely upon public policy as a reason for non-return of the child in the country of its habitual residence, however other specific reasons for non-return of the child would exist which would allow the relevant authority to depart from the duty to promptly return the wrongfully removed or retained child.³

The system for return of children envisaged in the Hague Child Abduction Convention is modelled as a prompt procedure according to which if the relevant authority in the place where the child is located⁴ finds that the child has been

¹ There are 101 Contracting parties to this Convention. 28: Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. <https://www.hcch.net/> [online] 29.7.2019 [viewed 1.12.2019]. Available from: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=24>.

² See the status table of the Hague Convention on International Child Abduction. <https://www.hcch.net/> [online] 29.7.2019 [viewed 1.12.2019]. Available from: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=24>.

³ Anton, A. E. The Hague Convention on International Child Abduction. *International and Comparative Law Quarterly*, vol. 30 (3), 1981, p. 550.

⁴ Article 12 of the Hague Child Abduction Convention

wrongfully removed or retained from the country of its habitual residence (this means that 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 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)⁵ then it should promptly return the child to the country of its habitual residence unless certain exemptions exist.⁶ These exemptions to the duty to promptly return the child are found in Article 13, Article 20 and Article 12(2) of the Child Abduction Convention and refer to several different scenarios:

1. the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention;⁷

2. the person, institution or other body having the care of the person of the child had consented to or subsequently acquiesced in the removal or retention;⁸

3. there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation;⁹

4. 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;¹⁰

5. The child settled into the new environment;¹¹

6. Public policy (the return of the child would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms).¹²

The Court or other relevant authority does not apply these exemptions automatically. It is left to the court to determine whether there are some other facts in the specific case which can be qualified under these exemptions from the general rule, or whether the conditions for application of these exemptions are met.¹³

⁵ Article 3 of the Hague Child Abduction Convention

⁶ Article 13 of the Hague Child Abduction Convention.

⁷ Article 13(1)(a) of the Hague Child Abduction Convention.

⁸ Article 13(1)(a) of the Hague Child Abduction Convention

⁹ Article 13(1)(b) of the Hague Child Abduction Convention.

¹⁰ Article 13(2) of the Hague Child Abduction Convention.

¹¹ Article 12(2) of the Hague Child Abduction Convention.

¹² Article 20 of the Hague Child Abduction Convention.

¹³ Pérez-Vera, E. Explanatory report of the Convention on the civil aspects of international child abduction. Actes et documents of the XIVth Session, vol. III, 1982, p. 460, paragraph 113.

Another point in the Child Abduction Convention is that on certain level it protects the right of access, or it ensures that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.¹⁴

The 1980 Hague Child Abduction Convention has been ratified by all the Member States of the European Union and continues to apply in cases of child abduction between Member States. On the other hand, the 1980 Hague Convention is supplemented by certain provisions of the Regulation,¹⁵ where in relations between Member States, the rules of the Regulation prevail over the rules of the Convention in so far as it concerns matters governed by the Regulation.

When the Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses (Brussels II Regulation)¹⁶ was drafted, there were two different views among the Member States regarding the future of international child abduction. The first view was to create EU rules for the return of children which would be applicable only to EU countries, and the other view considered that such an approach would undermine the 1980 Hague Child Abduction Convention, which by then was signed and ratified by 74 states.¹⁷ The result of these differences was Article 37 of the Brussels II Regulation, by which precedence of the Regulation over some international agreements was determined.¹⁸ The Hague Abduction Convention wasn't among these international agreements, because it was tendentiously left out. The Regulation itself referred to a conformal application of both instruments.¹⁹ However, this position was changed in the Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (Brussels IIbis Regulation).²⁰

The relationship between the Brussels IIbis Regulation and the 1980 Hague Child Abduction Convention is regulated in Article 60 of the Regulation,

¹⁴ Article 1(b) of the Hague Child Abduction Convention.

¹⁵ See Article 11 of the Brussels IIbis Regulation.

¹⁶ OJ L 160, 30.6.2000, 19–36

¹⁷ Schulz, A., *The New Brussels II Regulation and the Hague Conventions of 1980 and 1996. International Family Law*, 1 (2004), p. 23.

¹⁸ See Article 37 Brussels II Regulation.

¹⁹ Article 4 provides 'The courts with jurisdiction within the meaning of Article 3 shall exercise their jurisdiction in conformity with the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, and in particular Articles 3 and 16 thereof.'

²⁰ OJ L 338, 23.12.2003, 1–29.

which provides for precedence of this EU instrument over enlisted international agreements, which includes the 1980 Hague Child Abduction Convention. In this article, supremacy is conferred to the Regulation over the 1980 Hague Child Abduction Convention. This ultimately leads to different outcomes on the return of children.²¹ However this result is just a starting point. Essentially, the Brussels IIbis Regulation adopts a compromise between the different positions of the Member States concerning this question. It actually ‘adapts’ the Hague Abduction Convention for the needs of the EU Member States.²² Instead of creating new rules for the return of abducted children that will be applicable in the EU, the rules of the Brussels IIbis Regulation are founded on the basis of the 1980 Hague Child Abduction Convention²³ with an additional task of strengthening the procedure for the return of abducted children. It remains in force between the Member States,²⁴ however matters that are covered by the rules of the Brussels IIbis Regulation have precedence over the rules of the Hague Abduction Convention. As for the rules not covered by the Regulation, the Convention rules apply. It can be said that the instruments are ‘complementary’.²⁵

This position was also reaffirmed in the *Rinau* case.²⁶ In the case it was stated that the 1980 Hague Convention was adopted in the interest of children and that the guiding principles of the Convention with respect to matrimonial matters and matters of parental responsibility are also implemented in the Regulation.²⁷ Further, AG Kokott in the opinion delivered on 29 January 2009 Case C-523/07, held the position, which was rendered in the *Rinau* case, that:

[B]oth provisions pursue the aim that abducted children should return immediately to the State in which they had their habitual residence before the unlawful removal. That coordination also makes a uniform understanding of the concept of habitual residence necessary.²⁸

²¹ Ballesteros, M.H., *International Child Abduction in the European Union: The Solutions Incorporated by the Council Regulation*, *Revue générale de droit*, 2004 (34–2), p. 348.

²² Lamont R., *The EU: Protecting Childrens Rights in Child Abduction*. *International Family Law*, 2008, 110–112.

²³ In the *Rinau* Case, it is reaffirmed that the guiding principles of the 1980 Hague Child Abduction Convention ‘were taken over’, meaning that they were adopted (together with the Brussels Convention) in matrimonial matters and matters of parental responsibility. See judgment of 11 July 2008, *Rinau*, C-195/08 PPU, EU:C:2008:406, paragraph 48.

²⁴ Article 62 Brussels IIbis Regulation.

²⁵ McEleavy, P. *The new child abduction regime in the European Union: Symbiotic relationship or forced partnership?* *Journal of private International Law*, 2005 (1), 17.

²⁶ Judgment of 11 July 2008, *Rinau*, C-195/08 PPU, EU:C:2008:406.

²⁷ Judgment of 11 July 2008, *Rinau*, C-195/08 PPU, EU:C:2008:406, paragraphs 48, 49 and 62

²⁸ Opinion of AG Kokott delivered on 29 January 2009, C-523/07 A., EU:C:2009:39, paragraph 30.

It can be concluded that the Brussels IIbis Regulation adopts the guiding principles of the 1980 Hague Child Abduction Convention. This is especially important because it provides continuity of the uniform understanding of the concepts provided in the 1980 Hague Child Abduction Convention, the case law, and the relevant writings by distinguished scholars.

3. Impact of the Convention on the Rights of the Child on the Hague Child Abduction Convention

The mechanism for the return of the wrongfully removed or retained children is generally a simple one, intended to uphold the jurisdiction regarding parental responsibilities which was established, or it would have been established in the country of the child's habitual residence if the wrongful removal or retention didn't occur. It provides for children which are wrongfully removed or retained to be promptly returned in the country of their habitual residence. Only a limited number of exceptions are provided that could alter this situation. Its goals are positioned around the restoration of the *status quo* which was disturbed by the wrongful removal or retention and the protection of the child best interest. Having such goals, it provides for protection of children which were internationally displaced from the environment which was closest to them, that is their habitual residence. This provides for close interaction between the Hague Child Abduction Convention and the UNCRC.

In this aspect there are four important connecting points between the UNCRC and the Hague Child Abduction Convention: two general points – illicit transfer and non-return of children; and protection of the child's best interest; and two specific points – giving opportunity to the child to be heard; and providing for meaningful relation with both parents. These four aspects have significant impact but influence different phases of the Hague Child Abduction Convention.

On general level the child abduction mechanism is designed to stop the illicit transfer and non-return of children, which is conducted by the person which does not have parental responsibilities. This basic goal of the Hague Abduction Convention to deter parents from unilaterally choosing the forum in front of which the parental responsibilities will be decided, goes in line with Article 11 of the UNCRC. The other general aspect – 'best interest of the child' principle, prevails in the Hague Convention and it is present in different phases: from the determination of the wrongfulness of the removal or retention and the habitual residence of the child to the existence of the exemptions to the return of the child. The other two rights are more specific and refer to separate aspects of the convention. Namely, meaningful relation with both parents is important for the

whole Convention, however it is specifically dealt with in the part regarding the access rights. The right of the child to be heard is important for the determination of the child's habitual residence and the exemption under Article 13(2) of the Child Abduction Convention.

3.1. Illicit transfer and non-return of children

Article 11(1) of UNCRC provides for general rule that member states to the convention should take measures in order to combat this specific problem of illicit transfer and non-return of children. Article 11(2) of UNCRC provides for such specific measures which are conclusion of new agreements or accession to existing international agreements.²⁹ There is one ambiguity regarding the scope of the article, namely whether this article includes only wrongful removal or retention of children from parents and close relatives, without financial gain or it incorporates other type of "abductions" which have financial or sexual motive.³⁰ The mere analysis of the wording of this provision does not provide for answer, because illicit transfer and non-return of children relates to both aspects, personal and financial abductions. The answer is found in Article 35 of the UNCRC which delimits the abductions based on their motive as personal and financial (sexual) and refers to cases of "abduction of, the sale of or traffic in children for any purpose or in any form".³¹

In this aspect, the proper measures provided in Article 11(2) of the UNCRC refers for implementation of the Hague Child Abduction Convention as the most relevant international legal instrument that combats the unilateral removal or retention of children outside of the place of their habitual residence.³² This legal instrument is not exclusive. There are other instruments such as the Brussels IIbis Regulation which applies between Member States of the EU and is complementary to the Hague Child Abduction Convention, but with some modifications.³³ Also there is influence from the European Convention on Human Rights which provides for certain understanding of the child abduction regime in the Europe.³⁴

²⁹ Article 11(2) of UNCRC.

³⁰ Hodgkin, R., Newell, P. (Eds. for UNESCO). *Implementation Handbook for the Convention on the Rights of the Children* (fully revised 3rd edition). Geneva: Atar Roto Presse, 2007, 143. Also available online at https://www.unicef.org/Implementation_Handbook_for_the_Convention_on_the_Rights_of_the_Child.pdf.

³¹ Article 35 of the UNCRC. This aspect of 'child trafficking' is also covered with the Optional Protocol to the Convention on the sale of children, child prostitution and child pornography.

³² Hodgkin, R., Newell, P. (Eds. for UNESCO). *Op. cit.*, 144; Tobin, J. *The UN Convention on the Rights of the Child: A Commentary*. Oxford: OUP, 2019, p. 74.

³³ McElevay P. *Op. cit.*, p. 17.

³⁴ Kiestra, R. L. *The Impact of the European Convention on Human Rights on Private International Law*, The Hague: T.M.C. Asser Press, 2014, p. 201; Beaumont P., K. Trimmings, L. Walker and J. Holliday.

Moreover, the Hague Conference has a full set of conventions that are directly or indirectly connected to the Hague Child Abduction Convention.³⁵ In that way, Article 11 of the UNCRC is in huge proportion referring to the mechanism provided in the Hague Child Abduction Convention, however notion has to be given to a more broad set of rules outside of this convention.

Another aspect of Article 11 of the UNCRC is that its implementation in the member states to the convention is not solely absorbed by the Hague Child Abduction Convention. Member states can take other meaningful measures such as: put checks on borders and obtain appropriate court orders (for example, to withhold the child's passport) when it is suspected that a child is going to be abducted; parents are provided with legal aid and financial assistance when it is necessary to pay for the costs of the child's return; diplomatic and consular officials and the judiciary overseeing the law are fully acquainted with the principles of the Hague Convention; information is provided from government agencies and state databases to identify the whereabouts of abducted or wrongfully retained children.³⁶ Also, the implementation of both instruments can provide for certain differences and this can disturb the common understanding that the UNCRC is subordinate to the Hague Child Abduction Convention. These differences are subtle and refer to the different treatment of children's view and the discretionary nature of the exemptions to the presumption in favour of child's return under the Hague Convention.³⁷ Notwithstanding these differences, the goal of Article 11 of UNCRC is effectuated through the Hague Child Abduction Convention and it represents a moral and doctrinal ground for the implementation of the child abduction mechanism.

3.2. Best Interest of the Child

The 'best interest of the child' is according to the Committee on the Rights of the Child a "substantive right, an interpretative legal principle and a rule of procedure".³⁸ It expresses one of the fundamental values of the UNCRC and it is one of the four principles provided in the Convention.³⁹ This principle on general

Child Abduction: Recent Jurisprudence of the European Court of Human Rights. *International and Comparative Law Quarterly*, 2015 (64), p. 40.

³⁵ See the Hague 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; Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance and the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.

³⁶ Hodgkin, R., Newell, P. (Eds. for UNESCO). *Op. cit.*, p. 145.

³⁷ Tobin J. *Op. cit.*, p. 395.

³⁸ *Ibid.*, p. 394.

³⁹ The other three are: non-discrimination (Article 2); survival and development (Article 6) and children's

level is provided in Article 3. This article provides that the interests of children and young people should be thought about at all levels of society, and that their rights should be respected by people in power.⁴⁰ To that end, States Parties should undertake all appropriate legislative and administrative measures to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her.⁴¹ For the practical implementation of the ‘child’s best interest’ States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.⁴²

Article 3 of UNCRC is the rule which establishes the ‘best interest of the child’ principle on general level. Other rules in the UNCRC determine the application of this principle in different situations. For example, in Article 9 which refers to situations of non-separation of parents and children⁴³ provides that States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.⁴⁴ Article 18 which refers to situations regarding parental responsibilities, states that both parents have common responsibilities for the upbringing and development of the child and that the best interests of the child will be their basic concern.⁴⁵ Finally, ‘best interest of the child’ principle is expressly present in Article 20 of UNCRC (protection of a child without family), Article 21 of UNCRC (adoption) and Article 40 of UNCRC (administration of juvenile justice).

One of the main aspects of most of the international legal instruments that refer to children is that in all of the situations, ‘best interest of the child’ should

participation (Article 12).

⁴⁰Article 3(1) of UNCRC states: 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.

⁴¹Article 3(2) of UNCRC.

⁴²Article 3(3) of UNCRC.

⁴³For more on this subject, see, Doek, J., *A Commentary on the United Nations Convention on the Rights of the Child, Articles 8–9: The Right to Preservation of Identity and The Right Not to Be Separated from His or Her Parents*. Leiden, Boston: Brill – Nijhoff, 2006.

⁴⁴Article 9(1) of UNCRC.

⁴⁵Article 18(1) of UNCRC.

be taken into account.⁴⁶ This also refers to situations which are provided in the Hague Child Abduction Convention as well as the Brussels IIbis Regulation. For example, 'best interest of the child' is to be taken into account in the situations when the recognition of judgments is refused because of the public policy exemption. Exemption is not made for the Hague Child Abduction Convention. Moreover, the Hague Child Abduction Convention does not specifically refer to the 'best interest of the child' but in its preamble states that "interests of children are of paramount importance in matters relating to their custody".⁴⁷

This necessitates a clear understanding of the 'best interest of the child' principle. However, the concept of the 'best interest' of the child is ambiguous. There is little consensus about what criteria constitute a child's best interests or how these criteria should be applied.⁴⁸ Generally, it is accepted that the definition is left ambiguous intentionally, because the legislators are unable to envisage the entire range of complex and various situations a child can be in, and instead choose to pass the responsibility to the competent institutions (legal courts, administrative structures), which are supposed to evaluate the specific circumstances and to decide with accuracy what is the best interest of the child.⁴⁹ Furthermore, the Brussels IIbis Regulation does not contain a definition for it, and neither does the UN Convention on the Rights of the Child.⁵⁰ The guiding principles for determining a child's best interest are very broad. They range from personal aspects of the child itself⁵¹ to the aspects of the person or persons to whom the child relates personally and who have an impact on the education, growth or professional formation of the child.⁵² Also the particular relations between the child and the parent/parents can be taken into account and play important role in the determination of the 'best interest of the child'.⁵³ This large number of variable factors that each represent an indicator of what forms the best interest of the child makes it impracticable

⁴⁶ Declaration on the Rights of the Child (Articles 2 and 7); Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (Article 4(b)); Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (Articles 8, 9, 10, 22 and 23); African Charter on the Rights and Welfare of the Child (Articles 19, 20, 24, 25, 31 and 49) and etc.

⁴⁷ Pérez-Vera, E. Op. cit., p. 431.

⁴⁸ Kelly J. B. The Best Interests of the Child: A Concept in Search of Meaning. *Family Court Review*, 35-4 (1997), p. 377.

⁴⁹ Drăghici A., Tabacu A., Singh A. The Relations of the Minor with the Parents and Extended Family. Assessing the Best Interest of the Child. Criteria of Assessment, *EIRP Proceedings*, 5 (2010), p. 86.

⁵⁰ Article 3 (1) of the UN Convention of 20 November 1989 on the Rights of the Child.

⁵¹ Age, personality, sex, maturity level, institutionalized education, the child's social, academic, and psychological adjustment, etc.

⁵² Parental adjustment, parenting skills, morality issues, criminal record, financial criteria, etc.

⁵³ Emotional ties to each parent, etc.

to define the meaning of the term in advance. Every decision that is made must consider the individual child's developmental and psychological needs.⁵⁴ That is why the 'best interest' standard represents a willingness on the part of the court and the law to consider children on a case-by-case basis rather than adjudicating children as a class or a homogeneous group with identical needs and situations.⁵⁵ So the best interest of the child has to be evaluated in every single case, taking into account the special circumstances of that case.⁵⁶

3.3. Hearing of the child

One of the exemptions for the return of the wrongfully removed or retained children to the place of their habitual residence is provided in Article 13(2) of the 1980 Hague Child Abduction Convention. This rule provides that the judicial or administrative authority:

[m]ay 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.⁵⁷

However, the position of this rule in the 1980 Hague Child Abduction Convention gives full discretion to the relevant authorities to take into account the view of the child.⁵⁸

On the other hand, the Brussels IIbis Regulation specifically provides that the "hearing of the child plays an important role in the application of this Regulation".⁵⁹ This aspect is highlighted in Recital 33 where it is reaffirmed that the '[r]egulation recognizes the fundamental rights and observes the principles of the Charter of Fundamental Rights of the European Union' particularly Article 24 of the Charter, which refers to four postulates:

1) Children shall have the right to such protection and care as is necessary for their well-being;

2) They may express their views freely and such views shall be taken into consideration on matters which concern them in accordance with their age and maturity;

⁵⁴ Kelly J. B. Op. cit., p. 385.

⁵⁵ 'The best guidelines that can be given to the Court is rather than focusing on parental demands, societal stereotypes, cultural tradition, or legal precedent, the best interest standard asks the decision makers to consider what this child needs at this point in time, given this family and its changed family structure.' (Kelly J. B. Op. cit., p. 385).

⁵⁶ Magnus U., Mankowski P. (eds) *European Commentaries on Private International Law: Brussels IIbis Regulation*. Munich: Sellier European Law Publishers, 2012, p. 281.

⁵⁷ Article 13(2) of the 1980 Hague Child Abduction Convention.

⁵⁸ Pérez-Vera, E. Op. cit., p. 433.

⁵⁹ Recital (19) of the Brussels IIbis Regulation.

3) In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration; and

4) Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.⁶⁰

The main guiding principles given in Recitals 19 and 33 that refer to children play an important role in the solutions provided in Article 11 of the Brussels IIbis Regulation.⁶¹ Such a manifestation of these principles is given in the imposed obligation arising from Article 11(2) of the Brussels IIbis Regulation for the Courts of the Member States which are applying the Hague Child Abduction Convention, especially Articles 12 and 13, that they:

[s]hall [emphasis added] 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.⁶²

In this way, Article 11(2) of the Brussels IIbis Regulation imposes that children (conditionally if they have reached certain age and maturity) **must** be given the opportunity to be heard in child abduction cases that involves them. With this, the Brussels IIbis Regulation reinforces the right of the child to be heard during the procedure.⁶³

This necessity to act quickly is however not a novelty for the most of the Member States.⁶⁴ In the view of these states, this obligation is based on the implementation of Article 6 and 8 of ECHR and also on Article 12 of the UNCRC. The practical arrangements for the method which will be implemented for the

⁶⁰ Clear division of jurisdiction between the courts of the Member State of origin and those of the Member State of enforcement established by the provisions of Chapter III, Section 4 of Regulation No 2201/2003 (see, to that effect, judgment of 1 July 2010, Povse, C-211/10 PPU, EU:C:2010:400, paragraph 73) rests on the premiss that those courts respect, within their respective areas of jurisdiction, the obligations which that regulation imposes on them, in accordance with the Charter of Fundamental Rights. In that regard, since Regulation No 2201/2003 may not be contrary to the Charter of Fundamental Rights, Article 42 of that regulation, the provisions of which give effect to the child's right to be heard, must be interpreted in the light of Article 24 of that charter (see, to that effect, judgment of 5 October 2010, McB., C-400/10 PPU, EU:C:2010:582, paragraph 60). Judgment of 22 December 2010, Aguirre Zarraga, C-491/10 PPU, EU:C:2010:828, paragraphs 59–60.

⁶¹ Fawcett J. and Caruthers J. *Cheshire, North & Fawcett: Private International Law*, 14th ed. Oxford: OUP, 2008, p. 1119.

⁶² Article 11(2) of the Brussels IIbis Regulation.

⁶³ European Commission. *Practice Guide for the application of the Brussels IIa Regulation* [online] 2015 [viewed on 03 December 2019]. Available at: <https://e-justice.europa.eu/fileDownload.do?id=b1f086c0-8d5b-4cb9-ad0e-85e38d528c7a>, p. 55.

⁶⁴ Schulz, A. Op. cit., p. 23.

ascertaining the view of the child for its position in the child abduction cases vary depending on the national legal systems of each Member State. One of the possible methods is the direct hearing of the child in the Court. In such cases the judge directly asks the questions which will enable him/her to ascertain the factual situation of the child. However, the judge must take into account the age and the maturity of the child and other relevant circumstances in each case individually. In the Brussels IIbis Regulation, there is not a direct mandate that the child's view must be taken directly by the judge.⁶⁵

Another possible method through which the child's view can be ascertained, is if the view of the child is taken by a social worker or other person specialized in working with children. It is necessary that this person conduct the hearing of the child and later present the report in which the desires and feelings of the child regarding its own case are noted.⁶⁶ In this way, recognition is given to the diversity of national legal systems and the different legal traditions of the EU Member States. However, the main goal must not be forgotten: the view of the child of the position in which he/she has been placed and the necessity for this aspect to be taken into account when rendering a decision for the return or non-return in the Member State of the child's habitual residence. If the court chooses the most appropriate method for conducting such procedural action and in the safest possible way, then in such a situation the child will be free and express its desires and emotions, and in the end feel liberated from the feeling of responsibility or guilt.⁶⁷

The solution taken in Brussels IIbis Regulation for the hearing of the child is a step forward from the Hague Child Abduction Convention. Although the right of the child to be heard and the actual hearing of the child cannot be considered to be identical, the solution in Article 11(2) of the Brussels IIbis Regulation significantly raises the participation of the child in the procedure for his/her return in the Member State of its habitual residence.⁶⁸ On the other hand, these additional procedural actions (which the court must take) increase the consideration to slow the procedure down. The modalities and the methods through which these hearings are carried by the court or other relevant authorities depend exclusively on the national law of the competent authorities. In other words, before a court of the Member State of origin can issue a certificate which accords with the requirements of Article 42 of Regulation No 2201/2003, that court must ensure

⁶⁵ Ibid.

⁶⁶ European Commission. *Practice Guide for the application of the Brussels IIa Regulation*. Op. cit., p. 42.

⁶⁷ Ibid.

⁶⁸ Lamont R. Op.cit., p. 128.

that, having regard to the child's best interests and all the circumstances of the individual case, the judgment to be certified was made with all due regard to the child's right freely to express his or her views and that a genuine and effective opportunity to express those views was offered to the child, taking into account the procedural means of national law and the instruments of international judicial cooperation.⁶⁹ No matter the manner in which this procedural action is taken, it holds the possibility of prolonging the procedure for the return of children. There is a real danger of the collision of Article 11(2) and 11(3) of the Brussels IIbis Regulation, of the necessity of accurately and adequately hearing the child and also the mandate that it takes place within a timeframe of six weeks. It is to the competent authorities to respond to this challenge for conducting the whole procedure in such a short time frame.⁷⁰

3.4. Access Rights

One of the main policy objectives of the Hague Child Abduction Convention is to provide children with family relationships which are as comprehensive as possible, so as to encourage the development of a stable personality.⁷¹ Moreover, the Brussels IIbis Regulation itself gives recognition to these fundamental rights and takes into consideration the principles of the Charter of Fundamental Rights of the European Union. In particular, it seeks to ensure respect for the fundamental rights of the child as enumerated in Article 24 of the Charter of Fundamental Rights of the European Union.⁷² To this effect, Article 24 of the Charter includes the right of the child to maintain on a regular basis a personal relationship and direct contact with both of his or her parents.⁷³ These rules are also in correlation with the principle provided in Article 9 and 10 of the UN Convention on the Rights of the Child that the States should

[r]espect 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.⁷⁴

Also, such relationships are covered by Article 8 of the ECHR (the right to respect for family life). The violation of Article 8 of the ECHR extends to ensuring

⁶⁹ Judgment of 22 December 2010, Aguirre Zarraga, C-491/10 PPU, EU:C:2010:828, paragraph 68.

⁷⁰ See JPC v SLW and SMW (Abduction) [2007] EWHC 1349(Fam). [2007] 2 FLR 900; Re F (Children: Abduction) [2008] EWHC 272 (Fam), [2008] 2 FCR 120.

⁷¹ Pérez-Vera, E. Op. cit., p. 432.

⁷² Recital (33) of the Brussels IIbis Regulation.

⁷³ Judgment of 5 October 2010, McB., C-400/10 PPU, EU:C:2010:582, paragraph 60; judgment of 9 January 2015, RG, C-498/14 PPU, EU:C:2015:3, paragraph 42.

⁷⁴ See Articles 9 and 10 of the UNCRC.

the exercise of rights of contact as it was shown in the cases *Shaw v Hungary*⁷⁵ and *Prizzia v Hungary*⁷⁶ in which a breach was said to have occurred where the authorities in Hungary failed to ensure that the applicants could exercise rights of contact with their children.⁷⁷

The Brussels IIbis Regulation goes one step further. Access rights are defined in Article 2(10) of the Brussels IIbis Regulation. They include, in particular, the right to take a child to a place other than his or her habitual residence for a limited period of time.⁷⁸ The term used in the Regulation is the same as the one provided in Article 3 (b) of the 1996 Hague Child Protection Convention,⁷⁹ which itself is reproduced from the 1980 Hague Child Abduction Convention.⁸⁰ However, the term used in the Brussels IIbis Regulation is much broader and applies to any access rights, irrespective of who the beneficiary thereof is. According to national law, access rights may be attributed to the parent with whom the child does not reside, or to other family members, such as grandparents or third persons.⁸¹ Moreover, ‘access rights can include any form of contact between the child and the other person, including for instance, contact by telephone, skype, internet or e-mail.’⁸²

Article 41 of the Brussels IIbis Regulation provides that decisions regarding right of access that have been granted in an enforceable judgment given in one Member State will be recognized and enforceable in another Member State without the need for a declaration of enforceability and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in the proper form provided in the Brussels IIbis Regulation. ‘Proper form’ means that the judgment has been certified⁸³ and the conditions in Article

⁷⁵ *Shaw v. Hungary*, Application No 6457/09.

⁷⁶ *Prizzia v. Hungary*, Application No 20255/12.

⁷⁷ Practice Guide for the application of the Brussels IIa Regulation, p. 71.

⁷⁸ Article 2(10) of the Brussels IIbis Regulation.

⁷⁹ Article 3 (c) of the 1996 Hague Convention provides:

Article 3

The measures referred to in Article 1 may deal in particular with –

...

(b)... as well as rights of access including the right to take a child for a limited period of time to a place other than the child’s habitual residence;

⁸⁰ Explanatory Report on the 1996 Hague Child Protection Convention prepared by prof. Paul Lagarde, Proceedings of the Eighteenth Session (1996), tome II, Protection of children, <<https://assets.hcch.net/upload/exp134.pdf>> accessed 3.12.2019, p. 547.

⁸¹ European Commission. *Practice Guide for the application of the Brussels IIa Regulation*. Op. cit., p. 43.

⁸² Magnus U., Mankowski P. (eds). Op. cit., p. 85.

⁸³ Certification of the judgments in accordance with Brussels IIbis Regulation means that the court of origin of its on motion has issued a certificate using the standard form in Annex III of the Regulation and

41(2) of the Brussels IIbis Regulation have been satisfied. The Court of origin must verify that the following safeguards have been respected:

- all parties concerned were given an opportunity to be heard;
- the child was given an opportunity to be heard, unless a hearing was considered inappropriate due to the age and maturity of the child; and
- where the judgment was given in default, the defaulting party has been served with the document instituting the proceedings in sufficient time and in a manner enabling that person to prepare his or her defence, or if the person was served with the document but not in compliance with these conditions, it is nevertheless established that the person has accepted the judgment unequivocally.⁸⁴

Some situations provide that the rights of access involve a cross-border situation at the time of the delivery of the judgment.⁸⁵ In these situations the certificate shall be issued *ex officio* when the judgment becomes enforceable, even if only provisionally.⁸⁶ If the situation subsequently acquires an international aspect,⁸⁷ either party may at that time request the court of origin that delivered the judgment to issue a certificate. At the end, if the procedural safeguards have not been respected, the decision will not be directly recognized and declared enforceable in other Member States, but rather the parties will have to apply for an exequatur to accomplish this end.⁸⁸

The purpose of the certificate is not only to indicate whether the above-mentioned procedural safeguards have been respected, but it also contains information of a practical nature, intended to facilitate the enforcement of the judgment. This includes, for example, the names and addresses of the holders of parental responsibility and the children concerned, any practical arrangements for the exercise of access rights, any specific obligations on the holder of access rights or the other parent and any restrictions that may be attached to the exercise of access rights.⁸⁹

completed in the language of the judgment. See Stone P. *EU Private International Law*. 2nd edition. Cheltenham, UK. Northampton, MA, USA: Edward Elgar Publishing, 480.

⁸⁴ Article 41(2) of the Brussels IIbis Regulation.

⁸⁵ One of the parents is a resident of or plans to move to another Member State. See Practice Guide for the application of the new Brussels II Regulation, p. 25.

⁸⁶ Article 41(3) of the Brussels IIbis Regulation.

⁸⁷ For example, because one of the holders of parental responsibility moves to another Member State. See Practice Guide for the application of the new Brussels II Regulation, p. 26.

⁸⁸ Practice Guide for the application of the new Brussels II Regulation, p. 25.

⁸⁹ *Ibid.*, p. 44.

4. Conclusion

Proper development of children is immanently connected to the environment that is most familiar to them and that is in the place where the child has its habitual residence. Unilateral disturbance of their everyday life, of their habitual residence presents a huge distortion in children's life. They are distanced from their familiar surroundings; from the people they feel connected and are transferred to a place where one of their parents presumes that it can produce a legal advantage in determination of the parental responsibilities. Such act is deterred with the existence of the Hague Child Abduction Convention. This convention is not flawless, it is very rigid instrument intended in restitution of the *status quo* which is the Court most familiar with the case and that is the Court of habitual residence of the child. The balance is established with the existence of several exemptions from the obligation to promptly return the abducted child in the country of its habitual residence which are constructed in the 'child's best interest'. In this balance the UNCRC represents the moral and doctrinal background of the rights which are protected with the Hague Child Abduction Convention. The illicit transfer and non-return of children determined by Article 11 of UNCRC is directly derived from the Hague Child Abduction Convention, but it cannot be said that it is completely absorbed by this convention. The rules provided in UNCRC are more general, going outside of the Hague Convention covering different, bilateral and multilateral agreements. On the other hand, the principle of the 'child's best interest' is in more details trough the practice in different legal fields, covered in the UNCRC. In that aspect the UNCRC highly influences the Hague Child Abduction Convention.

The other aspects covered in both instruments are more specific. The right of the child to be heard, represents one of the most important exemptions in the Hague Child Abduction Convention. The threshold provided in the Hague Convention is of discretionary nature, while the provisions provided in Brussels IIbis Regulation are of obligatory nature (as long as the child acquires certain age in which it could freely express its own views). The influence of the UNCRC in light of developing an enhanced importance for the determination of the child's view are manifested in evolutionary improvement of the Hague Child Abduction Convention to the Brussels IIbis Regulation. The last aspect regarding access rights also goes through evolutionary improvement from the Hague Convention to the Brussels IIbis Regulation. This evolution of the understanding of the importance of this right is directly influenced from the UNCRC and its understanding that children need to be in contact with both parents in order to properly develop. In

order to understand the interplay between these legal instruments it is important to have a cohesive approach, to understand their nature. The Hague conventions give operationalization of the principles and rights provided in the UNCRC, while the UNCRC itself gives the moral and doctrinal understanding of the rules provided in the Hague conventions.