Migration, abduction and children's rights: the relevance of children’s rights and the European supranational system to child abduction cases with immigration components

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Part II
The Child Abduction Framework

4 Parental Child Abduction and Children's Rights

4.1 Introduction

The aim of this chapter is to identify if and how a child rights-based approach can be incorporated into the Child Abduction Convention. For this, it is necessary to briefly outline the private international law context within which this instrument operates.

The international family law landscape is framed by several conventions drafted under the auspices of the Hague Conference, an intergovernmental organisation whose aim is the unification of private international law.[1] The Hague Conference has been involved in drafting conventions concerning children and private international law already as of the beginning of the twentieth century.[2] Currently, three conventions are of particular importance for the rights of children in the aftermath of their parents'[3] separation. These are: the 1980 Child Abduction Convention, the 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 (the "1996 (Child Protection) Convention") and the Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance (the "Maintenance Convention").

Of them, the one which has assumed the greatest importance is the Child Abduction Convention. Several factors attest to its prominence in the cross-border family context. First, it is the most ratified Convention. To date 103

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1 Article 1 of the Statute of the Hague Conference adopted during the Seventh Session of the Hague Conference on Private International Law on 31 October 1951 and entered into force on 15 July 1955. Amendments were adopted during the Twentieth Session on 30 June 2005 (Final Act, C), approved by Members on 30 September 2006 and entered into force on 1 January 2007.

2 The first Convention drafted was the Convention related to the settlement of Guardianship of Minors adopted on 12 June 1902 (the "1902 Guardianship Convention") during the fourth Hague Conference. Subsequently, under the influence of a ruling of the International Court of Justice exhibiting the limitations of the Guardianship Convention, The Hague Conference drafted in 1960 the Convention concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Minors, first signed on 5 October 1961 (the "1961 Child Protection Convention"). For details on these instruments and the relevance of children's rights see Dyer 1996, p. 625.

3 In this dissertation the term 'parent' is used broadly to encompass all individuals with parental responsibility in relation to a child.

countries are parties to the Child Abduction Convention as opposed to 54 the Child Protection Convention and 49 parties to the Maintenance Convention. Further, it is widely regarded as the most successful instrument of the Hague Conference.[4] It is also the first Convention (of the three) which saw the light of day. This means that the subsequent instruments build upon the Child Abduction Convention, which has set the parameters for dealing with cross-border cases. For example, the Child Protection Convention uses the same concepts of custody and access rights as well as that of 'wrongful removal' as set out in the Child Abduction Convention. Further, it is the international instrument that has been the most thoroughly scrutinised by the world's highest courts.[5] Despite its prominence in literature, it should be noted that child abduction cases worldwide are not that frequent. For example, the latest statistical analysis published in 2023 analysed 2,579 incoming applications from 71 states.[6] However, the importance of the Child Abduction Convention does not lie solely in the number of child abduction applications given that not all child abduction cases follow the procedure under the Convention. Also, the mechanism of the Convention forms the backbone of international family law laying down the principle that whenever parental responsibilities are joint, children should remain in the jurisdiction of habitual residence. Thus, laws and practices of many states have been directly or indirectly influenced by the Convention: child abduction has been criminalised in many countries since the adoption of the Convention; the Hague Conference has contributed to increased harmonisation between countries by publishing Guides to Good Practice and by filing *amicus* briefs before the highest domestic courts. States have also used their diplomatic influence to deter other countries from enacting or implementing legislation which was perceived as going beyond the scope of the Convention.[7] Consequently, the (interpretation of) Child Abduction Convention has important implications for other areas of law, including but not limited to family law, criminal law, and as shall be argued in this dissertation, immigration law.

This chapter contributes to the first sub-research question. The analysis here will determine how the child rights-based framework contoured in the previous two chapters can inform child abduction cases. Section 4.2 delves into the conceptualization of the triangle parents-children-state during the *travaux préparatoires*; Section 4.3 explains the operation of the Convention against some key contemporary debates. Section. 4.4 looks at the Child Abduction Convention together with the 1996 Child Protection Convention. Finally, Section 4.5 offers a reflection on the role of children's rights within the Child Abduction Convention.

4 Elrod 2023, p. 48.
5 George 2014, p. 311.
6 Global Report 2023, Preliminary Document No. 19A, para 12.
7 Yamaguchi/Lindhorst 2016, p. 8.

4.2 Children parents and the state at the drafting stage

The drafting of the Child Abduction Convention followed the working methods of the Hague Conference. The issue of 'legal kidnapping' had been brought to the attention of the Conference from the early 1970s, however it was only six years later, in 1976, that it was added to the agenda of a Special Commission at the suggestion of a Canadian expert, Bradbrooke Smith.[8] During the meeting of October 1976, it appeared that there was a sharp increase in child abductions in all the Hague Conference Member States.[9] This increase was caused by the ease of international transport, the international marriages and the recognition of divorce.[10]

Adair Dyer published a sociological report in 1978 on the legal and social aspects of the phenomenon.[11] This report revealed, among others, that there were difficulties in locating the children; international disputes were complicated and difficult to resolve; local and foreign authorities were often unable or unwilling to provide assistance; characterising and labelling the issue was a challenge for the courts.[12] Moreover, the taking parent often sought to secure a favourable custody decision in the country where the child was abducted, which led to two conflicting custody orders in respect of the same child.[13]

The inclusion of the topic on the agenda of the Hague Conference received substantial support from States Parties, yet disagreements arose concerning the format of a future instrument.[14] Negotiations also showed differences on the approach to be taken to the best interests of the child. One of the issues was the inappropriateness of a semi-automatic return of a child to states with a different level of social and legal development.[15] The conditions for the return of the child equally raised tensions.

Ultimately, the Convention is the result of a compromise formula that diverges from traditional private international law mechanisms.[16] The success of the proposal was that it presented a simple mechanism that avoided pronouncements on custody but rather used the premise that it was against the best interests of children to be subject to unilateral removals.[17] So as to achieve consensus, the states' objections over the best interests of the child had been included in a series of exceptions permitting some assessment of the rights of children.[18] One area of concern at the time of drafting was in

8 Beaumont/McEleavy 1999, p. 17.
9 Ruitenberg 2015, p. 25.
10 Ruitenberg 2015, p. 25.
11 Schuz 2014, p. 8.
12 Schuz 2014, p. 8.
13 Stewart 1997, pp. 320-321.
14 The three avenues considered where whether (i) the envisaged instrument was to follow classical private international law rules on recognition or enforcement, (ii) to limit jurisdiction to a single state or (iii) to focus on international cooperation, see Schuz 2014, p. 9
15 Beaumont/McEleavy 1999, p. 19, referring to Anton 1981.
16 Beaumont/McEleavy 1999, p. 21.
17 Beaumont/McEleavy 1999, p. 21.
18 Beaumont/McEleavy 1999, p. 22.

relation to the automatic return of children with some states being fearful of a wide interpretation of the Convention and some others that the Convention did not allow for a sufficient weight for the best interests of the child.[19]

Ruitenberg comments that at the time there was a growing recognition in many states that the child had the right to contact with both parents.[20] However, as there was also a clear distinction between custody and contact, it was thus considered that frustrations in the exercise of contact rights could result in the abduction of the child by the contact parent from the parent having custody.[21] These assumptions also demonstrate in Ruitenberg's views the underlying rationale of the Convention was the protection of custody rights rather than the best interests of the child.[22] Regardless of whether the aim was the protection of the best interests of the child or those of the parent exercising custody, commentators agree that the Convention had a clear factual scenario in mind: that of a parent without custody who takes the child abroad from the parent with custody.[23] For the drafter the parent with custody was also the primary carer or the child, whereas the taking parent was the parent having contact rights. The drafters did consider that parents may have joint custody, yet this possibility did not receive much attention as joint custody was not the norm at the time.[24]

The Convention in its current form was adopted by the 14th Session of the Hague Conference in 1980.[25] Under Article 37, the Convention was open for signature and ratification by the States Members to the Hague Conference at the time of its 14th Session. In addition, Article 38 allows any other country to accede to the Convention; however legal effects shall exist only as regards the relations between the acceding State and the Contracting States which have declared their acceptance of the accession.

4.3 The operation of the Child Abduction Convention

4.3.1 Policy goals (object and purpose of the Convention)

Article 1 of the Convention sets out its two goals: to secure the prompt return of wrongfully removed children and to ensure the effective exercise of custody rights. The Convention assumes that the abductor is the parent without custody rights who is taking a child away to obtain a favourable custody decision in another jurisdiction.[26] At the same time, the Explana-

19 Schuz 2014, p. 9.
20 Ruitenberg 2015, p. 30.
21 Ruitenberg 2015, p. 30.
22 Ruitenberg 2015, p. 43.
23 Schuz 2014, Beaumont/McEleavy 1999, Freeman/Taylor 2020, p. 155.
24 Pérez-Vera, E. (1982). Explanatory report on the 1980 Hague child abduction convention. *Netherlands: HCCH Publications*, para 84.
25 Schuz 2014, p. 9.
26 Pérez-Vera Explanatory Report (1982), para 13.

tory Report conveys an image of the child as somebody strongly integrated and suddenly uprooted from their "family and social environment in which its life has developed"[27] Situations falling outside this premise, -when the removal of the child could be justified for objective reasons- , are dealt with by the exceptions to the prompt return mechanism.[28]

Other than in the Preamble, the Convention does not include references to the best interests of the child. Nevertheless, the Explanatory Report, -while recognising the difficulties associated with the best interests standard-, clarifies that the Convention had been drafted in the desire to protect children.[29] In the Explanatory Report the best interests of the child are equated to the right of the child not to be removed or retained from their habitual residence.[30]

Academic literature later delved into clarifying the notion of the best interests of the child in the context of child abduction proceedings. It has been considered that the Convention furthers the best interests of all children affected by international child abductions *collectively* without individualised best interests inquiries.[31] Beaumont and McEleavy pointed out that the novelty lies especially in the fact that 'the welfare of the individual child is not the first and paramount consideration'.[32] The Convention serves the child's interests by bringing clarity to the proceeding and also by applying a single interpretation to this concept.[33] The Child Abduction Convention thus allows only for limited consideration of the rights of individual children. The main reason is the concern that individual assessments of the best interests may lead to the inoperability of the return system all together.[34] The return mechanism under the Child Abduction Convention prioritises trust in the legal system of the country where the child is to be sent to.[35] The logic of the Convention is that the authorities of the country of habitual residence will decide the custody proceedings fairly.[36] On this basis, some courts and commentators have argued that return should be ordered even if it is against the interests of an individual child.[37]

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27 Pérez-Vera Explanatory Report (1982), para 11.
28 Pérez-Vera Explanatory Report (1982), para 25.
29 Pérez-Vera Explanatory Report (1982), para 24.
30 Pérez-Vera Explanatory Report (1982), para 24.
31 Vivatvaraphol 2008, p. 3335.
32 Beaumont/McEleavy 1999, pp. 28-29.
33 Beaumont/McEleavy 1999, pp. 28-29.
34 Pérez-Vera Explanatory Report (1982), para 34; Silberman 2004, p. 1051.
35 This view was also expressed in the Pérez-Vera Explanatory Report (1982) paras 35-37 where Pérez-Vera has argued that the nature of the Convention is one of cooperation among authorities.
36 This logic can also be seen in the text of Article 38 according to which accession of a country to the Convention has to be accepted by another country so that the Convention becomes operable.
37 See Secretary for Justice (New Zealand Central Authority) v. HJ [2006] NZSC 97, [2007] 2 NZRL 289; referred to in Heneghan et al 2023, p. 2.

The scholarly discussions outlined above are illustrative of the dilemmas between substantive human rights and comity considerations which are prevalent in the Child Abduction Convention. The solutions offered ranged from equating the best interests of the child to the right not to be removed, to focusing on the fairness of the proceedings in the country of return or to presenting the interests of the children as a collective, outweighing the interests of individual children. The sections below look into how legislative and sociological developments across States Parties to the Hague Conventions have amplified some of the tensions to children's rights posed by the Convention's policy goals.

4.3.2 The return mechanism

The success of the Abduction Convention lies in its simplicity: it does not deal with the substance of custody rights; instead, under the Convention, whenever a child has been wrongfully removed/retained from their country of habitual residence, the courts where the child is located should order their speedy return to the country of habitual residence. The remedy offered is the return of the child to their country of habitual residence, which is the most appropriate forum for deciding questions of custody and access.

The Convention rests on some key concepts which have a (semi) autonomous meaning. First, for the purposes of the Convention, a *wrongful removal/retention* under Article 3 exists if (i) it is in breach of custody rights attributed to a person, an institution, or another body under the law of the state in which the child was habitually resident at the time of the removal or retention provided that (ii) such custody rights were actually exercised, or would have been exercised save for the removal or retention. A wrongful removal/retention is assessed by reference to the laws of the child's habitual residence, which is in principle the place where the child should return, unless the parent filing the return request has subsequently moved.[38] *Habitual residence* becomes the jurisdictional trigger under the Convention where the return should be ordered within 6 weeks of filing an application (Article 11).

38 The obligation to return the child to the place of habitual residence is only mentioned in the Preamble to the HC '[…] desiring to […] establish procedures to ensure their prompt return to the State of their habitual residence'. However, in practice there might be situations where, even if there is an obligation to return, such obligation does not apply to the state of habitual residence but to the state where the (one) of the custodians lives. This situation would arise where, subsequent to the wrongful removal the custodian has moved to a different place, therefore it would make little sense to order the return of a child to a place where none of its custodians lives. This interpretation is supported by the provisions of Article 12 as well as by the Pérez-Vera Explanatory Report 1980, para 110 which reads " […] when the applicant no longer lives in what was the State of the child's habitual residence prior to its removal, the return of the child to that State might cause practical problems which would be difficult to resolve. The Convention's silence on this matter must therefore be understood as allowing the authorities of the State of refuge to return the child directly to the applicant, regardless of the latter's present place of residence."

There are five limited situations where authorities in the host state may refrain from ordering a return. These are prescribed under Article 12 (the settlement exception); Article 13 (a) (non-exercise of custody; consent or acquiescence by the left-behind parent); Article 13 (b) (return would expose the child to a grave risk of harm), Article 13 (2) (objection of the child to return); and Article 20 (return would be contrary to fundamental principles). Moreover, under Article 4 only children under 16 years old fall under the personal scope of the Convention.

The smooth operation of the Convention is to be ensured through Central Authorities -administrative bodies designated by each Contracting State which cooperate with each other to achieve the return of the child (Articles 6 and 7 of the Convention). If Central Authorities do not achieve the voluntary return, judicial and administrative proceedings are initiated to this effect. The role of Central Authorities in facilitating the initiation of judicial proceedings depends on each state, the Convention allows for the possibility of, for example, the Central Authority acting as a representative of the left-behind parent in the proceedings (Article 7 (g) of the Convention).

In essence, courts should order the return of the child if (i) (s)he was habitually resident in the requesting state at the date of wrongful removal/retention and if (ii) there was a breach of custody rights, provided that (iii) no exceptions to return are applicable. These three steps shall be analysed in turn below.

4.3.2.1 Habitual residence

Habitual residence is a key connecting factor for the Child Abduction Convention as it determines the country with jurisdiction for the merits of the parenting dispute(s). Conversely, if a child is found to not be habitually resident in the requesting state, the remedy of return does not apply. Indeed, in 2015, 25% of applications were dismissed on this ground.[39]

Habitual residence is a question of fact, and as such it was not defined in the Convention. The lack of a definition was considered as a key strength of the concept, which entailed a more flexible manner of responding to the demands of modern society.[40] Nevertheless, the key importance of habitual residence as a jurisdictional trigger resulted in scholars and courts alike endeavouring to outline key relevant factors for judicial decision-making. In the past 20 years, three main approaches have been crystalised: (i) the *parental intention approach*, (ii) the *child-centred approach* and (iii) the *hybrid*

39 Lowe and Stephens, Prel. Doc. No 11 A of September 2017 – 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, (Lowe and Stephens 2017) available at <https://assets.hcch.net/docs/d0b285f1-5f59-41a6-ad83-8b5cf7a784ce.pdf>>, 25 April 2023, p. 16.

40 Beaumont/McEleavy 1999, p. 89.

approach.[41] Under the *parental intention approach*, the parents' intention dominates the habitual residence meaning that time-limited travel to which the parents agree does not change the child's habitual residence. Courts following this approach have held that children's habitual residence had not changed if their parents agreed to move to another country for a limited period of time (which may be of several years).[42] Under this view the duration of the move or the child's integration in the new country are of little relevance as the parents' intention was not to move permanently.[43]

The *child-centred approach* "determines the habitual residence by looking at the child's acclimatisation in a given country rendering the intentions of the parents largely irrelevant."[44] This approach does not take into account parental intentions.[45]

Finally, under the *hybrid approach* the judge must consider all relevant factors in order to "determin[e] the focal point of the child's life — 'the family and social environment in which its life has developed' — immediately prior to the removal or retention".[46] It appears that the hybrid approach is now the favoured one across many jurisdictions. For example, with reference to the parental intent approach, in its amicus brief to the US Supreme Court, Reunite has identified a departure of the UK Supreme Court (UKSC) from the parental intent focus towards a more holistic analysis where parental intent is but one factor within a broader factual enquiry.[47] In Europe the catalyser for the change in approach has been the CJEU which has laid down a set of criteria for defining habitual residence. For the CJEU habitual residence "corresponds to the place which reflects some degree of integration by the child in a social and family environment."[48] So as to assess the degree of integration, courts are to look at several aspects, including the conditions and reasons for the child's stay, the child's nationality, the age of the child, parental intentions, stability of the child and the family.[49]

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41 *Office of the Children's Lawyer v. Balev*, 2018 SCC 16, [2018] 1 S.C.R. 398, para 109, see also Brief of Amicus Curiae Reunite International Child Abduction Centre in support of neither party (on Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit) (August 21, 2019), see also Schuz 2001, p.7 for a different classification at the time into (i) the *dependency model* where the child's habitual residence followed the residence of the parent with whom (s) he lives; (ii) the *parental rights(or parental intentions) model* under which the habitual residence of the child is that of the parent who has the right to decide where the child lives and (iii) child-centred model, under which the child is seen as an individual and the courts' primary focus when assessing the habitual residence is on his integration in a particular country.

42 Mozes v. Mozes 239 F 3rd 1067 (9th Circuit 2001).

43 For example Mozes v. Mozes 239 F 3rd 1067 (9th Circuit 2001) where the court suggested that evidence of a child's acclimatisation could be taken into account only exceptionally.

44 *Balev*, para 41

45 *Balev*, para 41; Friedrich v. Freidrich, 983 F.2d 1396, 1401 (6th Cir. 1993) where it was held that "the court must focus on the child, not the parents, and examine past experience, not future intentions."

46 *Balev,* para 42, 43.

47 Reunite Amicus Brief 2019, p. 18.

48 CJEU, 2 April 2009, C-523/07, 2009 I-02805 (*A.*), para 44.

49 CJEU, 22 December 2010, C-497/10 PPU, ECLI:EU:C:2010:829 (*Mercredi v. Chaffe*), paras 51-56, for a more elaborate discussion on the contribution of the CJEU to the concept of habitual residence see Chapter 6 below.

The hybrid approach has also been adopted in Canada following the Supreme Court judgement in *Balev.* Among the reasons for changing its case law the Canadian Supreme Court referred to the need of harmonisation with the practices of courts in other countries, including the European Union, some states in the United States, Australia and New Zealand.[50] It should be also noted that this approach gives courts the maximum flexibility in deciding matters concerning children as they do not need to follow set presumptions, allowing them to consider all the relevant factors.[51] This may entail that parental intentions weigh heavier in some circumstances (especially for young children), or become less relevant in others.

The hybrid approach is emerging as the accepted standard for determining habitual residence; it is thus important to outline some of its implications for children.[52] First, as its name suggests, compared to the parental intentions view, there is more room for taking into account the rights of children. Courts are encouraged to look at the children's actual integration into a particular environment, by assessing whether they attend school, or other educational institutions.[53] In addition, the integration of the child is seen as a separate matter to that of a parent, which allows for a distinct analysis of the child's position.[54] Such separate analysis has in practice resulted in courts finding that children's habitual residence has changed following a unilateral relocation. Such a finding would not have been possible under the parental intentions approach. This was the case in *Balev* where the mother moved from Germany to Canada pursuant to an agreement with the father that they would take up residence for 16 months only.[55] The same happened in *M*, where the parents agreed that the mother would take the children to the UK for a period of 12 months.[56]

Another significant aspect of the hybrid approach is that it leaves more room for children's own perceptions to play a role in determining habitual residence.[57] In the case of *Re LC (Children)*, Lord Wilson writing for the majority agreed that adolescent children's perceptions about their habitual residence should be considered by courts.[58] That case concerned the strong objection of three children, aged 13, 11 and 9 at the date of the relevant proceedings to their return to Spain on the ground that during the year

50 *Balev*, para 49.
51 *Balev*, para 65.
52 Schuz 2023, p. 3 noting subtle differences between countries in formulating the hybrid approach.
53 Eg, A v. A [2013] UKSC 60.
54 For example M (Children) (Habitual Residence: 1980 Hague Child Abduction Convention), [2020] EWCA Civ 1105 paras 73 and 74; also [2020] HCKA 317, para 2.
55 *Balev,* para 2.
56 M (Children) (Habitual Residence: 1980 Hague Child Abduction Convention), [2020] EWCA Civ 1105 paras 4 and 5.
57 George 2014.
58 LC (Children) [2014] UKSC 1.

they spent there they never felt at home. The majority however agreed only to the proposition that the perception of *adolescent* children should be considered as one of the relevant factors. According to Lord Wilson, "what can occasionally be relevant to whether an older child shares her parent's habitual residence is her *state of mind* during the period of her residence with that parent."[59] Albeit framed as an exception, it was also admitted that such a possibility was created by the departure from a parental intent standard to one where courts need to assess the child's integration into a particular environment.[60] Lady Hale's dissent centred on the fact that the opinions of all the three children should have been taken into account when assessing habitual residence. She highlighted

> "It is the child's integration which is under consideration. Each child is an individual with his own experiences and his own perceptions. These are not necessarily determined by the decisions of his parents, although sometimes these will leave him with no choice but to buckle down and get on with it."[61]

She also stressed that these questions are particularly relevant for

> "peripatetic families, who move from one country to another […]. If so, the perception of the children is at least as important as that of the adults in arriving at a correct conclusion as to the stability and degree of their integration. The relevant reality is that of the child, not the parents. This approach accords with our increasing recognition of children as people with a part to play in their own lives, rather than as passive recipients of their parents' decisions."[62]

Indeed, a recent judgement of the Ontario Court of Appeal indicates that, for younger children (in the specific case, aged 8 and 6) the assessment of whether children are integrated is *not* based on their opinion.[63] A different approach has been taken in Canada where courts considered the views of children (in this case ranging from 9 years old to 15) among other relevant factors for establishing the habitual residence.[64]

Notwithstanding the above, parental intention continues to play an important role in determinations of habitual residence. This is particularly true for infants and younger children for whom the social environment is less relevant.[65] The 'age' factor was highlighted by the CJEU in the *Mercredi* judgement. According to the Court

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59 LC (Children) [2014] UKSC 1, para 37
60 LC (Children) [2014] UKSC 1, para 37.
61 LC (Children) [2014] UKSC 1, Para 62.
62 LC (Children) [2014] UKSC 1, Para 87.
63 Re M [2020], paras 72 to 74.
64 Ludwig v. Ludwig, 2019 ONCA 680, (para 52).
65 For eg *Balev*, para 44.

> "The factors to be taken into account in the case of a child of school age are thus not the same as those to be considered in the case of a child who has left school and are again not the same as those relevant to an infant. As a general rule, the environment of a young child is essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of."[66]

Another important aspect is the relationship between lawful and unlawful moves. Article 3 of the Convention indicates that habitual residence is assessed at the date of the *unlawful* removal or retention. Any period after that shall not be considered. However, whenever the move is *lawful*, habitual residence may change very fast. For example, stays of some days or months have been considered sufficient to change children's habitual residence.[67] Indeed, it is envisaged that whenever the move is lawful, and there is a settled intent to reside in the new country for a longer time, habitual residence can change in a day.[68] Also, it is not permanency that is important but stability and the intention to reside in a new place for a significant period of time.[69] In the Netherlands, the Supreme Court looked closely at the integration of the mother in the new environment and thus accepted that a move of about one year did not result in a change of habitual residence.[70] Nevertheless even if the intentions of the parents play a decisive role for young children, so far it has been considered that habitual residence cannot be established without the child having actually lived in a country. This means that the parents' residence before the birth of a child is irrelevant; only periods after the child's birth can be taken into account.[71]

Consequently, current approaches to habitual residence reveal that courts' have started to consider children as separate individuals when establishing their habitual residence. This was evident in the courts' assessment of children's integration separately from that of their parents. Furthermore, particularly for adolescent children, their state of mind may sometimes

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66 CJEU 22 December 2010, C-497/10 PPU, ECLI:EU:C:2010:829 (Mercredi/Chaffe), paras 53 and 54.

67 [2020] HKCA 317 referring to *LM v. HTS* concerning a stay of four months; Monasky v. Taglieri, 589 U.S. ___ (2020), where the mother left Italy two months after the child's birth; B (A Child) (Abduction: Habitual Residence) [2020] EWCA Civ 1187, 10 September 2020 concerned a stay of two weeks; J (A Child) (Finland) (Habitual Residence) [2017] EWCA Civ 80 the lengths of stay was of 4 months; See also CJEU 22 December 2010, C-497/10 PPU, ECLI:EU:C:2010:829 (Mercredi/Chaffe), indicating that for lawful moves one day may be sufficient in changing the habitual residence.

68 *A v. A and Another (Children: Habitual residence) Reunite International Child Abduction Centre intervening)* [2013] UKSC 60, para 44, Baroness Hale DPSC declined to accept that it was impossible to become habitually resident in a single day." CJEU 22 December 2010, C-497/10 PPU, ECLI:EU:C:2010:829 (Mercredi/Chaffe) paras 51,55.

69 Schuz 2023, pp 6-7.

70 Ibili.Fatih/Olland 2019, p. 21 referring to ECLI:N:HR:2011:BQ4833, 17 June 2011.

71 Schuz2023, p. 8, CJEU 17 October 2018, C-393/18 PPU, ECLI:EU:C:2018:835 (U.D. v. X.B.).

influence a finding of habitual residence. On the other hand, younger children's assessment of integration is less evident, and for this group, the intentions of the parents will play a more important role. As a result, particularly for younger children, their habitual residence may change after a very short stay if both parents agreed to the move abroad. Finally, it should also be stated that habitual residence remains a question of fact thus highly case-specific which means that courts may adopt different approaches depending on the facts of the case.

4.3.2.2 Custody rights

After the habitual residence has been determined, the next step is to analyse whether the parent requesting the return had custody rights in light of the laws of the state of habitual residence.

For the purposes of the Convention, 'custody rights' is a semi-autonomous concept, meaning that the content of the right rather than its name is relevant in evaluating whether such custody rights existed at the time of the removal.[72] The prevailing view at the moment is that custody exists, irrespective of actual residence arrangements, whenever one parent can veto the other parent's relocation with the child, – the so called *ne-exeat* rights.[73] This view has been consolidated since 2010 when the United States Supreme Court delivered a landmark judgement holding that the right to veto a relocation was the key factor in determining whether custody existed, irrespective of the actual living arrangements of the child.[74]

It should be added that the concept of custody rights under the Child Abduction Convention is now the functional equivalent of the more recent 'parental responsibilities.'[75] The Convention will apply irrespective of the actual living arrangements of the child and regardless of whether the child was removed by the parent with whom (s)he spent most of the time. It has been suggested that this evolution in the interpretation of the Convention effectively blurs the lines between access rights and custody rights which had been originally envisaged.[76] It is in this context that the notion of 'primary caretaker' gains importance as recent statistics show that children are being removed by their primary caretakers, in contradiction with the original assumptions of the Convention.[77] The sociological paradigm which

72 Overall Conclusions of the Special Commission of October 1989 on the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, 26 October 1989, Section 9, p. 3.

73 Commentary of the International Child Abduction Database available at <www.incadat.com/index.cfm?act=search.detail&cid=34&lng=1&sl=1>, 8 January 2021.

74 Abbott v. Abbott, 130 S. Ct. 1983 (2010).

75 For the European Union it was codified in the Brussels II *bis* Regulation.

76 Freeman 2000, p. 50.

77 Original assumptions Silverman 2005, Beaumont/McEleavy 1999; most recent statistics Global Report 2023, Preliminary Document No. 19A.

determined the adoption of the Child Abduction Convention has thus fundamentally changed.

In some jurisdictions custody rights have been interpreted extensively and the Child Abduction Convention was applied even in cases where the person applying for return did not have custody rights in the country of habitual residence.[78] The case of *Re K* applied the notion of inchoate custody rights to child abduction proceedings to account for situations where the primary carer of the child did not have parental responsibility but had in fact exercised duties akin to such responsibilities. It was considered that this approach gave indirect recognition to the child's right to have contact with both parents.[79]

Furthermore, under Article 3(b) the Convention shall apply provided that at the time of the removal or retention the custody rights were actually exercised, either jointly or alone or would have been exercised save for the removal or the retention. Commentators have shown that courts rarely find that a parent was not actually exercising custody rights.[80] Moreover, the inclusion of *ne-exeat* rights in the definition of 'custody rights' has also resulted in diminishing the need for courts to analyse whether left-behind parents were actually exercising their rights; having a veto right to relocation automatically implies that that parent may wish to exercise it.[81]

A determination that the child has been removed or retained in breach of the rights of custody of the left-behind parent results in an obligation to order the return of the child, unless one of the exceptions to return are met. These exceptions shall be addressed in turn below.

4.3.3 Exceptions to return

The Explanatory Memorandum accepts that in some situations the removal of the child could be justified by objective reasons and in these circumstances a derogation from the return mechanism is permissible.[82]

The first exception, derived from the text of Article 12(2) of the Hague Convention, envisages that the return of the child shall not be ordered if the proceedings have been initiated more than one year after the removal or retention and it is demonstrated that the child is now settled in the new environment. The text of Article 12(2) includes thus two cumulative conditions for its application. First, the proceedings should have been commenced more than one year after the wrongful retention/removal and second that the child is settled.

78 Re K (A Child)(Reunite International Child Abduction Centre Intervening [2014] UKSC 29.
79 Schuz 2015, p. 613.
80 Schuz 2014, pp. 156-157, Ibili/Fatih/Olland 2019, and Ruitenberg 2015, Global Report 2023, Preliminary Document No. 19A.
81 Schuz 2014, p. 157.
82 Vera Perez Explanatory Report (1982), para. 25.

It has been considered that proceedings have commenced for the purposes of Article 12 only if the left-behind parent has lodged a petition with the authority which has the power to order the return.[83] Such wording raised difficulties for situations where the taking parent has absconded with the child. Some courts in the United States have previously ruled that the term of one year only starts running from the moment the left-behind parent locates the child.[84] More recent case law from the United States Supreme Court rejected this approach, confirming that the one-year time is not interrupted by the concealment of the child.[85] This approach (of not interrupting the one year) is being applied in several other jurisdictions and it is deemed to be more in line with the intention of the drafters to take into account the child's integration and actual living circumstances in the new country.[86] Nevertheless, the behaviour of the taking parent can be taken into account by courts in determining whether the child has settled, in that absconding in itself can prevent settlement.[87]

It has been considered that settlement can be ascertained by looking at the child's emotional and psychological state and the physical environment.[88] Rhona Schuz has further argued that the emotional element should be tested from a child's perspective, in light of the ways children become connected to an environment and not through an adult lens.[89] This would mean that due account should be given to factors such as the child's sense of time which does not usually entail long term planning.[90] Similarly to the determination of habitual residence judges look at several factors when assessing whether the child has settled in the new environment.[91] However, as opposed to habitual residence, it appears that older children's opinions as to their integration carry more weight in findings of settlement.[92] A recent Canadian judgement, reasoned that in cases raising the issue of settlement courts are concerned with the impact of another uprooting on the child who has already crossed international borders.[93] Furthermore, it was noted that

83 Ruitenberg 2015, p. 354. This means that generally an application with the Central Authority is not sufficient as Central Authorities do not usually have the power to order the return.
84 Erler 2018, referring to Furnes v. Reeves, 362 F.3d 702, 723 (11th Cir. 2004).
85 Lozano v. Montoya Alvarez, 134 S. Ct. 1224, 1236 (2014).
86 Schuz 2014, p. 227 referring to Canon v. Canon [2004] EWCA Civ 1331.
87 Schuz 2014, p. 231.
88 Schuz 2014, p. 229-230; *Simpson v. Hamilton* CA398/2018 [2019] NZCA 579, paras 30 45; *Wallace v. Williamson* 2020 ONSC 1376.
89 Schuz 2014, p. 230.
90 Schuz 2014, p. 230.
91 For example the US courts have identified 6 relevant factors: child's age; (2) "the stability of the child's [new] residence"; (3) "whether the child attends school or daycare consistently"; (4) "whether the child attends church regularly"; (5) "the stability of the [parent's] employment"; and (6) "whether the child has friends and relatives in the new area." in Norris 2010, p. 175.
92 Re M. (Children) (Abduction: Rights of Custody) [2007] UKHL 55, [2008] 1 AC 1288; CA Paris 27 October 2005, 05/15032.
93 Wallace v. Williamson 2020 ONSC 1376, para. 45.

conflicting views have emerged especially concerning the settlement of younger children.[94]

Finally, it should be also noted that states differ in their approaches to discretion under this Article. Some jurisdictions interpret that a court may order the return of the child even if the settlement exception has been established whereas others find that this exception, if met, leaves no room for courts to order the child's return.[95]

The second exception is included in Article 13(1)(a) and provides that return may be refused if the person having the care of the child was not actually exercising custody rights at the time of the removal or has subsequently consented or acquiesced in the retention. This exception by its very wording seeks to secure the protection of the left-behind parent's right to custody and as such it cannot be considered child-centric.[96] It is a parent who can waive this right, and there is no suggestion that the child's right to maintain contact with both parents also needs protecting.[97] Moreover, it is an exception which in practice has been very difficult to establish given the high standard of proof.[98] The taking parent should demonstrate by clear and cogent evidence that the acquiescence was unequivocal.[99]

In practice, it is Article 13(1)(b) which proved the most contentious and litigated exception to the Hague Convention.[100] Article 13(1)(b) provides that

> "the judicial or administrative authority of the requested State is not bound to order the return of the child if […] there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."

This Article poses particular challenges of interpretation and application. On the one hand, claims about violations of individual children's rights are most frequently made out in the context of the grave risk exception. The Explanatory Report of Vera Pérez acknowledged that the exceptions

94 Incadat commentary, exceptions to return: settlement of the child available at <https://www.incadat.com/en/case/596>.

95 Schuz 2014, Ruitenberg 2015.

96 Schuz 2014, p. 245; Ruitenberg 2015 p. 321who notes that this is an exception reflecting the policy goals of the Convention rather than the child's best interests.

97 Schuz 2014, p. 266.

98 A search on the INCADAT database retrieved 25 results and of these results the exception had been met on two occasions, see: Townsend & Director-General, Department of Families, Youth and Community (1999) 24 Fam LR 495, [1999] FamCA 285, (1999) FLC 92-842; Director-General, Department of Families, Youth and Community Care v. Thorpe (1997) FLC 92-785, [1997] FamCA 45. According to Lowe and Stevens 2018 Article 13 1 (a) has been applied in 7% of the cases.

99 In re H and others (Minors) (Abduction: Acquiescence) [1998] A.C. 72 (H.L.); Katsigiannis v. Kottick-Katsigiannis (2001), 55 O.R. (3d) 456 (C.A.).

100 The Global Report, para 21 mentions that Article 13(1)(b) was the most common sole reason for refusal in 2021 which was applied in 29% of the cases.

listed under Articles 13(1)(b) and 13(2) clearly derive from a consideration of the interests of the child.[101] On the other hand, this exception should be assessed in light of the overall policy objective, that of return, as otherwise there is a risk of undermining the prompt return mechanism envisaged therein.[102] Child abduction proceedings are not custody proceedings, thus a full best interests assessment would go contrary to its objective.[103] Consequently, whenever Article 13(1)(b) is brought into question, courts should carefully balance the rights of the individual child with the policy of the Convention – taking into account that the full best interests assessment should be conducted only in the context of custody proceedings. Eekelaar has argued that decisions in child abduction proceedings only affect children indirectly and thus courts should adopt a narrow view to the best interests assessment.[104]

It is this very balancing exercise between the individual child and the policy of return that has posed problems and has generated many commentaries and case law from national and international courts.[105] In 2020, the Hague Conference published a Guide to Good Practice to Article 13(1)(b) (the "Guide (to Good Practice)") setting out several guidelines for the proper application and interpretation of the grave risk exception.[106] The Guide is not binding, however it represents the most recent authority in the field and it has been drafted in collaboration with numerous experts. For this reason, the overview below is largely based on this instrument.

First, the Guide reiterates the framework for assessing the grave risk of harm, focusing on the idea that the exceptions are to be interpreted narrowly in light of the object of the Convention and the underlying international comity duties.[107] According to the UKSC however the very terms of this Article are of restricted application, hence there is no need for such a narrow construction.[108]

The text of Article 13(1)(b) envisages three types of risk, (i) physical harm, (ii) psychological harm or (iii) intolerable situation; however the Guide clarifies that these are usually intertwined in practice.[109] As to the standard for grave risk, the Guide adopts the approach of the UKSC:

> "It is not enough as it is in other contexts such as asylum, that the risk be "real". It must have reached such a level of seriousness as to be characterised as "grave".

101 Pérez-Vera Explanatory Report (1982), para 29.
102 Pérez-Vera Explanatory Report (1982), para 34.
103 Guide to Good Practice Article 13 (1) (b), para 26.
104 Eekelaar 2015 p. 15.
105 Henaghan et al 2023; Schuz 2023; Skelton 2023.
106 Guide to Good Practice under the HCCH 1980 Child Abduction Convention, which deals with a crucial provision of the Convention: Article 13(1)(b) (the grave risk of harm exception), Published by The Hague Conference on Private International Law – HCCH Permanent Bureau, 2020 ((Guide to Good Practice Article 13(1)(b)), Part VI.
107 Guide to Good Practice Article 13(1)(b), paras 15-25.
108 Re E (Children (FC), [2011] UKSC 27, para 32.
109 Guide to Good Practice Article 13(1)(b), para 31.

> Although grave characterises the risk rather than the harm, there is in ordinary language a link between the two. Thus, a relatively low risk of death or really serious injury might be properly qualified as "grave" while a higher level of risk might be required for other less serious forms of harm."[110]

Another important aspect is that this exception covers solely risks to the child and not to the taking parent. This is reiterated on several occasions throughout the Guide, although the Guide accepts that there may be situations where the exception may be triggered if there is sufficient evidence that, because of a risk of harm directed to a taking parent, there is a grave risk to the child.[111]

In practice, the best interests of the child have been raised by taking parents who sought to have the return proceedings dismissed. The burden of proving the existence of a grave risk is incumbent on the party opposing the return.[112] Given the consensus on the restricted scope of application of the exception it has also been submitted that the burden of proof should be a high one.[113]

The Guide further recommends a two-step approach in dealing with the exception. First, courts should be sufficiently satisfied that there is enough evidence to establish potential harm or an intolerable situation. Second, even if such evidence exists, courts should assess whether adequate measures of protection are available or have been put in place to protect the child from grave risk.[114] Finally, having established that there is a potential grave risk and that there are no adequate measures of protection, courts retain the discretion to nevertheless order the return of the child.

The issue of 'adequate measures of protection' is dealt with extensively in the Guide and more broadly, it has been considered a thorny aspect in the application of the Convention.[115] The Guide stresses that the protective measures are broad and include access to legal services, financial assistance, housing assistance etc.[116] The Guide envisages that protection measures do not need to be put in place at the time of the child's return to the country of origin, rather they should be available and readily accessible.[117] Further, although the language used is 'adequate and effective' measures of protection, no particular guidelines are given as to the assessment of the effectiveness criterion. The Guide also mentions undertakings in the context of protective measures. Undertakings represent promises of the left-behind parent made to alleviate the taking parent which form the basis of a court's

110 Re E (Children (FC), [2011] UKSC 27, para 33.
111 Guide to Good Practice Article 13(1)(b), para 33.
112 Guide to Good Practice Article 13(1)(b), para 51.
113 Ripley 2008, p. 447.
114 Guide to Good Practice Article 13(1)(b), paras 40 and 41.
115 Schuz 2014, p. 291; Trimmings and Momoh 2021; Puckett 2017.
116 Guide to Good Practice Article 13(1)(b), paras 43-46.
117 Guide to Good Practice Article 13(1)(b), para 44.

order for the child's return.[118] However, while such undertakings are well known in common law countries, their effectiveness and enforceability is questionable in other systems of law.[119] Undertakings have mainly been used to alleviate allegations of domestic violence. Available data suggests that they are not taken seriously either by the parent making them or by the authorities in the state where they should have been enforced, leaving alleged victims of domestic violence utterly unprotected.[120] The Guide mentions that "they should be used with caution" but courts' reliance on them is not further dissuaded.

Among the procedural guarantees, the Guide dedicates three paragraphs to the topic of child participation.[121] The Guide makes a brief reference to the CRC and its impact on child participation, however it fails to encourage states to use the CRC Committee guidelines on child participation. The Guide defers on these matters to national laws, and asks states to consider some aspects such as, appointing a separate representative, informing the child about the proceedings, manner of assessing the weight to be attached to children's views and finally that the decision-making process is speedy.

Article 13(1) is highly fact specific, however in time several defences have been more commonly put forward.[122] A detailed analysis of these defences is outside the scope of the present research, however it should be highlighted that the Guide indicates a clear prioritisation of comity to a concrete assessment of the defences and their materialisation. For example, in the case of domestic violence, which so far has been the most litigated and controversial aspect,[123] the Guide stresses that evidence of the existence of a situation of domestic violence in and of itself is not sufficient to establish the existence of a grave risk of harm.[124] By stressing the importance of adequate measures of protection, the Guide envisages that

118 See for eg: Re (E) (Children) (FC) [2011] UKSC 27, 10 June 2011; RE Y (2013 EWCA CIV [2013] 2 FLR 649 [2013] 2 FLR 649.

119 Trimmings/Momoh 2021, pp. 12-13.

120 Trimmings/Momoh 2021, p. 12, *see also* Hüßtege, 'Article 13(1)b of the Child Abduction Convention in the Light of Judicial Practice' (2006) 11 Judges' Newsletter 37.

121 Guide to Good Practice Article 13(1)(b), paras 86- 88.

122 The Guide to Good Practice Article 13(1)(b), identifies the following defences which have most commonly put forward: Domestic violence against the child and/or the taking parent; Economic or developmental disadvantages to the child upon return; Risks associated with circumstances in the State of habitual residence; Risks associated with the child's health; The child's separation from the taking parent, where the taking parent would be unable or unwilling to return to the State of habitual residence of the child, Criminal prosecution against the taking parent in the State of habitual residence of the child due to wrongful removal or retention, Immigration issues faced by the taking parent, Lack of effective access to justice in the State of habitual residence, Medical or family reasons concerning the taking parent, Unequivocal refusal to return, Separation from the child's sibling(s).

123 In this sense see also Section 5.3 below.

124 Guide to Good Practice Article 13(1)(b), para 58.

where legal protection as well as police and social services are available courts have ordered the return of the child.[125] Further, when it comes to claims of economic and developmental disadvantages upon return, courts should focus on the child's basic needs rather than embarking in a comparison between the living conditions in the two countries.[126] As to situations which may lead to the separation of the child from the taking parent, the Guide does not distinguish between cases where the taking parent will not return and those where the taking parent cannot return to the child's country of habitual residence.[127] For cases concerning criminal prosecution of the taking parent, undertakings of the left-behind parent of not pursuing prosecution are acceptable.[128] Impossibilities to afford legal representation or immigration considerations are in principle insufficient to establish the exception.[129] Finally, separation of siblings does not usually result in a grave risk determination for the child as in these cases it may be possible to maintain contact later on, through different arrangements.[130]

An analysis of the text of the Guide demonstrates a clear prioritisation of comity in dealing with the grave risk of harm exception. This is consistent with the object and purpose of the Convention – that of ensuring the smooth return of the child to the country of habitual residence. However, it has been highlighted that there is a conspicuous absence of references to human rights standards, in particular to the ECtHR which has developed substantial case law on many aspects dealt with in the Guide.[131] To this, it could be added that, although included, the references to the CRC are sparse, and there is no mention of any of the General Comments. While the Guide does address the topic of child participation, it fails to link it to the General Comment no 12 and to the standards therein. Furthermore, at no point does the Guide envisage addressing the grave risk exception from the child's perspective. In other contexts, such as risk of persecution for the purposes of refugee proceedings, commentators have pointed out that the risk should be addressed through the eyes of the child.[132] Children have different perceptions over risk, which are not necessarily the same as those of adults. Similarly, in the context of child abduction, including guidance on addressing the risk through the perspective of the child would have ensured a more child centric approach to the exception. Arguably, such an approach may delay proceedings, and for child abduction time is of essence,

125 Guide to Good Practice Article 13(1)(b), para 58.
126 Guide to Good Practice Article 13(1)(b), para 60.
127 Guide to Good Practice Article 13(1)(b), para 20.
128 Guide to Good Practice Article 13(1)(b), para 67.
129 Guide to Good Practice Article 13(1)(b), paras 68 and 69.
130 Guide to Good Practice Article 13(1)(b), paras74 and 76.
131 Celis 2020, blog post available at <https://conflictoflaws.net/2020/a-few-thoughts-on-the-guide-to-good-practice-on-the-grave-risk-exception-art-131b-under-the-child-abduction-convention-through-the-lens-of-human-rights-part-i/>>, last accessed on 20 June 2023.
132 Pobjoy 2013; Pobjoy 2017.

however a failure of the system to equip itself with appropriate procedures does not in itself discharge states from their obligations to comply with human rights.[133]

The two remaining exceptions to be analysed are included in Article 13(2) -the objection of the child to return- and Article 20 of the Convention -the fundamental rights exception. In practice, considerations arising under Article 20 are closely intertwined with those discussed in the preceding paragraphs concerning Article 13(1) and 13(2). Therefore, it appears more appropriate to address this exception first.

Pursuant to Article 20, the return of the child may be refused if "this would not be permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms."

The drafting of Article 20 was subject to extensive debate as it was feared that a wide policy defence would undermine the mechanism of the Convention.[134] Originally the proposed text envisaged that return could be refused if "such return would be manifestly incompatible with the fundamental principles of the law relating to *the family and children* in the State addressed."[135] This text was changed to reflect a narrower approach to the exception and to minimise the application of the internal law of the requested state which -it was feared- would alter considerably the text of the Convention.[136] Article 20 represents thus a compromise and under the new text the return can be refused if it is showed that (i) there is a contradiction between the fundamental rights principles of the requested state and those in the state of origin and (ii) that the "protective principles of human rights prohibit the return requested."[137]

As yet, this exception has been of little practical relevance, to the point of nearly fading without a trace.[138] This assessment is confirmed in the statistics of applications submitted on the basis of the Convention. In the 1999 statistical analysis, there were no reported cases of the application of Article 20.[139] The 2008 analysis revealed that on eight occasions (representing 8% of all cases of judicial refusal) Article 20 together with other Articles were raised in support of refusals; however in no case was Article 20 the sole

133 See among many authorities ECtHR 18 June 2019, no. 16572/17 (*Haddad v. Spain*), para 56; for the specific context of child abduction see ECtHR 21 September 2017, no. 53661/15 (*Severe v. Austria*) para 98.

134 Schuz 2014, p. 354.

135 Pérez-Vera Explanatory Report 1982, para 31.

136 Pérez-Vera Explanatory Report 1982, para 32.

137 Weiner 2003, p. 709; Pérez-Vera Explanatory Report 1982, para 33.

138 Weiner 2003, p. 702.

139 Lowe/Stephens 2012, referring to Lowe/Armstrong/Mathias, HCCH Prel. Doc. No. 3 (rev. version, Nov 2001).

basis for the decision.[140] The latest report indicates that in 2021 Article 20 was applied in two cases, representing 1% of the total judicial refusals.[141]

One of the explanations advanced by the scholars for its lack of use was precisely the language of the Explanatory Report.[142] Following the Explanatory Report, return could only be refused if domestic laws of the Contracting States expressly prohibit it as incompatible with fundamental rights.[143] Weiner argues for a less technical reading of Article 20.[144] In her view, an interpretation to the effect that return should not occur whenever it is inconsistent with the fundamental principles of the returning state, is more in line with the object and purpose of the Convention.[145] Another explanation for the limited use of Article 20 HC by the domestic courts, is its perceived overlapping scope with Article 13 (b) HC.[146] Thus, domestic courts preferred to analyse cases under the angle of Article 13(b) rather than Article 20 HC. Weiner suggests however that the personal scope of Article 20 is broader than that of Article 13(b) as an Article 13 defence may only be used to a risk of harm against the child, whereas Article 20 allows for its application to situations concerning the mother.[147] Schuz has identified three broad categories of claims which have been made in the context of Article 20.[148] First, applicants have argued that return of the child without an assessment of the child's best interests is against the fundamental principles of the requested state.[149] As shown above, a welfare inquiry is prohibited under the Convention. It was considered that a balanced approach between the best interests of the child as envisaged under the Hague Convention and a return order subject to conditions in the state of return, would serve to reconcile the best interests of the individual child with the goals of the Convention.[150] The best interests of the child has also been raised in relation to proceedings in the country of origin. The Barcelona Court of Appeal ruled that a return would be contrary to the basic principles of the Spanish law as a mother had been declared a 'rebellious wife' by a Rabbinical court,

140 A statistical analysis of applications made in 2003 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, 2007 update (Prel. Doc. No 3, Part I, of September 2008), *available at hcch.net*, last accessed on 13 January 2021.

141 Global report 2023, available at hcch.net, last accessed on 13 January 2024.

142 Pérez-Vera Explanatory Report 1982, para 118; *see also* Weiner 2003, p. 715.

143 Weiner 2003, p. 712 who argues that Pérez-Vera subconsciously added the words « the laws » to her commentary, to the effect that the text should be implicitly read as « would not be permitted by *the laws reflecting* the principles related to human rights and fundamental freedoms».

144 Weiner 2003, p. 712.

145 Weiner 2003, p. 712.

146 Smetzer/Mast 2003, p. 251.

147 Weiner 2003, p. 714.

148 Schuz 2014, p. 356.

149 Schuz 2014, p. 356.

150 Sonderup v. Tondelli 2001 (1) SA 1171 (CC), para 31.

due to the fact that she had removed her daughter.[151] The Rabbinical Court granted sole custody to the father as a form of punishment for the mother's rebellion. At the same time the Spanish court held that the interests of the child would not have been taken into account in the domestic proceedings, should the child be returned to Israel.

Second, Article 20 was raised in connection with due process requirements such as the length of proceedings in the home state.[152] Immigration considerations and refugee claims have also been discussed under Article 20.[153] The third category of cases in which the fundamental rights exception became relevant are those where the right to freedom of movement of the taking parent was at stake. These cases have sometimes been dismissed on the ground that the return order concerned the child and not the taking parent.[154] However, cases where the taking parent invoked objective reasons such as domestic violence, abuse or persecution have been considered to raise concerns because the taking parent had to choose between safety and the relationship with the child.[155] Debates as to the incidence of Article 20 have also been raised when the state where the child should return does not allow as a matter of law the relocation of the parent.[156]

The examples above indicate that the incidence of the fundamental rights exception is generally linked to the laws or their application in the state of origin. Only the first case discussed the incompatibility of the approach of the Convention with the fundamental rights -as applied- in the country of presence (the country ruling on the return). The other examples concerned aspects such as the impossibility of the taking parent to participate in custody proceedings in the country of origin; the impossibility as a matter of law to obtain custody; or the impossibility as a matter of law and practice to relocate with the child. In other words, cases under Article 20 raise due process concerns. In practice some of these concerns have been dealt with by expanding the interpretation of intolerable harm under Article 13(1)(b).[157] Also, little consideration has been given to the role of the ECtHR in the application of this exception.[158]

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151 Re S., Auto de 21 abril de 1997, Audiencia Provincial Barcelona, Sección 1a (INCADAT cite HC/E/ES 244).

152 Schuz 2014, p. 358 referring to the four year delay in hearing a relocation petition (Caro v. Sher 687 A.2d 354).

153 Schuz 2014, p. 358 citing State Central Authority of Victoria v. Ardito, 29 October 1997, or Weiner 2003, pp. 723-730 referring to refugee claims. However as will be shown below these considerations may also be linked to other Articles of the Convention such as Article 12 or 13 (b).

154 Schuz 2014, p. 360.

155 Weiner 2003, p. 731.

156 Schuz 2014, p. 361. Beaumont/McEleavy 1999, p. 11.

157 As has been the case of Domestic violence and separation of the child for the mother. For a detailed discussion, see Chapter 5 of this dissertation.

158 Schuz 2003, p. 355 criticising the ECtHR; see also Re M. (Children) (Abduction: Rights of Custody) [2007] UKHL 55; [2008] 1 AC 1288 (INCADAT cite HC/E/UKe 937), para 19.

Indeed, during the *travaux préparatoires*, the words "fundamental principles of the law relating to the family and children in the State addressed" have been replaced by the current wording "fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms." The proponents of this more limited scope of the exception agreed that some international consensus on the fundamental rights that could justify non return was necessary.[159]

Outside concrete cases, it was also suggested that the Convention mechanism whereby Contracting States have to accept the accession of a new state implies also an acceptance of the fundamental principles of that state and such an acceptance automatically bars the application of Article 20.[160] In this view, only if there has been a change in regime in the requesting state could courts apply Article 20.[161] This approach however appears hardly reconcilable with the *travaux préparatoires*. No such discussion existed at the time of drafting. Moreover, such interpretation suggests that the drafters of the Convention had the intention to adopt an Article largely devoid of purpose.

The last exception to be analysed, laid down by Article 13(2) reads:

> "The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views." The 2021 Statistics indicate that Article 13(2)(b) has been used as a sole reason for judicial refusal in 29% of the cases and together with other reasons in 46% of cases.[162] The data further show that the average age of the 'objecting child' was 9,8 years with the lowest age being 1 years old (albeit with an older sibling). Also, the average age of children involved in child abduction proceedings is 6,7 years old, with the greatest proportion of children aged between 5 to 7 years old.[163]

The 'child's objection' to return was primarily included in the Convention to make sure that older children, especially teenagers, are not returned against their will.[164] Article 13(2) is phrased as a two-prong test: first the competent authority must ascertain whether the child objects to return and second, such authority should determine whether that child has an age and degree of maturity appropriate to take into account their views.[165] The phrasing of the Hague Convention suggests that in abduction proceedings the voice of the child plays a role only to the extent that the child expresses an *objection* to return.[166] Furthermore, Article 13(2) is formulated in such a way to imply

159 Weiner 2002, p. 710.
160 Schuz 2014, p. 13.
161 Schuz 2014, p. 13.
162 Global Report 2023, paras 81-83.
163 Global Report 2023, para 52.
164 Pérez-Vera Explanatory Report 1982, para 30.
165 Elrod 2010, p. 677.
166 Fenton-Glynn 2014, p. 157.

that only the views of children who have an appropriate age and maturity will be considered at all in the proceedings.[167]

There is no clear obligation under the Child Abduction Convention to hear children as a matter of procedure. The wording of the Convention could be interpreted to mean that unless the taking parent raises the objection under Article 13 (2), there is no obligation for courts to hear children in the proceedings.[168]

Empirical research concerning several European countries showed that judges have not heard children as neither party had requested it and it was not mandatory under the national laws.[169] Substantive family laws, such as age limits, (discussed in the preceding chapter) shall determine whether children are heard in child abduction cases.[170] It has further been shown that in Belgium children under nine years old have not been heard; in France children under eight years old have not been heard.[171] Overall, a recent large-scale study of 17 European jurisdictions revealed that children had been heard in 194 out of 435 cases.[172] This represents less than half of all the cases.

However, it should be noted that some jurisdictions have laid down special rules for hearing children in abduction cases. For example, in The Netherlands children as of the age of six are invited to be heard directly by a judge whereas in parental separation cases hearing of children is mandatory only as of the age of 12.[173] Further, since 2018 each child as of the age of 3 shall be appointed a guardian *ad litem* in child abduction cases.[174] In Romania, the hearing of children in parental separation cases is only mandatory as of the age of 10.[175] The same age limit applies to child abduction cases; however the law implementing the Convention has added the requirement to have a psychologist available for children involved in abduction proceedings, a requirement which does not exist for other parental separation cases.[176] It has also been reported that in some cases children were not heard as they were not parties to the procedure and in this respect it is not clear whether there are differences between substantive family laws and child abduction cases.[177]

Furthermore, procedural aspects regarding whether children are heard directly or indirectly whether they have the right to separate representation

167 Fenton-Glynn 2014, p. 157.
168 Schuz 2014, p. 373.
169 Van Hof e.a. 2020.
170 Van Hof e.a. 2020.
171 Van Hoorde e.a. 2018, pp. 115, 123.
172 Hof e.a (2020).
173 Rap/Florescu 2020, p. 161, see also Van Hof et.al. 2019, pp. 327-351 indicating that pursuant to article 809(1) Dutch Civil Code the hearing of children over 12-year-old is mandatory in civil proceedings.
174 Lembrechts e.a., 2019, p. 9; Olland, Mink and Ibili 2019, p. 91
175 Article 264 of Law No. 287/2009, republished in the Official Journal of Romania no 505 from 15 July 2011.
176 Article 11 (*5)* of Law 369/2004 on the implementation of the Child Abduction Convention, published in the Official Journal of Romania no 888 of 29 September 2004. See also Florescu 2021, p. 279.
177 Van Hof e.a. 2020.

and the role of the representative also play a role in child abduction cases. There may be some variations, as discussed above where children benefit from more procedural guarantees in abduction cases as opposed to substantive family law proceedings.[178]

One important difference between child abduction and national family law concerns the purpose of hearing children and the ensuing impact of their voice on the outcome of proceedings. Article 13(2) provides that the competent authorities may refuse the return if the child objects and has the necessary age and maturity. Courts have interpreted this requirement to mean that *preferences* of children are not relevant for triggering Article 13(2).[179] In Australia, Section 111(1B) of the Family Law Act 1975 (CtH) ('FLA') provides that an objection by a child to return must not be allowed unless it imports "a strength of feeling beyond the mere expression of preference or of ordinary wishes." Similarly, in the Netherlands Dutch judges have underlined that mere preferences of the child will not be taken into account.[180] Even if a child forms an objection, if the objection is related to the country of habitual residence or one of the parents, there is a tendency to not take it into account.[181] In order to fall under Article 13(2), judges will assess whether the objection relates to the circumstances and the context of their return.[182] Objections resulting in the application of Article 13(2) related for example to the fact that return would hamper the normal development of the child or the child had the initiative in proposing contact with the left-behind parent. Furthermore, the assessment of the objection appears to be closely intertwined with the age of the child. This means that only mature children are seen as capable of objecting.[183] This reasoning has at least two implications. On the one hand, judges refuse to hear younger children on the ground that they are not mature enough and as such they could not object to return.[184] On the other hand, even when they do hear the children, judges apply a presumption of immaturity for young children which is directly linked to a view that young children cannot object to their return.[185] In the same vein, with a specific focus on young children, it has been remarked that the younger the child, the less likely it will be for a judge to find that such child is of a sufficient age and maturity to have his or her objections considered seriously.[186] Nevertheless, hearing very young children has been considered important as it helps judges understand the

178 For an overview of several jurisdictions see: Schrama e.a. 2021.
179 Lembrechts e.a., 2019, Fernando/Ross 2018.
180 Van Hoorde e.a. 2017, p. 133.
181 Van Hoorde e.a. 2017, p. 134.
182 Van Hoorde e.a. 2017, p. 135.
183 In some jurisdictions the exception has also been named the "mature child's objection", Spector 2019, p. 575.
184 Van Hoorde e.a. 2017, p.123. In the matter of LC (Children) (No 2) [2014] UKSC 1, 15 January 2014 On appeal from [2013] EWCA Civ 1058.
185 Van Hoorde e.a. 2017, p. 130.
186 Elrod 2010, p. 680.

child's self-perception of their interests and the reasons for an objection to return.[187]

Last but not least, it should be pointed out that even if children are considered sufficiently mature and they object, courts retain discretion to nevertheless order the return. For example, research on French case law showed that judges rarely consider the children's objections to be decisive in the final judgement.[188] A paternalistic approach of judges substituting their own best interests assessment for the children's views has been reported in Israel.[189] The Israeli Supreme Court considered that the children were mature and they did object to return, however, they were unable to understand that separation from a parent will cause them damage in the long term.[190] In Australia it was also held that two children -aged 14 and 12- had not formed an ability for abstract thought and future forecasting and thus they lacked the ability to predict the impact of their choices on the future relationship with the left-behind parent.[191] Interviews with judges also reported difficulties in assessing the child's objection. In particular judges found it was difficult to explain to children that a child abduction case is not a merits assessment of their best interests which remains to be analysed by the competent courts in the child's country of habitual residence.[192]

Consequently, based on commentaries and case law analysed above, it appears that despite Vera Perez' assertion that Article 13(2) was included to reflect the interests of the child the voices of the child are not always reflected in domestic judicial practice. Hague Convention proceedings allow for limited opportunities for children to participate and indeed commentators have highlighted that in many cases there is no indication of children having been heard.[193] High minimum ages for hearing children in national substantive family laws coupled with the low ages of children subject to abduction proceedings entail that many children are not heard in practice. Some positive examples have been noted where child abduction proceedings departed from the national substantive family laws by lowering the age of hearing children and/or appointing guardians *ad litem* or other experts to facilitate the expression of their views. It should equally be noted that even when children are heard, the narrow wording of the Article 13(2) exception implies that their voices are to be considered only to the extent they object to return. In other words, the possibilities of giving their voices 'due weight' as required under Article 12 of the CRC, remain limited.

187 Elrod 2010, p. 686.
188 Van Hoorde e.a. 2017, pp.123-126.
189 Schuz 2014, p. 325.
190 Schuz 2014, p. 325.
191 Fernando/Ross 2018 referring to RCB as litigation guardian of EKV, CEV, CIV, and LRV v. The Honorable Justice Colin James Forrest (2012) FLC 93-517.
192 Van Hof e.a. 2020, p. 347.
193 Van Hoorde e.a. 2018, pp. 115, 123; Hof e.a (2020).

4.4 Effects of a non-return order. The relationship of the Child Abduction Convention with the 1996 Child Protection Convention

The overview of the summary proceedings above outlined that they leave open several questions on the protection of individual human rights. A return order under the Child Abduction Convention enables the courts of habitual residence to decide on the merits of the parenting dispute. Less attention has been dedicated to the impact of a non-return order on the proceedings on the merits. In other words, if Hague courts refuse the return of the child, which courts have jurisdiction to adjudicate the merits of the custody dispute? An answer to this question, from the perspective of private international law, can shed light on different alternatives to summary proceedings. Such alternatives in turn could arguably offer more robust human rights protection to children and their parents.

The instrument which determines the competent courts on parenting disputes after a non-return order is the 1996 Child Protection Convention.[194] Article 7 lays down that the authorities of the habitual residence of the child prior to the wrongful removal retain their jurisdiction.[195] Article 1 of the Convention clarifies that such jurisdiction includes the 'attribution, exercise, termination or restriction of parental responsibility'. Consequently, if the child's habitual residence was found to be in a different state, and the authorities in the state of presence have decided to refuse the return of the child, the 1996 Convention offers the possibility of continuation or initiation -as the case may be- of the parenting dispute in the country of habitual residence.[196] Thus, following the logic of the 1996 Convention, one parent and the child could continue to reside in a 'new' state while the courts of their former residence would decide on the substance of the custody dispute,

194 Under Article 3, the scope of the 1996 Convention is to determine *a)* the attribution, exercise, termination or restriction of parental responsibility, as well as its delegation; *b)* rights of custody, including rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence, 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; *c)* guardianship, curatorship and analogous institutions. It should equally be noted that in the 1996 Convention has been superseded in proceedings between EU Member States by the Brussels II *ter* Regulation (discussed under Section 7.3.2 of this dissertation). The 1996 Convention remains applicable for proceedings concerning one EU Member State and a third state, subject to Article 97 of the Brussels II *ter* Regulation.

195 Article 7(1) of the 1996 Convention offers a very narrowly tailored possibility to deviate from this jurisdictional rule where "*a)* each person, institution or other body having rights of custody has acquiesced in the removal or retention; or *b)* the child has resided in that other State for a period of at least one year after the person, institution or other body having rights of custody has or should have had knowledge of the whereabouts of the child, no request for return lodged within that period is still pending, and the child is settled in his or her new environment."

196 In this sense see also Spector 2015, pp. 391-394.

following all the rigours of the law in that state. If these courts ultimately vest the custody with the left-behind parent, then this parent can request the enforcement of the custody judgement in the country where the child is present. Article 23(2) of the 1996 Convention lays down six (6) grounds for non-recognition of judgments, of which particularly relevant to the present dissertation are those in paragraphs (b) failure to provide the child the opportunity to be heard, (c) failure to provide the parent the opportunity to be heard or if (d) such recognition is manifestly contrary to the public policy of the requested state, taking into account the best interests of the child.

A reading of these provisions of the 1996 Child Protection Convention indicates that this instrument has the potential to offer a more comprehensive protection of human rights than the very limited Child Abduction Convention. First, this Convention allows the child and one parent to remain in one country while proceedings on the substance are pending in another country.[197] Presuming that the child may remain in the country where (s)he is, the application of the 1996 Child Protection Convention avoids uprooting the child on repeated occasions. The 1996 Child Protection Convention also offers the possibility to enforce contact rights for the duration of contentious proceedings (for example under Articles 11 and 12). In addition, the 1996 Child Protection Convention includes a cooperation mechanism between courts aimed at deciding the best-placed State to determine the best interests of the child (Articles 8 and 9). Finally, the 1996 Child Protection Convention's non-recognition system reflects the standard public policy exceptions of private international law instruments which have the capacity to assess the procedural fairness for the child and parents as well as other wider human rights considerations.

All these considerations are important for examining the *potential* of the 1996 Child Protection Convention. Nevertheless, a more detailed analysis of this instrument is not offered here given that despite its potential, and the estimation of some scholars that the 1996 Child Protection Convention will in time replace in prominence the Child Abduction Convention, [198] the 1996 Child Protection Convention has fallen short of these expectations. To date, there is no evidence to suggest that domestic courts decide on the link between the Child Abduction Convention and the 1996 Child Protection Convention in the manner described above. Such an outcome may be caused by the low ratification rate of the 1996 Child Protection Convention (51 States Parties[199]), and the significantly less dedicated attention to this instrument as opposed to the Child Abduction Convention, both in the aca-

197 This has been confirmed in a recent case from the United Kingdom where proceedings on the substance of parental responsibility continued in the United Kingdom (country of habitual residence) after the court where the child had been removed dismissed the return request. See Trimming et al 2024, pp. 5-6, referring to *B v. L* [2022] EWHC 2215 (Fam).

198 Spector 2015, p. 386.

199 Status table available at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=70>, last accessed on 15 June 2024. According to the HCCH website, there are a total of 55 Contracting Parties, 4 of which have only signed but not ratified the Convention.

demic literature and judicial practice. Nevertheless, this dissertation argues that the 1996 Child Protection Convention can offer a viable alternative to concerns raised by the Child Abduction Convention to both substantive and procedural human rights.

4.5 The place of children's rights within the Child Abduction Convention

The Child Abduction Convention is without a doubt an instrument tackling a very topical problem, that of unilateral removals of children. Recent developments in migration patterns where globalisation has resulted in an exponential growth of movement of people across country borders attest to the necessity of an international instrument regulating the situation of children caught in the middle of their parents' conflict. The underlying policy objectives of the Convention continue to receive support from countries across the world and this is evident in the number of ratifications as well as in the fact that the mechanism set out in 1980 has not been amended to date, nor is there any envisaged future amendment.

Commentators have moreover highlighted the importance of the Convention for securing the rights of children, and its consistency with the provisions of the CRC.[200] Indeed, Article 11 of the CRC mandates states to take measures for combating the illicit transfer of children abroad and to enter into bilateral or multilateral agreements to this effect. Accession to the Child Abduction Convention is envisaged under Article 11(2) of the CRC and this is clearly reflected in the preparatory works of the latter instrument. It has been pointed out that Article 11 CRC had been drafted with the Child Abduction Convention in mind and it was kept simple precisely to avoid overlapping with the Abduction Convention.[201] In other words there is an inextricable link between child abduction and the rights of children.

The best interests of the child, albeit not expressly included in the body of the Abduction Convention, were one of its key policy goals. It would however be inaccurate to argue that the rights of children were the sole, or even the main consideration of the Convention.[202] Other important policy considerations are comity (mutual respect for judicial decisions of foreign courts); deterrence of abductions, justice between parents, upholding the rule of law or determination of the appropriate forum for deciding on the substance of custody disputes.[203] Case law examples have shown that these policy goals may lead to conflicting results in concrete situations. For

200 Khazova and Mezmur 2020, p. 337, Baker and Groff 2016, Duncan 2000 p. 122-123.
201 Tobin, Lowe and Luke 2019, pp.370-375.
202 The Pérez-Vera Explanatory Report (1982) as well as the Dyer Report posit that children were at the heart of the Convention. However, this has been disputed by other authors, See Ruitenberg 2015.
203 Schuz 2014a, pp. 47, 63; Mol/Kruger 2018, p. 444.

example, the aim of return which serves the best interests of the child in general may go against the interests of the individual child. At a theoretical level, these cases have questioned whether it can be justified to sacrifice the interests of a few children in the name of children in general.[204] This utilitarian approach was deemed inconsistent with the normative values of autonomy and equality and with the Kantian principle that a person should always be treated as an end in himself, rather than a means to an end.[205]

Against this background, scholars and courts have developed mechanisms to integrate human rights considerations in the Child Abduction Convention.[206] Many agree that human rights should guide the interpretation of the Child Abduction Convention.[207] This is all the more evident due to the fact that human rights instruments form part and parcel of the international normative landscape. Article 31(3)(c) of the Vienna Convention on the Law of Treaties supports a harmonious approach to treaty interpretation by providing that any relevant rules of international law are applicable in the interpretation of an international treaty. Thus, not only does the CRC take into account the Child Abduction Convention but this Convention should equally be interpreted in light of the CRC. The principle of evolutive interpretation requires decision-makers to consider not only the intention of the drafters but the changing applicable rules of international law.[208]

On this basis it can be concluded that the Child Abduction Convention is an instrument reflecting in general the rights of children. However, competent authorities should also interpret the Convention on a case-by-case basis in a way that is consistent with the principles of the CRC. Section 4.5.1 below analyses the tensions between children's rights and the policy aims of the Convention, Section 4.5.2 analyses the only decision to date of the CRC Committee and finally Section 4.5.3 applies the rights-based framework of Chapter 2 to child abduction cases.

4.5.1 Comity versus human rights

The first aspect which has caused difficulties in reconciling the return mechanism with substantive children's rights is the principle of comity. This doctrine has been used in a sense of judicial courtesy in order to show deference to other sovereign states.[209] It has been considered that the doctrine of comity can be understood as a theory that provides general justification for the need to apply foreign laws and recognize foreign judgments.[210] Comity

204 Schuz 2015 pp. 607-633; referring to Freeman 1997, pp 34-35.
205 Schuz 2015 pp. 607-633; referring to Freeman 1997 pp 34-35.
206 Eekelaar 2015; Schuz 2005, Mol/Kruger 2018.
207 Although this is not the position of all, see for example Eekelaar 2015, Silberman 2010.
208 Article 31(3)(c) VLCT, see also Arato 2010.
209 Schuz 2014a, p. 39.
210 Schuz 2014a, p. 39.

within the Child Abduction context is reflected in several ways. First, the return mechanism is based on the comity principle that the state of origin is willing and able to protect children.[211] Therefore children should be returned as they will have the benefit of a fair decision-making process on the custody proceedings in the country of habitual residence. Second, the exceptions to return provided under Articles 13 and 20, expressly allow for discretion in ordering the return even if the conditions to raise the exception have been met.[212] The discretion is intended to show that judges in one country trust the system in the other country, to show deference, and it has been indeed applied in this spirit.[213] Comity was also the basis for developing the practice on undertakings – discussed above – where judges order the return subject to compliance with certain specific conditions upon return.[214]

There is an undeniable tension between comity and substantive children's rights. Comity requires deference whereas substantive children's rights require an examination of the situation of the individual child and a careful balancing of all the competing rights.[215] A children-rights approach does not entail that the rights of children always prevail but it requires an individual assessment by courts.

The tension has been reconciled in the text of the Convention by allowing for limited assessment of individual children's rights whenever exceptions to return are raised. This has led to the view that the Convention does allow for a narrow interpretation of the best interests of the individual child. However, to meet the requirements of a child rights approach courts need to actually assess the interests of the individual child in the limited way envisaged in the Convention, rather than automatically applying the return mechanism. Indeed, as Lord Justice Ward held "The interests of the children in remaining here should not be sacrificed at the altar of comity between nation states."[216] It has also been argued that "today, courts and others seem to take the view that states actually have an interest in returning abducted children so that the international community will consider those states compliant with the Convention."[217] However, measuring the success solely in terms of the returns ordered rather than by ordering the return only where it is necessary, is not in line with a child rights approach as the essence of the latter approach is an individualised assessment of the child's situation.[218]

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211 Schuz 2014a, p. 50.
212 Schuz 2014a, p. 48.
213 Mol/Kruger 2018, pp. 444-445 citing judgements where return was ordered even if the exception was met.
214 R Schuz 2014, p. 48.
215 See also Chapter 2 above.
216 Schuz 2014a, p. 53 referring to Re T (Abduction: Child's Objections to Return) [2000] 2 FLR 192, 220.
217 Schuz 2014a, p. 66.
218 See also Schuz 2014a, p. 68.

Furthermore, it could be argued that more recent developments in international law have diminished the importance of some comity interests. At the time of the adoption of the Convention, the effect of the non-return order was that jurisdiction on the merits of the custody dispute was changed from the country of origin to the country of presence. Such change of jurisdiction affected the comity interest of allowing the country of origin to decide the substance of the custody dispute. Under the Child Protection Convention as well as the Brussels II *bis* Regulation such a change of forum does not necessarily follow from a non-return order.[219] In other words, even if the return is refused the state of habitual residence retains competence to decide on custody while the child remains in another country. The development of electronic means of communication can also allow for the possibility to hear parties via video conferencing thus alleviating any concerns about fairness and at the same time avoiding the disruption to the child's life by having to relocate (potentially twice).[220] Evidently, there will be situations where return is not the most appropriate remedy (see also below the sections discussing immigration considerations) and -if jurisdiction for custody adjudications remains with the country of origin- comity and children's rights are both reconciled under other international instruments. The efficacy of such instruments is dependent on the possibilities of effectively exercising cross-border contact between the child and the left-behind parent during the dispute on the merits. While this is something for the competent authorities to decide on a case-by-case basis, it is important to highlight that there is an international framework in place to facilitate this.[221]

Other tensions between comity and individual children's rights can be identified from the fact that there is no possibility to monitor the situation of the child after the return. The text of the Convention envisages that the child shall return to the country of habitual residence on the *assumption* that decisions on the merits shall be fair and that the child shall not be exposed to a grave risk of harm or other human rights violations. Return is thus ordered following assumptions about the *future* of the child. Practice has shown that child abduction cases sometimes require protection measures in place in the country of habitual residence. Undertakings have proven particularly unreliable, specifically due to their unenforceability. Furthermore, there is nothing in the Convention to require any form of monitoring of the child's situation post return. Arguably, the lack of any provision to this effect is justified by mutual trust and respect for the systems of another country – two comity considerations. Following the 2017 Hague conference questionnaire, states indicated that even if protection measures are put in place to ensure the safety of the child upon return, neither the sending state or the receiving state see themselves competent under the Hague Convention to monitor the

219 In this sense see also Section 4.4 above.
220 Hof/Kruger 2018, p. 148, Schuz 2014a, p. 74.
221 For example, the Brussels II *ter* Regulation; The 1996 Child Protection Convention.

effectiveness of the protection measures.[222] Some states however considered that such follow up would be necessary to ensure the protection of the child whereas others rejected this idea.[223] The reasons put forward against the follow up mechanism related to the restrictive language of The Hague Convention. However, from the perspective of children's rights, the existence of a follow up mechanism would ensure *effective* protection of children upon return. Moreover, international developments in the field of human rights go against a restrictive view of comity in this sense. For private international law, the Child Protection Convention does include provisions about inter-state cooperation on a broader basis than the Child Abduction Convention.[224]

4.5.2 Child abduction before the CRC Committee

As mentioned in Chapter 2 of the present dissertation, the OPIC has entered into force on 14 April 2014, giving the possibility to the CRC Committee to issue Views in individual communications, and to further elaborate on the intersection between the Child Abduction Convention and the CRC. To-date[225] three individual communications have been submitted to the CRC Committee.[226] Of these, one communication was declared admissible and analysed on the merits.

N.E.R.Á. on behalf of J.M. v. Chile v. Chile was filed by a mother on behalf of her three-year-old son who had been diagnosed with language delay and a form of autism. Before domestic courts, the father claimed that the child had been wrongfully removed from Spain to Chile. Opposing the return, the mother submitted that the child's habitual residence remained Chile. She also argued that there was a grave risk of harm for the child on several accounts. First, an arrest warrant for international child abduction had been issued against her which placed her, as the child's primary caretaker, in an impossibility to return with the child. The separation of the child from the mother would amount to a grave risk of harm for the child. The mother had

222 HCCH questionnaire 2017, see the answers of Belgium, Croatia, Finland, France, Germany, Ireland, Netherlands. Available at hcch.net.

223 HCCH questionnaire 2017, Available at hcch.net. Supporting countries: Czech Republic, Malta, Portugal, Romania, Switzerland, Denmark. Against France, Netherlands, United Kingdom, Germany, Ireland.

224 See Articles 29-32 of the Child Protection Convention.

225 15 June 2024.

226 J.*S.H.R. v. Spain*, Communication no 13/2017, 15 May 2019, *N.E.R.Á. on behalf of J.M. v. Chile*, Communication no 121/2020, 20 June 2022; *W.W. and S.W. v. Ireland*, Communication no. 94/2019, 12 September 2022 – while this Communication has been declared inadmissible, it should be noted that three CRC Committee Members dissented on the ground that Ireland had not observed the interim measure requesting Ireland to suspend enforcement of the return order. This case further shows the tensions between the expediency required under the Hague Convention and procedural incidents which may occur in these types of complaints. For a commentary, see also Paul, *Communication No. 94/2019: S.F. on behalf of W.W. and W.F v. Ireland,* Leiden Children's Rights Observatory, Case Note 2023/02, 29 March 2023.

also claimed that she had been the victim of psychological abuse from the father, however these claims were not further elaborated upon. Finally, she claimed that due to the child's medical condition and treatment which he was following in Chile, return to Spain would expose him to severe psychological trauma. In Chile, two of the lower courts dismissed the father's return request, accepting that the child's habitual residence has remained in Chile. It appears that these courts also considered that the child's best interests would be severely impacted if returned. It is not clear if this consideration formed part of Article 13(1)(b) analysis or if it was an *obiter dictum* for the Chilean lower courts. On 3 September 2019, the Chilean Supreme Court allowed the father's appeal on points of law and ordered the child's return to Spain. It does not appear that the Supreme Court analysed any of the exceptions to return put forth by the mother; it simply declared her allegations as unsubstantiated. The Supreme Court found essentially that the father's rights had been infringed.

The complaint was brought to the CRC Committee under Article 3, 9 and 23 of the CRC. It their defence, the state relied heavily on the policy aims of the Child Abduction Convention, arguing that these policy aims, *per se*, reflect the best interests of the child and thus bar any individualised assessment of the best interests.

In its interpretation of Article 3(1) CRC, the CRC Committee relied on the General Comment no. 14 which requires an individualised approach to the best interests of the child, depending on "their personal context, situation and needs".[227] It also accepted that the CRC should be interpreted in the light of the Hague Convention, by virtue of VLCT as well as under Article 11 of the CRC which calls upon states to take measures against the illicit removal of children. However, it did not accept the argument that the Hague Convention is directly intended to ensure compliance with the best interests of the child. On the contrary, while ascribing to the objectives of the Hague Convention, the CRC Committee reasoned that the exceptions to the Convention call for an individualised assessment of the best interests of the child.

As a standard of assessment, the CRC Committee established two steps. First, national courts must effectively assess the elements which may constitute an exception to the duty to return a child and make a sufficiently reasoned decision on this point. Second, the elements must be assessed in the light of the best interests of the child.[228] When it comes to the content of the best interests assessment, the CRC Committee considered that it falls within the competence of domestic courts. Consequently, following this reasoning, the obligations imposed by the CRC in child abduction cases are mostly procedural, rather than substantive.

227 *Communication No. 121/2020 N.E.R.Á. on behalf of J.M. v. Chile*, para 8.2 referring to GC no 14, paras 17 and 32.

228 *Communication No. 121/2020 N.E.R.Á. on behalf of J.M. v. Chile*, para 8.5.

On the facts of the case, a violation of Article 3 CRC was found on the ground that that the Chilean Supreme Court did not assess the concrete circumstances of the child including the real possibilities of the parent to return to the child's country of habitual residence and maintain contact with him. The case concerned a 3 year-old boy with autism whose mother had been his primary carer. The Chilean Supreme Court did not assess any of these elements; it simply ordered the return on the ground that the father had not consented to the child's move to Chile. It also declared her complaints unsubstantiated without further elaborating upon this.

This case is the first and only one to date where the CRC Committee undertook a merits assessment of the interrelation between the CRC and the Hague Convention. It is also important in that it both sets the standard of assessment for the CRC Committee while also illustrating the existing tensions generated by the interpretation of the Hague Convention. As has been acknowledged in commentaries to this View, the CRC Committee dismissed the proposal that the collective best interests override individual best interests in child abduction cases.[229] Indeed, as discussed in this dissertation this is one point of contention.[230] The argument that the Child Abduction Convention does not allow for an individualised assessment of the child's best interests was also put forward by the Chilean government in the *N.E.R.Á* communication. The Committee found that the best interests of the child should be a primary consideration in deciding whether a return should be carried out.[231]

Questions in academic literature remain as to the compatibility with the CRC of the discretionary powers of courts to order return even when it has been established the return is against the best interests of the individual child.[232] For example, Skelton considers that it is likely that the Committee will accept as compatible with the CRC situations where after assessing the best interests of the child, domestic courts use their discretionary powers and order the return.[233] In this view, this is an instance where the best interests of the individual child are overridden by the best interests of children, as a group.[234] On the other hand, Tobin et al argue that a return against an individual child's best interests goes against the CRC.[235] On this point, it should be stated that there may be a conflation between the best interests of the child and a grave risk of harm or an intolerable situation. From a child rights perspective a distinction should be made between ordering the return when it has been established that it may not be in the best interests of the child and a situation where the return would expose the child to a

229 *Communication No. 121/2020 N.E.R.Á. on behalf of J.M. v. Chile,* para 8.4; Skelton 2023, p.293 referring to Tobin et al. 2019, p. 389.
230 See also Section 4.3.1 of this dissertation.
231 *Communication No. 121/2020 N.E.R.Á. on behalf of J.M. v. Chile,* para 8.4.
232 In this sense Skelton 2023; Tobin et al. 2019, p. 389; Freeman 2022; Schuz 2014.
233 Skelton 2022, p. 297.
234 Skelton 2022, p. 297.
235 Tobin et al 2019, p. 390.

grave risk of harm. A child rights perspective may be said to be compatible with a return order against the best interests of the individual child given that their best interests are only a primary consideration in the return proceedings. They are not the only consideration and hence they could arguably be outweighed by other factors.[236] Moreover, it should be stated that this situation does not cover discretionary instances under the Child Abduction Convention, but rather situations when the grave risk defence has not been met. However, this dissertation argues that a situation where it has been established that return exposes the child to a grave risk of harm or to an intolerable situation, is incompatible with the CRC and, depending on the facts of the case, with the principle of non-refoulement.[237] Clearly, as discussed herein, protective measures may be taken so as to ensure that the child is not exposed to such a grave risk of harm, however, these protective measures should equally be tested for their compatibility with a child rights-based approach.

Further, available commentaries on the CRC Committee's View also show that whereas the standards established by the CRC Committee are not controversial in and of themselves, their application in practice remains a point of contention.[238] This type of criticism is mirrored in judgments of the ECtHR as well as in the available commentaries to those judgments.[239] Referring to *N.E.R.Á. on behalf of J.M. v. Chile,* Basi and Pedreño argue that in this case the Committee substituted their view to the domestic judgment, by implying that Article 13(1)(b) may be incident. This argument is made despite the fact that the Committee clarifies, and it is not disputed by the Chilean Government, that the judgment of the Chilean Supreme Court lacked any reasoning concerning the concrete situation of the child and to the arguments put forward by the taking parent in that regard.[240] The commentary also considers that the vulnerabilities of the child have not been sufficiently evidenced.[241] Nevertheless, it is not questioned that it had been proven that the child had autism; that the taking parent was the primary carer and that she was subject to criminal proceedings in the country of habitual residence. It appears that the commentary focuses on the possibilities for a safe return, even though these possibilities had not been entertained at domestic level. It therefore appears that even if this commentary accepts *prima facie* that the Hague Convention allows for some individualised assessment of the rights of children, it rejects any scrutiny which may lead to a finding that children's rights warrant the application

236 See also section 2.4.2 of this dissertation.
237 Section 11.1.2 of this dissertation.
238 Basi/Pedreño, *Communication No. 121/2020 N.E.R.Á. on behalf of J.M. v. Chile,* Leiden Children's Rights Observatory, Case note 2022/3, 31 October 2022.
239 In particular the case of ECtHR 26 November 2013, no. 27853/09 (*X v. Latvia (GC)*) and the commentaries thereto referred in Section 8.3.3. and 8.4.
240 *Communication No. 121/2020 N.E.R.Á. on behalf of J.M. v. Chile,* para 8.7, *in fine*.
241 Basi/Pedreño, *Communication No. 121/2020 N.E.R.Á. on behalf of J.M. v. Chile,* Leiden Children's Rights Observatory, Case note 2022/3, 31 October 2022.

of the exceptions to the Convention. As this dissertation argues, the burden of proof is set to an extent to which it becomes insurmountable for the person raising it. On the contrary, the standard set by the Committee is a purely procedural one which in fact should lead domestic courts to a more contextual analysis of the rights of children in complex abduction cases. It is for the domestic courts to carry out such analysis and to demonstrate how they have looked at the rights of children. The CRC Committee indicated that the right to maintain contact with both parents will form part of the analysis and that it shall supervise that domestic courts adopt reasoned decisions. The CRC Committee went even further by mentioning that "it seems unlikely that an adequate respect for the procedural safeguards […] would result in a substantive violation of Article 3 of the Convention."[242] There is a clear commitment thus to a harmonious interpretation of the CRC and The Hague Convention.

Finally, it should be said that the position of the CRC Committee is similar to that of the ECtHR which is discussed at length in Chapter 8. It could be argued that the CRC Committee adds a novel element to the ECtHR's case law by expressly mentioning that the best interests of the child should inform the assessment of the exceptions to return. However, as discussed in this section and in the chapter dedicated to the ECtHR it appears that divergences occur when it comes to factual assessments, rather than on the standards of review themselves.

4.5.3 The three core children's rights in the Child Abduction Convention

Many references have been made throughout this chapter about children's rights and the Child Abduction Convention. This section aims to provide a clearer and more coherent picture on the challenges children's rights pose to the Abduction Convention. It should be recalled that Chapter 2 proposed following Tobin's rights-based approach to judicial decision-making which includes four stages, starting from the identification of the rights at stake and culminating with showing in the judicial reasoning how the rights have been balanced within the context of an individual decision. Throughout this chapter it has been discussed that the Child Abduction Convention does not permit an evaluation of the merits of custody dispute and that it has been considered that the impossibility of an in-depth analysis also bars an individualised assessment of the rights of children. However, while it is indeed a fact that the Child Abduction Convention does not amount to a custody determination, this dissertation follows the VLCT's systemic integration approach which calls for a harmonious interpretation of international treaties. The proposition is thus that children's rights as formulated within the CRC, and the application of a rights-based approach are not per se incompatible with the Abduction Convention. The question is rather about how

242 *Communication No. 121/2020 N.E.R.Á. on behalf of J.M. v. Chile,* Leiden Children's Rights Observatory, Case note 2022/3, 31 October 2022, para 8.5.

courts could achieve the appropriate balance in individual cases. As with the other chapters, the focus of the following paragraphs is on the three core rights: the child's best interests, the right to have contact with both parents and the right to be heard.

In abduction cases, children's rights are included in two ways: as a matter of policy and as individual rights. These two considerations could sometimes be seen as pointing in different directions but as has been argued herein, through a harmonious interpretation policy considerations can and should be reconciled with individual rights (consistent with the narrow reading of the Convention).

Similarly to substantive family laws, at policy level the best interests of the child in abduction proceedings is intimately linked to the right to contact with both parents. It has been held that the Hague Abduction Convention complies with the CRC as the Convention promises that the child will be separated from the left-behind parent only where this is absolutely necessary.[243] It has been held that the Convention gives effect to the rights of the child set out under Article 9(3) and Article 10(2) of the CRC.[244] Empirical research has also shown that in concrete cases courts tend to rely on the best interests of the child as a policy consideration when ordering the return, rather than when applying the exceptions to the Convention.[245] It was also found that many judges do not refer to the interests of the child at all in the proceedings.[246] Eekelaar has proposed that child abduction cases are decisions *indirectly* affecting the child as they are about the *best place to make a decision* and, consequently, the courts are not bound to undertake a detailed investigation into the child's interests.[247] If it is accepted that the Child Abduction Convention does allow for limited consideration of the best interests of the child in an individual case, then a child rights approach would also entail that judges identify in each concrete case what these interests are and subsequently balance them against the interests of the other parties or of the policy interests of the Convention more in general.[248] This does not appear to systematically happen in these proceedings.

Furthermore, while indeed considerations about the right of the child to have contact with the left-behind parent play a significant role at policy level, questions about separation between the child and the taking parent should also be taken seriously into consideration. This is all the more important as now the taking parents are in most cases also the primary caretakers of the children.[249] No significant attention appears to have been given on the impact separation from the taking parent may have on the child and on

243 Sthoeger 2011, p. 539.
244 Baker/Groff 2016, p. 148.
245 Mol/Kruger 2018, pp. 421-454. The authors found that judges used the best interest of the child more in decisions ordering return rather than in cases when the return was refused.
246 Mol and Kruger 2018, pp. 437, 444.
247 Eekelaar 2015, p. 12.
248 See also Chapter 2.
249 Chapter 5, Section 5.4.1; Introduction, Section 1.4.

the circumstances which could justify a non-return order on this ground. Clearly, reasons for not including these considerations relate to the fact that child abduction should be punished and the Convention should also have a deterred effect for potential abduction. These considerations, valid as they may be, fail to take into account situations where the taking parent is in an objective impossibility to return and which necessarily will result in the separation from the child.[250] Also, if it is accepted that children should not be made responsible for the behaviour of their parents, then concrete cases may raise the requirement of a more detailed analysis of the child's relationship with both parents. An example of trying to reconcile the Convention with the interest of the individual child has been noted in Switzerland where Article 13(b) has been expanded at legislative level.[251] The Federal Act on International Child Abduction and the Hague Conventions on the Protection of Children and Adults included the following definition of intolerable situation:

> "Under Article 13(1)(b) of the 1980 Hague Convention, the return of a child places him or her in an intolerable situation where:
> (a) placement with the parent who filed the application is manifestly not in the child's best interests;
> (b) the abducting parent is not, given all the circumstances, in a position to take care of the child in the State where the child was habitually resident immediately before the abduction or this cannot reasonably be required from this parent; and
> (c) placement in foster care is manifestly not in the child's best interests."[252]

The application of this Article is very restrictive in that all three conditions should apply cumulatively but it does attempt to take into account the situation of the child post return and the relationship between the child and both parents.

Furthermore, an important aspect to address is the extent to which the Convention allows for the perception of the child in concrete determinations. As has been shown, the child's perception is essential for a child rights approach as it is through including their perceptions that children can exercise their autonomy. In child abduction proceedings children's perceptions may play an important role at various levels: including for example when determining the habitual residence, settlement, the grave risk of harm or whether they object to return. In addition, children's views may play a role whenever states accept the existence of inchoate custody rights in the determination of the care relationship with the left behind parent, even if such parent does not have custody rights within the sense

250 See for eg discussion on the case law of the ECtHR, Chapter 8.
251 Van Hof/Kruger, p. 138.
252 Van Hof/Kruger, p. 138.

of the Child Abduction Convention.[253] As many aspects require assessments of fact rather than laws it is arguable that children's views should be considered also outside the provisions of Article 13(2) of the HC. However, concerns have been expressed that children are not systematically heard in proceedings and when they are heard, it is usually solely for the purposes of assessing whether they object to return, which is a very narrow construction of Article 12.

There are also many positive developments, and as has been shown above, states increasingly accept that children can determine their habitual residence or whether they are settled in a new environment. It should be noted however that these positive developments are mainly in place for older children. At the same time, the Child Abduction Convention affects mostly younger children, the average age being six years old.[254] This approach is in clear contradiction both with General Comment no 12 on children's right to be heard as well as with General Comment no 7 on Implementing Children's Rights in early childhood, where the CRC Committee does not distinguish between children's rights on the basis of their age.[255] The commentaries on the child's right to be heard included in Chapter 2, are equally relevant and shall not be reiterated here. However, it should be pointed out that outside the limited context of Article 13(2), there is nothing to suggest that children's voices, if appropriately expressed, could not be taken into account for determining several questions of fact in the Convention, including the grave risk of harm exception, habitual residence or whether custody rights were actually exercised. Such an approach would ensure that return orders comply with both the policy objectives of the Convention and with the interests of the particular child. Moreover, as discussed in Chapter 3 above, family courts could equip themselves with the appropriate tools for ensuring that children are heard in accordance with their specific needs.

It has also been held that comity interests of not having one's legal system subject to scrutiny justify states in not assessing whether the child has the opportunity to be heard in another legal system.[256] In this study, it is argued that the European supranational structure has a different understanding of comity and that under this system courts should make sure that minimum conditions for hearing children are in place in the country of return.[257]

Further, in this dissertation it is argued that the voice of children should play a more important role especially in cases concerning separa-

253 Inchoate righs have been applied to child abduction cases following the case of Re K (A Child) (Reunite International Child Abduction Centre Intervening [2014] UKSC 29; see also Schuz 2015, p. 613.

254 Lowe/Stevens 2015, p. 9; Lowe/Stevens Global Report 2023, para 84.

255 Skelton 2023, p. 290.

256 Schuz 2014, pp. 72-74.

257 See chapters 7 to 9, below.

tions from the primary caretaker where the latter cannot return for reasons independent of his or her will. This argument will be elaborated upon in Chapter 6, Preliminary Conclusions, which also addresses the incidence of immigration-based defences within child abduction proceedings.

Another aspect to be mentioned concerns the discretion envisaged under the Convention. Here, courts are given the possibility to order a child's return even when, for example, it was established that the child could be subjected to a grave risk of harm. The exercise of discretion to order a return even when the narrowly worded exceptions are met is hardly reconcilable with a child rights approach. It could be counter-argued that children's rights should not trump all other rights, therefore a different outcome may exist when return does not reach a grave risk of harm, but it is nevertheless contrary to the child's best interests. Be that as it may, in cases of serious allegations of human rights violations, a return order would hardly be defendable from a children's rights perspective.

Finally, one aspect that may merit further attention in the future is the return as the remedy under the Convention. It has been argued that this remedy in itself could be seen as treating the child as an object rather than a rights holder.[258] In this spirit it is believed that future discussions should focus on cross border exercise of contact between children and parents as well as possibilities to decide speedily on custody without the need for return so as to avoid damaging situations arising from extended custody litigation and/or multiple relocations. This possibility is ever more present now with the advent of new technologies, but it has been little explored in this specific context.

4.6 Conclusions

This Chapter has dealt extensively with the Child Abduction Convention. The mechanism of the Convention has been outlined. It was argued that the Convention leaves room for an individualised application of children's rights in the exceptions to return. Further, the Child Abduction Convention has been contrasted with the 1996 Child Protection Convention; the argument was that despite the emphasis in literature and practice on the Child Abduction Convention, the Child Protection Convention has the capacity to reconcile the human rights tensions within the former instrument. Section 4.5 has analysed the Child Abduction Convention from the perspective of children's rights, exposing the tensions within the instrument as well as some solutions which have been found. The overall conclusion is that despite the push for a very restrictive interpretation of the Convention

258 R Schuz 2015, p. 614.

so as to minimise or eliminate individual rights considerations, the text of the Convention permits the incorporation of individual children's rights without jeopardising the return mechanism, which is extremely valuable in a globalised world.