The Hague Convention of 1980 is an extraordinary tool designed to prevent international child abduction with no less than 101 Contracting States. In 2015, almost 3.000 children were involved in a return application, and 45% of them were returned[1].

However, the instrument is still perfectible. This article will focus on issues which cause the most difficulties during litigation: (I) the unfortunate absence of a definition of the concept of "habitual residence" and a proposed definition ; (II) the unfairness of the starting point of the one-year period with regards to the settlement of the child exception and a proposed starting point and (III) the dangers of a broad interpretation of the grave risk of harm exception and proposed express limitations.

I- <u>A proposed definition of "habitual residence"</u>

The Hague Convention has omitted a definition of "habitual residence", in order to let Member States make their own determinations. The absence of a definition "*has helped courts avoid formalistic determinations but has also caused considerable confusion as to how courts should interpret 'habitual residence*[2] *'*".

The concept of habitual residence is central to the application of the Hague Convention remedy. If a child is found not to have their habitual residence in another Member State, the Convention will not apply and return will not be available. Judges of the Requested State have jurisdiction to determine the child's habitual residence.

This absence of definition fails to offer legal certainty for the left-behind parent. Absent a global definition, a child could be abducted to a foreign country which applies a fundamentally different interpretation to the one applied at home. Since the left-behind parent, by definition, has no control over which State their child will be abducted to, it follows that parents can never figure out for sure what would be taken into account to consider that their child has acquired or abandoned a habitual residence.

This is particularly problematic given the diversity of interpretations used throughout the years and among the different countries. The most striking difference being whether one should focus the inquiry on the particular circumstances of the child, VS on the intention of their parents.

A. Study of case law interpretation

Focus on the child. In Canada, most cases will give more importance to the reality of the child, the fact that they have remained in one place for some time prevailing over parental intention[3]. Similar approaches prevail in Germany[4] and Switzerland[5].

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[1] Report from The Seventh Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention – October 2017, p.3

[2] Holder v Holder, 392 F.3d 1009 (9th Cir 2004), HC/E/USf 777

[3] See, for example: Québec Court of Appeals (1996) Droit de la famille 2454, No 500-09-002645-968, HC/E/CA 746; Montreal Court of Appeals (2000) Droit de la famille 3713, No500-09-010031-003, HC/E/CA 651 ; M.P. c. J.K Droit de la famille 0957, Cour supérieure de Montréal, 8 janvier 2009 QCCS 141, HC/E/CA 1093.

[4] See Bundesverfassungsgericht, 2 BvR 1206/98, 29 October 1998, HC/E/DE 233

[5] Federal Supreme Court of Switzerland, Decision of the Federal Supreme Court 5A_846/2018 of 6 November 2018, HC/E/CH 1448

In France[6], it was recently held that the common intention of the parents at the time of birth to have the child live in a specific country was not enough to overlook the fact that the infant had lived with their mother in a another State, considering that the main "center of life" of an infant revolves around the person(s) they are living with. Therefore, habitual residence of the child was established absent the father's consent. Continuous physical presence trumped initial common intention of the parents, which was criticized[7]. Previously, heavy weight was given to the parents' common intention[8].

In the United States (federal level), the inquiry used to focus on the child in the leading case *Friedrich*[9], until it was reversed in *Mozes*[10] in favor of a focus on parental intention.

Focus on the intention of parents. Some states focus solely on the parents' common intention, sometimes ignoring duration of the stay (2,3[11], 4 years[12]). The test in the United States derives from *Mozes*[13] under which settled intention to abandon one's prior habitual residence is a crucial part of acquiring a new one. The reasoning being: "*the function of a court is not to determine whether a child is happy where it currently is, but whether one parent is seeking unilaterally to alter the status quo with regard to the primary locus of the child's life*" considering that the easier it is to shift a child's habitual residence without both parents' consent, the greater the incentive to try, and that children can quickly adapt to a new environment.

In Australia[14] and New Zealand[15], common intention of the parents also trumps the child's reality. Similar weight was given to common intention in the United Kingdom[16], until the Supreme Court[17] applied the test adopted by the CJEU, "*with the purposes and intentions of the parents being merely one of the relevant factors*".

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[6] Arrêt n°462 du 12 juin 2020 (19-24.108) – Cour de cassation – Première chambre civile, HC/E/FR 1454
[7] Cass. Civ. 1, 12 juin 2020 n°19-14.108, AJ fam.2020.423, obs. A Boiché
[8] Cass. Civ. 1ère, 26 octobre 2011, n°10-19.905, 1015, HC/E/FR 1130 ; Cass. Civ. 1ère 4 mars 2015, Yc. X, N. 14-19015, HC/E/FR 1373
[9] Friedrich v. Friedrich, 983 F.2d 1396, 125 ALR Fed. 703 (6th Cir. 1993), HC/E/USf 142
[10] Mozes v Mozes, 239 F.3d 1067 (9th Cir. 2001), HC/E/USf 301
[11] USCA for the 11th Cir., Ruiz v. Tenorio, 392 F.3d 1247 (11th Cir. 2004), HC/E/USf 780: Tsarbopoulos v. Tsarbopoulos, 176 F. Supp.2d 1045 (E.D. Wash. 2001), HC/E/USf 482
[12] USCA for the 9th Cir., Holder v Holder, 392 F.3d 1009 (9th Cir. 2004), HC/E/USf 777
[13] Mozes v Mozes, 239 F.3d 1067 (9th Cir. 2001), HC/E/USf 301, followed in Delvoye v. Lee, 329 F.3d 330 (3rd Cir. 2003), HC/E/USf 529;Larbie v Larbie, 690 F.3d 295 (5th Cir. 2012), HC/E/US 1236; Darin v. Olivero-Huffman, 746 F.3d 1 (1st Cir. 2014), HC/E/US 1275;
[14] D.W. & Director-General, Department of Child Safety [2006] FamCA 93, (2006) FLC 93-255; (2006) 34 Fam LR 656, HC/E/AU 870; Kilah v. Director-General, Department of Community Services [2008] FamCAFC 81, (2008) FLC 93-373; (2008) 39 Fam LR 431, HC/E/AU 995; Paterson, Department of Health and Community Services v. Casse (1995) FLC 92-629, [1995] FamCA 71, HC/E/AU 229; Laing v. Central Authority (1996) FLC 92-709, 21 Fam LR 24; Director-eneral of the Department of Community Services, v. M.S. 15 Octber 1998, transcript, Family Court of Australia (Sydney) [1998] FamCA 2066
[15] H. v H. [1995] 12 FRNZ 498, HC/E/NZ 30 ; RCL v APBL [2012] NZHC 1292, HC/E/NZ 1231; S. v. O.D. [1995] NZFLR 151, HC/E/NZ 250.
[16] Re B. (Child Abduction: Habitual Residence) [1994] 2 FLR 915, [1995] Fam Law 60, HC/E/Uke 42; Re F. (Minors) (Abduction: Habitual Residence) [1992] 2 FCR 595, HC/E/Uke 204 ; Re H (Children) (Jurisdiction: Habitual Residence) [2014] EWCA Civ 1101, HC/E/BD 1287
[17] A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre intervening) [2013] UKSC 60 [2013] 3 WLR 761, HC/E/PK 1233

Mixing both findings. The leading case from the European Court of Justice is that of *Mercredi*[18], which proposes a definition[19] which takes into account not only intention but also factual integration of the child.

In Israel, the Supreme Court has held that both factors should be taken into account[20], not giving independent weight to parental intent[21]. A recent case considered both and determined parental intent through the child's reality[22] (kindergarten, health insurance…).

Mozes was sometimes altered, using common intention as a first step to a two-step analysis where acclimatization of the child to their new environment could trump parental intent[23]. State Circuits have also developed their own case law, blending the perspective of the child with circumstantial evidence showing parental intent, in *Feder*[24] and *Silverman*[25].

A South African court[26] held that if parents have a shared intention it will determine habitual residence, failing that, the child's perspective should prevail.

Common ground. Most states consider habitual residence is a factual concept[27], and consider the stability[28] and duration of the stay (without a fixed minimal duration except in Switzerland[29]), as well as the child's age[30].

B. Proposition of a global definition

Proposal (article 3§4).

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[18] CJEU, A. (C-523/07), HC/E/1000, 2 April 2009

[19] "(…) *the place which reflects some degree of integration by the child in a social and family environment. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case*".

[20] Supreme Court of Israel (2009) LM v MM Nevo, RFamA 2338/09, HC/E/IL 1037

[21] Supreme Court of Israel (2013), L.S. v G.S, RFam 7784/12, HC/E/IL 1301

[22] Family Appeal 10701-04-20 R. v. BR., HC/E/IL 1466

[23] For example in Guzzo v ; Cristofano, 719 F.3d 100 (2nd Cir. 2013), HC/E/US 1212

[24] Feder v Evans-Feder, 63 F.3d 217 (3d Cir. 1995), HC/E/USf 83, followed by Villalta v. Massie, No 4:99cv312-RH (N.D. Fla. Oct. 27, 1999)

[25] Silverman v Silverman, 338 F.3d 886 (8th Cir. 2003)

[26] Central Authority, RSA v OCI [2010] JOL 25947 (GSJ)

[27] For example, Federal Supreme Court of Switzerland, Decision of the Federal Supreme Court 5A_846/2018 of 6 November 2018, HC/E/CH 1448, as per the Pérez-Vera Report, §66

[28] For example, **European Union** CJEU, A. (C-523/07), HC/E/1000, 2 April 2009; **Belgium** Brussels Court of Appeal (2019), C.L. / Procureur général, agissant à la demande de l'Autorité centrale, HC/E/BE 1431 ; **England & Wales** Re P.-J (Children) (Abduction: Habitual Residence: Consent) [2009] EWCA Civ 588, [2010] 1 W.L.R. 1237, HC/E/Uke 1014; Re H (Children) (Jurisdiction : Habitual Residence) [2014] EWCA Civ 1101, HC/E/BD 1287; **France** Cass. Civ. 1ère 4 mars 2015, Yc. X, N. 14-19015, HC/E/FR 1373

[29] For example in 5A_346/2012, Ile Cour de droit civil, arrêt du TF du 12 juin 2012, HC/E/CH 1293

[30] For example, **United States** USCA Karkkainen v. Kovalchuk, 445 F.3d 280 (3rd Cir. 2006), HC/E/USf 879; **England & Wales** Re G. (Abduction: Withdrawal of Proceedings, Acquiescence, Habitual Residence) [2007] EWHC 2807 (Fam), HC/E/Uke 966; **Australia** Full Court of the Family Court of Australia, Kilah v. Director-General, Department of Community Services [2009] FamCAFC 81, (2008) FLC 93-373; (2008) 39 Fam LR 431, HC/E/AU 995; **South Africa** Central Authority, RSA v OCI [2010] JOL 25947 (GSJ), HC/E/ZA 1202

"*The habitual residence mentioned in sub-paragraph a) above, is a notion of fact, which shall be determined through the agreement of both parents to establish stable settlement of their child in that State for an unlimited duration.*
Common intention shall be assessed at the time of the move, and demonstrated, among other facts, by the reasons for the move, its intended duration and the stability of the stay.
Absent common intention, the perspective of the child should prevail, taking into account (but not limited to) the duration of the stay, the child's age, attendance at school, language spoken, as well as family and social relations."

Explanation. This definition is a compromise, inspired by the different interpretations. It provides discretion to consider particular circumstances, while setting a framework.

It makes clear that unilateral intention is not enough to modify a child's habitual residence, as per the Convention aim to protect children against wrongful removal or retention. It intends to avoid "trapping" parents who have gone abroad with their children for a limited duration ("sabbatical year", attempted reconciliation with a spouse). It contemplates that children adapt quickly to a new environment while still benefitting from stability being maintained. It rejects a potential last step of the analysis[31] allowing habitual residence to be modified through settlement, since this issue relates to the Article 12 exception.

II- <u>The starting point of the settlement exception</u>

Under Article 12(2), the court may not order the return of the child if a year has elapsed since the wrongful removal/retention and the child is found settled. Giving weight to settlement of the child into the environment of the wrongful retention/removal goes against the aim of the Convention (deter abduction), and allows the position of the abducting parent to consolidate over time.

Abducting parents also sometimes claim settlement of the child as a defense, even before the time period has lapsed[32], despite the Hague Judge not having jurisdiction over the welfare of the child.

However, the rationale is that after one year, the focus shifts from the policy aims of the Convention to an inquiry more focused on the child[33].

In practice, the courts will most often find after one year that the child has settled, applying a broad test, and rule against return <u>unless</u> the child was hidden by the abducting parent and living secretly, preventing them from acquiring stability.

In that case, the left-behind parent can sometimes search for years before finding them, which prevents filing within the limit. Even if they manage to find the child shortly before a year, the

[31] For example in Guzzo v ; Cristofano, 719 F.3d 100 (2nd Cir. 2013), HC/E/US 1212
[32] For example, in Switzerland, 51.582/2007 Bundersgericht, II. Zivilabteilung, 04 décembre 2007, HC/E/CH 986
[33] Re C. (Abduction: Settlement) [2004] EWHC 1245, HC/E/Uke 596: "*Established settlement after more than one year since the wrongful removal or retention is the juncture in a child's life where the Hague judge's legitimate policy objective shifts from predominant focus on the Convention's aims (…) to a more individualized and emphasized recognition that the length and degree of interaction of the particular child in his or her new situation deserve qualitative evaluation, free of Hague Convention considerations and constraints*".

length of the proceedings and inadequate legal advice[34] may exclude return. Courts have sometimes circumvented the one-year rule, holding the child was "not settled" even after a long time (up to seven years[35]!), or applying the equitable tolling doctrine, while other countries have refused to bend the rules, accepting an unfair result for the left-behind parent.

A. Case law study

Children almost always found settled after one year. Showing a child has settled into their new environment after one year is an easy burden. In Australia[36] , it was held that the onus is not difficult to discharge and mere adjustment to surroundings will suffice. Similar success in Canada[37], France[38], Israel[39], Luxembourg[40], United States[41].

In the United Kingdom however, "emotional" integration as well as mere adjustment to surroundings[42] was required, since "*the interest of the child in not being uprooted must be so cogent that it outweighs the primary purpose of the Convention*[43]". This threshold was relaxed[44] in 2007[45] where settlement was considered from the child's perspective : "*felt integrated into their new environment and now wanted to remain there*".

Exception: hidden children. Abducting parents can sometimes conceal the child hoping the other parent won't find them. "Hiding places", will usually not amount to settlement, whether in the United Kingdom[46], Switzerland[47], United States[48], or Canada[49]. These children might not attend school or develop relationships due to concealment, or courts use these cases as a deterrent policy (see latter case).

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[34] Rapport sur les déplacements illicites d'enfant 2016, Commission des lois, des règlements et des affaires consulaires, 24e session Mars 2016, M. GOUPIL, p.34,n) ; p.39

[35] Canada, J.E.A. v. C.L.M. (2002), 220 D.L.R. (4th) 577 (N.S.C.A.), HC/E/CA 754

[36] Director-General Department of Families, Youth and Community Care v. Moore, (1999) FLC 92-841; [1999] FamCA 284, HC/E/AU 276; Townsend & Director-General, Department of Families, Youth and Community (1999) 24 Fam LR 495, [1999] FamCA 285, (1999) FLC 92-842, HC/E/AU 290; Secretary, Attorney-General's Department v. TS (2001) FLC 93-063, [2000] FamCA 1692, 27 Fam LR 376, HC/E/AU 823; State Central Authority v. CR [2005] Fam CA 1050

[37] P. (N.) v. P.(A.), 1999 CanLII 20724 (QCCA) (Droit de la Famille – 3193) SOQUIJ AZ-99011344, HC/E/CA 764 ; Kubera v. Kubera, 2010 BCCA 118, HC/E/CA 1041

[38] CA Paris, 27 octobre 2005, n°05/15032, HC/E/FR 814 ; Cass. Civ. 1, 12 décembre 2006, n°06-13177, HC/E/FR 892 ; CA Paris, 19 octobre 2006, n° de RG 06/12398, HC/E/FR 1008 ;CA Lyon, 17 janvier 2011, n° de RG 09/05813, HC/E/FR 1084 ; CA Paris 11 décembre 2012, n°12/13919, HC/E/FR 1186

[39] Family Appeal 548/04, Plonit v Ploni, HC/E/IL 838

[40] Tribunal d'arrondissement de et à Luxembourg, 19 décembre 2012, Référé n° 882/2012, HC/E/LU 740

[41] Lozano v. Montoya Alvarez, 134 S. Ct. 1224 (2014), HC/E/US 1262; Broca v Giron 2013 WL 867276 (E.D.N.Y), HC/E/US 1264f

[42] Re N. (Minors) Abduction [1991] 1 FLR 413, HC/E/UKe 106, followed in Re M. (Abduction: Acquiescence) [1996] 1 FLR 315, HC/E/Uke 21

[43] Soucie v. Soucie 1995 SC 134, HC/E/UKs 107, Incadat comment

[44] In S. v. S. & S. [2009] EWHC 1494 (Fam), HC/E/Uke 1016: "*Reviewing earlier case law the trial judge held that the English interpretation of settlement which had previously been considered to be restrictive had been relaxed following the decision of the House of Lords*" – Incadat comment

[45] Re M. (Children) (Abduction : Rights of Custody) [2007] UKHL 55 [2008] 1 AC 1288, HC/E/Uke 937

[46] Re L. (Abduction : Pending Criminal Proceedings) [1999] 1 FLR 433, HC/E/Uke 358; Re H. (Abduction: Child of 16) [2000] 2 FLR 51, HC/E/Uke 476

[47] Justice de Paix du cercle de Lausanne (Magistrates' Court), decision of 6 July 2000, J 765 CIEV 112E, HC/E/CH 434

[48] Lops v. Lops, 140 F.3d 927 (11th Cir. 1998), HC/E/US 125

[49] J.E.A. v. C.L.M. (2002), 220 D.L.R (4th) 577 (N.S.C.A.), HC/E/CA 754

Perverse effect of article 12(2) when the child's location is unknown. A parent who ignores the location cannot initiate proceedings, not knowing in which country to do so. In a French case, the holding of the Appellate Court that less than one year had elapsed between the time the mother learned the location of the children and the application was reversed, holding that the starting point was the time of removal, not the time the mother had found out the location[50]. This solution is logical per the letter of the Convention, but unfair for the parent who finds themselves without a remedy despite their best efforts to search for the children. Similar outcomes appear in Canada[51], United Kingdom[52], United States[53].

Attempted solutions. In the United States, equitable tolling[54] is sometimes applied (it allows the delay to start running after the parent finds out the location of the child if one can show that the child was concealed and the delay in filing was due to concealment[55]), while the Supreme Court have refused to do so[56]. Some States have rejected this doctrine while still using a more stringent burden in case of concealment[57], taking into account the reason behind the delay in filing, refusing to let an abductor rely upon their ability to hide[58]. Some have held that when the delay in the proceedings was engineered by the taking parent in order to invoke article 12(2), return should be ordered[59].

These solutions contradict the letter of the current Convention.

B. Proposition: a different starting point

Upon finding settlement, a court can still exercise discretion and order the return nonetheless[60]. However, this power is not always used, and the practice of refusing to find settlement when it is clearly existent, in order to circumvent article 12(2) and obtain a "fair" result should not perpetuate.

Modifying the starting point could diminish the arbitrariness[61] of the one-year period, and adapt to obstacles faced by parents (child concealment, heaviness of proceedings, unsuitable legal advice).

Therefore, article 12(1) could be modified as follows:

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[50] Cass. Civ. 1, 9 juillet 2008, n°07-15.402, HC/E/FR 977, Commentaire Mélina DOUCHY-OUDOT, Contentieux familial, Déplacement illicite d'enfant : point de départ du délai d'un an de saisine du juge, Procédures n°10, Octobre 2008, comm. 273

[51] Droit de la famille 2785, No500-09-005532-973, HC/E/CA 747 ;

[52] Re C. (Abduction: Settlement) [2004] EWHC 1245, HC/E/Uke 596

[53] Lozano v. Montoya Alvarez, 134 S. Ct. 1224 (2014), HC/E/US 1262; Yaman v. Yaman, 730 F.3d 1 (1st Cir. 2013), HC/E/US 1267

[54] Furnes v. Reeves, 362 F.3D 702 (11th Cir. 2004), HC/E/USf 578; Duarte v Bardales, 526 F.3d 563 (9th Cir. 2008), HC/E/US 741;

[55] In re : B. DEL C.S.B., (minor), Mendoza v Miranda, 559 F.3d 999 (9th Cir. 2009), HC/E/US 1260

[56] Lozano v. Montoya Alvarez, 134 S. Ct. 1224 (2014), HC/E/US 1262

[57] Cannon v. Cannon [2004] EWCA CIV 1330, HC/E/UKe 598 and C. v C. [2008] CSOH 42, 2008 S.C.L.R. 329, HC/E/UKs 962

[58] Re H. (Abduction: Child of 16) [2000] 2 FLR 51, HC/E/Uke 476

[59] Canada, Lozinska v. Bielawski (1998), 56 O.T.C. 59 (Gen. Div. (Div. Ct.)), HC/E/CA 761

[60] It is made clear by the Pérez-Vera Report, §112, despite contrary interpretation in Australia, State Central Authority v Ayob (1997) FLC 92-746, 21 Fam. LR 567, HC/E/AU 232

[61] "*Now, the difficulties encountered in any attempt to state this test of 'integration of the child' as an although perhaps arbitrary, nevertheless proved to be the 'least bad' answer to the concerns which were voiced in this regard*" §107 Pérez-Vera Report

> "*Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the moment the left-behind parent has discovered the location of the child, the authority concerned shall order the return of the child forthwith.* (…)"

This will allow this article to be applied only in cases where parents have voluntarily or negligently let one year elapse before filing.

III- Limitations to the grave risk exception

This exception is almost always raised by the abducting parent, resulting in being nicknamed "*talon d'Achille*"[62] of the Convention. The Pérez-Vera Report recognizes the exceptions must be interpreted restrictively if the Convention is not to become "*a dead letter*"[63].

Hague Judges have no jurisdiction over the welfare of the child, and this exception interpreted broadly could grant such power. Abducting parents indeed sometimes raise matters related to the welfare of the child, asking the Judge to determine where the child would be happier – staying or returning – or make grave and unfounded accusations against the left-behind parent hoping for the exception to apply.

The abducting parent will usually raise arguments based on their own refusal to return with the child.

One must keep in mind that the return order commands the child to return to the country of their habitual residence, not always to the home of their other parent[64]. The abducting parent is therefore free to accompany their child, smoothing their return, and it is their refusal to do so, as well as their decision to wrongfully remove the child which inflicts the harm.

A. Case law study

Evolution from permissive to strict interpretation. Case law has sometimes evolved from a permissive interpretation amounting to an assessment of the welfare of the child to stricter analysis: at the ECHR, from *Neulinger*[65] to *K.J.*[66]. In France, precedent also went from a permissive approach[67] to restrictive interpretation, refusing to take into account adaptation issues and difficulties to organize visitation with the mother[68].

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[62] S. TOUGNE ; A. BOICHÉ, Dalloz Référence, Droit et Pratique du divorce, Chap. 241, Modalités d'exercice de l'autorité parentale, 241.233

[63] Pérez-Vera Report, §34

[64] For example, in Hadissi v. Hassibi, 1994 Carswell Ont 2076 [1995] WDFL 001, HC/E/CA 1117; Blondin v. Dubois, 189 F.3d 240 (2d Cir. 1999), HC/E/USf 216

[65] ECHR, Neulinger and Shuruk v. Switzerland, July 6, 2010, n°41615/07

[66] ECHR, K.J. v. Poland, March 1, 2016, n°30813/14

[67] For example, Cass. Civ. 1, 12 juill. 1994, Rev. Crit. 84 (1995), HC/E/FR 103 ; Cass. Civ. 1, 21 nov. 1995, n°93-20140, HC/E/FR 514 ; Cass. Civ. 1, 12 dec. 2006, n°05-22119, HC/E/FR 891; CA Rouen 9 mars 2006, n°05/04340, HC/E/FR 897

[68] Cass. Civ. 1, 13 févr. 2013, n°11-28.424, HC/E/FR 1203

Residual permissive interpretation has sometimes denied return on the basis of article 13(1) instead of 12(2), relying on time spent in the new country and the best interest of the child[69].

Absence of grave risk. Hague Judges are confronted with welfare arguments and have been firm about what cannot constitute grave risk of harm or an intolerable situation, applying strict standards. Violence must be established through repetition[70] and cannot be limited to "minor domestic squabbles[71]".

(i)Adaptation issues. Issues inherent to return cannot be taken into account or else they would negate the purposes of the Convention (prompt return). Therefore, mere adaptation issues linked to changing homes are not grave risks[72].

(ii)Separation with parent/sibling. This should not constitute grave risk since the abducting parent is the one creating this situation by removing the child, as was held in England[73], Canada[74], Israel[75], United States[76], Switzerland[77] and ECHR[78].

The mental state of the mother upon return with the child should only be considered if it would cause a situation which the child should not be required to endure[79]. Separation with siblings has sometimes[80] been considered grave risk. Where separation with the mother was deemed intolerable enough to deny return[81], the Canadian Supreme Court Justice added that this should happen only "in the rarest of cases".

(iii)Potential protection by the State of return. Courts have taken into account the capacity of the State of return to protect the child/parent from violence and abuse[82], while some have refused to do so[83].

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[69] Re D. (A Child) (Abduction: Rights of Custody) [2006] UKHL 51, HC/E/Uke 880; Cass. Civ. 1, 17 oct. 2007, HC/E/FR 946

[70] Finizio v. Scoppio-Finizio (1999), 46 O.R. (3d) 226 (C.A.) HC/E/CA 752

[71] Norinder v Fuenters, 657 F.3d 526 (7th Cir. 2011), HC/E/US 1138

[72] **Canada** TV c. MB, Droit de la famille 1222, 2012 QCCA 21, HC/E/CA 1158 ; **France**Cass. Civ. 1ère 20 janv. 2010, 08-18085, HC/E/FR 1036 ; **Israel** Reshut ir'ur ezrachi (leave for appeal) 7994/98 Dagan v Dagan 53 PD.F. (3) 254, HC/E/IL 807; **United States** England v England, 234 F.3d 269 (5th Cir. 2000) HC/E/USf 393; **Switzerland** 5A_105/2009,II. Zivilrechtliche Abteilung, arrêt du TF du 16 avril 2009, HC/E/CH 1057 ; 5A_436/2010,II. Zivilrechtliche Abteilung, arrêt du TF du 8 juillet 2010, HC/E/CH 1060 ; Decision of the Federal Supreme Court 5A_440/2019 of 2 July 2019, HC/E/CH 1445

[73] Re B. (Children) (Abduction: New Evidence) [2001] 2 FCR 531, HC/E/Uke 420; Re C. (Abduction: Grave Risk of Physical or Psychological Harm) [1999] 2 FLR 478, HC/E/Uke 421

[74] M.G. v. R.F. 2002 R.J.Q 2132, HC/E/CA 762

[75] Motion forLeave to Appeal (Family Matters) 5690/10, HC/E/1290 (2010); LM v MM Nevo, FRamA 2338/09 HC/E/IL 1037 (2009); DZ v YVAMVD, RFamA 2270/13, HC/E/IL 1211; Family Appeal 10701-04-20 R. v. B.R., HC/E/IL 1466

[76] Nunez-Escudero v. Tice-Menley, 58F 3d. 374 (8th Cir. 1995), HC/E/USf 98

[77] 5P_65/2002/bnm, II. Zivilabteilung, arrêt du TF du 11 avril 2002, HC/E/CF 789 ; 5P_367/2005/ast,II. Zivilabteilung, arrêt du TF du 15 novembre 2005, HC/E/CH 841

[78] ECHR, K.J. v. Poland, March 1, 2016, n°30813/14

[79] Re S. (A Child) (Abduction: Grave Risk of Harm) [2002] 3 FCR 43, [2002] EWCA Civ 908, HC/E/Uke 469

[80] Re T. (Abduction: Child's objections to return) [2000] 2 F.L.R. 192, HC/E/Uke 270

[81] Thomson v.Thomason [1994] 3 SCR 551, 6 RFL (4th) 290, HC/E/CA 11

[82] **England** Re M. (A Minor), 28 July 1993, transcript, Court of Appeal (England), HC/E/Uke 164; CA Bordeaux, 28 juin 2011, RG n°11/01062, hC/E/FR 1128; **Israel** Leave for Family Appeal 6390/13, Plonit v Ploni, HC/E/IL 1316; **United States** Nunez-Escudero v. Tice-Menley, 58F 3d. 374 (8th Cir. 1995), HC/E/USf 98; Pliego v. Hyayes, 843 F.3d 226 (6th Cir. 2016), HC/E/US 1386; **Switzerland** Decision of the Federal Supreme Court 5A_440/2019 of 2 July 2019, HC/E/CH 1445

[83] Baran v. Beaty, 526 F.3d 1340 (11th Cir. 2008), HC/E/US 1142

(iv)Risk not specific to the particular child. Return should not be refused due to the country of return being less secure (for example: Israel[84], Zimbabwe[85]), the question not being whether there is war in that country, but whether the child would suffer a grave risk of harm upon return[86]. Similarly, covid-19 is not a risk specific to that child, although one must check whether treatment is available in the return State[87].The risk must be on the child, not on a third party such as a sibling[88] or the unhappiness of the taking parent[89].

"Actual" grave risk of harm. Restrictive interpretation still allows for applications. For example, if a mother suffering from PTSD and battered woman syndrome will find herself upon return in such a mental state she will not be fit to care for her child[90]; if a child displays physical symptoms of trauma at the idea of returning to where he suffered violence[91]; if a child was very young and "wholly dependent" on a mother who was unable to return[92]; or sexually abused by the father[93]; or would suffer PTSD upon return[94] or in extraordinary circumstances involving the mafia prostitution issues and human trafficking[95]. In one very surprising case, it was held that the existence of a default judgment which found that the father had killed the mother was not clear and convincing evidence that the children would face a grave risk of harm if returned, absent any allegation he had ever harmed the children[96].

B. Proposed addition to article 13(1)b)

> "*Separation with the abducting parent and mere adaptation issues shall not be construed as grave risks or intolerable situations absent particular circumstances, as they can be prevented by restraining from abduction*".

The Convention relies on the principle that the courts of the habitual residence of the child are better fitted to rule on welfare[97]. This commands return in almost all cases unless there is an actual grave risk of harm. Disadvantages to return should therefore be excluded from this

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[84] Re S. (A Child) (Abduction: Grave Risk of Harm) [2002] 3 FCR 43, [2002] EWCA Civ 908, HC/E/Uke 469; Silverman v Silverman, 312 F.3d 914 (8th Cir. 2002), HC/E/USf 483

[85] Re M. (Children) (Abduction: Rights of Custody) [2007] UKHL 55 [2008] 1 AC 1288, HC/E/Uke 937

[86] Re S. (A Child) (Abduction: Grave Risk of Harm) [2002] 3 FCR 43, [2002] EWCA Civ 908, HC/E/Uke 469

[87] Family Appeal 10701-04-20 R. v. B.R., HC/E/IL 1466

[88] Re K. (Abduction: Psychological Harm) [1995] 2 FLR 550, HC/E/Uke 96; Re C. (Abduction: Grave Risk of Physical or Psychological Harm) [1999] 2 FLR 478, HC/E/Uke 421; Chalkey v. Chalkey (1995) ORFL (4th) 422; leave refused [1995] SCCA No. 33, HC/E/CA 14; Cannock v.Fleguel [2008] O.J. NO. 4480, HC/E/CA 852

[89] Re Medhurst and Markle; Attorney General of Ontario Intervenor, (1995) 26 OR (3d) 178, HC/E/CA 15

[90] Re S. (A Child) (Abduction: Rights of Custody) [2012] UKSC 10, [2012] 2. A.C. 257 HC/E/Uke 1147

[91] Re F. (A Minor) (Abduction: Custody Rights Abroad)[1995] Fam 224, [1995] 3 WLR 339 [1995] Fam Law 534, HC/E/Uke 8; CA Paris, 14 oct. 2010, 10/17238, HC/E/FR 1132

[92] Re M. (Abduction: Leave to Appeal) [1999] 2 FLR 550, HC/E/Uke 263; Pollastro v. Pollastro [1999] 45 R.F.L. (4th) 404 (Ont. C.A.) HC/E/CA 373; 5A_105/2009,II. Zivilrechtliche Abteilung, arrêt du TF du 16 avril 2009, HC/E/CH 1057

[93] Ortiz v.Martinez, 789 F.3d 722 (7th Cir. 2015), HC/E/US 1343

[94] Blondin v Dubois, 238 F.3d 240 (2d Cir. 2001), HC/E/USf 585

[95] P.(N), v. P(A), 1999 CanLII 20724 (QCCA) (Droit de la famille – 3193) SOQUIJ AZ-99011344, HC/E/CA 764

[96] March v. Levine, 249 F.3d 462 (6th Cir. 2001), HC/E/USf 386

[97] For example, Jabbaz v. Mouammar (2003), 226 D.L.R. (4th) 494 (Ont. C.A.) HC/E/CA 757; CA Rouen, 20 janvier 2005, N°04/03822, HC/E/FR 1007 ; CA Bordeaux, 28 juin 2011, N°11/01062, HC/E/FR 1128 ; DZ v. YVAMVD, RFamA 2270/13 (2013) HC/E/IL 1211, Friedrich v. Friedrich, 78 F.3d 1060 (6th Cir. 1996), HC/E/USf 82; LM v MM Nevo, RFamA 2338/09 hC/E/IL 1037 (2009)

Article, in order to deter parents from systematically raising very violent accusations which will eventually annihilate any dialogue between the parents, against the best interest of the child[98].

To conclude, while forty years in, the Hague Convention has improved the situation of many children and families, rethinking these remaining issues would make the instrument even more efficient. While the three themes studied seem particularly relevant to problems faced in practice, broader issues could also be discussed in the future, such as opening the return remedy to third party States, raising awareness with professionals, encouraging mediation…

[98] S. TOUGNE ; A. BOICHÉ, Dalloz Référence, Droit et Pratique du divorce, Chap. 241, Modalités d'exercice de l'autorité parentale, 241.233