Judicial Academy of Republic of Serbia

INTERNATIONAL CHILD ABDUCTION

Practical Issues Concerning Grounds for Non-return of the Child

Authors: Iva Marković, Dejan Milovanović, Bojan Petković

Tutor: Zorana Delibašić, Judge of the Appeal Court in Belgrade

Semi-Final B: International Judicial Cooperation in Civil Matters, European Family Law

Themis competition 2018, Vilnius, Lithuania

CONTENTS

1. Introduction

European Union is an international organization founded with the aim to strengthen the economic integration and cooperation between member states. The existence of this organization enabled the free movement of people, the possibility of living, working and studying in any of the member states and having one internal market. Due to this freedom of movement with increased communication and migration of labor, people of different nationalities are marrying across national borders. Unfortunately many of these transnational marriages come to an end. It is then that this same freedom of movement makes it possible for one parent to easily cross border with a child without the consent of the other parent. This in turn creates an unlawful situation of child abduction which is one of the most challenging problems for international community to solve in the area of international private law. The parent who abducts the child is hoping to obtain sole custody over his child in another country. The victim of this situation is the child who loses touch with the other parent and social environment. However, every case of parental child abduction is different and complex in its own terms. Is it possible that sometimes the act of parental abduction is actually beneficial for the child's wellbeing. Quite often, the reason behind the abduction is the existence of domestic violence towards one parent. In the case that is about to be presented, the child can be qualified as an indirect victim of domestic violence. To what extent can the freedom of the judge to form an of opinion influence the decision in these cases if he is expected to strictly follow the regulations of international community? In our paper we will try to provide answers to this question and share our own viewpoint of this matter using a model case.

2. The Circumstances of the Case

Our applicant, Milan Veljkovic from Belgrade, a Serbian citizen, initiated the proceedings before the Serbian Ministry of Justice for the return of the child under the 1980 Hague Convention. He claimed that his son had been abducted by his wife, Vida Veljkovic, and held in France, where her parents live, without his consent. Vida refuses to return the child to Serbia on a voluntary basis. Milan also claims that she announced him that she is about to file for divorce and custody over Mihailo before the French court.

Vida is a French citizen of Serbian origin, since her father was born in Serbia. Before the wrongfull removal, Milan and Vida lived in her father's apartment in Belgrade. Vida was employed in Belgrade as an administrative assistant in a realestate agency, where she earned a very low salary, even for Serbian standards. Milan has been unemployed since they got married and has no income or property whatsoever. Forasmuch Vida's salary was very low for a family with a child, her parents were supporting them with a monthly alimony.

In a hearing held before the French court, in a proceedings for the return of Mihailo to Serbia, Vida, Milan and Mihailo were examined.

Vida claimed that she was forced to flee from Serbia because she feared for her life. She explained that she had suffered severe psychological torture from her husband for several years, followed with occasional physical maltreatment. She asserted that Milan has continuously supervised her every move and prohibited her contact with other people. They did not have any social activities or made friendships, so no one could find out that she was practically imprisoned.

The supervision was carried out over the cell prone: every time she left the apartment, she had to start a phonecall with Milan and keep connection open the entire day, so that he could hear every step she makes and every conversation she leads. None of her colleagues noticed that her phone was always on and they did not know that Milan was constantly listening to them. Because of his jealousy, they often argued. He also punched her and now and again, but never before the child. Whenever she threatened to leave him, Milan told her that if she does so he will kill her, the child and himself. He never searched for employment, because of his fear of open space and very poor communication skills.

When she realized that his demands and unceasing conflicts over his jealousy, followed by death threats to her and the child, created an unhealthy environment for the child, she began to plan their escape. This venture wasn't easy to carry out, since he had a full control over her movement, communication and finances. With the help of her colleague she managed to buy two tickets for a night flight to France. Evening before she escaped with the child, she poured some sleeping drugs in Milan's cup of tea. During the night she managed to run away with the child. She could finally turn off her phone.

Milan denied all her claims and agued that she only wants to circumvent the jurisdiction of Serbian court and gain a sole custody over Mihailo. He believes that he is the victim of her illegal actions, since he is the one left childless by the abduction.

Interrogated by a child psychologist, Mihailo confirmed that "he and his dad had listened to mom all day long so they could look after her". Regarding the relationship between his parents he said that "dad loves mom very much and he gets mad only when mom is in danger". Asked if he wants to return to Serbia, Mihailo replied that he wants to "be with his dad and see mom every day." The French court, through the Central Authority in Serbia, the Ministry of Justice, obtained the mobile operator's listing and found that Milan and Vida were online from 9 to 11 hours a day.

3. Relevant International Regulations Concerning the Child Abduction

In 1980 the Hague Conference on Private International Law developed the *Hague Convention on the Civil Aspects of the International Child Abduction* [1], hereinafter the Hague Convention. It entered into force on 1983 and became one of the most successful conventions in terms of number of ratifications by member states. This multilateral treaty was developed to ensure the efficient instrument to counteract the international parental child abduction. The primary object of the Convention is to return the child in the State of its habitual residence whilst not entering into maters of parental responsibility. The conditions for the Convention to be applied are that the child was illegally removed from the State of his habitual residence and that it is under the age of 16. Although the Convention is enforced with success, it still has some faults that are going to be analyzed in this paper, especially concerning the term of "habitual residence" and the interpretation of the article 13 (b).

Another important international source in this field of international private law is *Brussels II Regulation (EC) No 2201/2003* [2] that came into force on 1st March 2005, hereinafter the Regulation. Legislator's intention was that, among other issues, Regulation provides certain clarifications of several Hague Convention provisions. Hence, the Hague Convention is still applicable but the Regulation prevails over some of its provisions concerning child's objection to return, expeditious handling, interpretation of "grave risk" as a ground for non-return of the child

[1] Hague Convention is accessible on the website of the Hague Conference of Private International Law (www.hcch.net) under Conventions.

[2] See more: European Commision, Practice Guide for the application of the new Brussels II Regulation, 2005, hhtp://ec.europa.eu/civiljustice/publications/docs/guide_new_brussels_ ii_en.pdf

and the enforcement of the positive judgment on return. Regarding the child's objection to return, the Hague Convention doesn't place an obligation on the trial court to inquire whether the child objects to return. The burden of proving of the child's objection lies with the party opposing return. Thus, the court may choose to hear the child and decide whether the child's opinion amounts to an objection to return, and if so, whether the court should consider that opinion. On the other hand, the Regulation obliges the court to inquire whether the child objects the return. When any of the objections under Article 12 and 13 of the Hague Convention are made in opposition to a return petition, the Regulation requires that the court gives the child the opportunity to be heard, unless if doing so appears inappropriate in terms of the child's age and maturity (Article 11.2). When it comes to the interpretation of "grave risk" as a ground for non-return in the sense of Article 13 (b) of the Convention, the Regulation restricts the application of Article 13 (b) of the Hague Covention on two levels. First, even in case when it is likely that a child would be in grave risk if his return was issued, the court shall not refuse to order the child's return if the "adequate arrangements have been made to secure the protection of the child after his or her return" (Article 11.4). Second, even if the trial court refuses to return the child on the basis of "grave risk" it is still possible for the court of the child's habitual residence to issue an order of return. (Article 11.6-11.8)

Two more conventions are relevant for our case: European Convention on Human Rights [3] (hereinafter the European Convention or the ECHR) and The United Nations Convention on the Rights of the Child [4].

Article 8 of the European Convention on Human Rights provides a right to respect for one's "private and family life, his home and his correspondence", subject to certain restrictions that are "in accordance with law" and "necessary in a democratic society". Convention on the Rights of the Child is a human rights treaty which sets out the civil, political, economic, social, health and cultural rights of children.

[3] European Convention on Human Rights as amended by Protocols No. 11 and 14 supplemented by Protocols No. 1, 4, 6, 7, 12 and 13

[4] The United Nations Convention on the Rights of the Child adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49.

4. Initiation of the Process

When Vida took the child with her to France, she was still married to Milan. Therefore, according to the Serbian Family Law, they had the joint custody. Vida took the child over the border without Milan's consent. Serbia and France are both contracting states of the Hague Convention. Since Serbia is still not a member state of the EU, the Regulation Brussels II bis cannot be applied. Therefore, the procedure for the recovery of Mihailo will be entirely conducted according to the provisions of the Hague Convention. In order to ensure the prompt return of the child 1980 Hague Convention required from each signatory nation to designate a Central Authority that will assist in carrying out duties imposed by the Convention. Competent authority in Serbia is the Ministry of Justice, where he submitted an application for the return of his son. The application must contain all relevant information concerning the identity of the applicant, child's identity and the person who allegedly abducted the child. Central Authority will then send the application and all relevant documents to Central Authority of the state in which the child is relocated to. In our case that is the Ministry of Justice in France, which forwards the application to the competent court in France. Trial court has to issue a decision within six weeks.

The first preliminary question for the competent Court is to determine Mihailo's habitual residence and to establish whether the removal or retention of the child was illegal, according to the applicable law. If the answer is positive, the Court can establish the jurisdiction and decide upon the application. The country of child's habitual residence is the country where the child must be returned, in the case of abduction.

4.1. Habitual Residence

The appearance of the term "habitual residence" began under the auspices of the Hague Conference on Private International Law, which was working on the unification of international private law and held its first session in 1893. The use of the term "habitual residence", in time began to suppress the term domicile and extended through the entire international private law. This term has its special meanings depending on the specificity of certain categories of persons to whom it relates and whose protection it provides.

The habitual residence of the child is a special form of the general term habitual residence of a natural person. This term is not defined, according to the Hague Convention and the Brussels II bis Regulation. There are no guidelines in any of the Hague conventions in which it is used. The cause could be, that it is a flexible standard that should be determined by judge in every particular case. The concept itself comprises two elements: the intention of residence and the physical presence in a particular state, as factual elements.[5] The first definition of habitual residence gave the European Court of Justice in 1994, stating that habitual residence is "the place in which the person established, with the desire to give it a permanent character, a permanent or ordinary center of his/hers interests".[6]

Serbian domestic law, dedicated to implementation of the Hague Convention in Article 4 of the Draft Law on Civil Protection of Children against Illicit Transboundary Removal or Retention of Children, for the first time, introduces the criteria for determining the habitual residence. In accordance with the criteria of the CJEU practice, in determining the habitual residence of a child, in each case, the following circumstances shall be taken into consideration: 1) the duration, regularity, conditions and reasons for the child's stay; 2) relocation of the family; 3) citizenship of the child; 4) the age of the child; 5) place and conditions of his education; 6) knowledge of the language; 7) family and social relations of the child. [7]

In view of these facts, in our case, it can be concluded that the custody rights, including the right to determine the child's place of residence, within the meaning of Article 3 of the Hague Convention, at the time of the child's removal, had both parents, since they were married and had

[5] The concretization is left to the judicial authorities, primarily the courts and case-law as the creator of this term *in concreto*, depending on the facts that would prevail in each case and the context of the relation between the two elements mentioned above. This is the way how factual basis gets a legal dimension and becomes a judicial concept.

[6] ECJ, Magdalena Fernández, C-452/93 P, § 22

[7] S. Đ. Marinković, "*Protection of Children in the Hague Conventions on International Privat Law"* (in Serbian), doctoral dissertation, Niš, 2014, page 106. Different modes were used to define the concept of a child's habitual residence. The oldest mode is "the dependency test", according to which "habitual residence of a child" is necessarily related to the habitual residence of a parent who has a sole custody. This mode is not flexible enough to successfully solve the problem of determining a habitual residence in all factual situations. Convention on the Rights of the Child (1989) has changed the situation, since it recognizes the child as a subject of legal protection in international law, and takes the central role in the family relations. Thus, new modes for determining the habitual residence of a child, such as "the parental rights test" and "the child centered approach", occured. "Therefore, today we can talk about three possible modes to determine the habitual residence of a child: so-called "dependency test", which is already mentioned, parental rights test and child centered approach." *ibid.*, p. 68. "The parental rights test" is based on the intention of the parents, regardless of where the child actually lives. If both parents have the custody of child, they have the right to determine where the child will live, none of them can change a child's habitual residence without of the consent of another parent. "The child in focus" test, alludes that the central figure is just a child, the habitual residence is determined on the nature and quality of the relation between the child and the place where it is physically present. It follows, therefore, that a child can have his own habitual residence independently of his parents.

no agreement to move the child to another place in other country. Vida has a clear intention to live with the child in France. Considering the age of the child, it can be concluded that the relationships of a child with an environment are relevant for the case, as well as relations established with parents. In such a situation, the unilateral intention of a parent cannot influence the change of the child's habitual residence. According to that, the place of the child's habitual residence at the time of the child's removal was in Belgrade in Serbia.

4.2. Wrongful Removal and Grounds for Return

The next question that needs to be addressed is whether a "wrongful removal or retention" had taken place. The Convention provides that removal or retention should be considered "wrongful" whenever: a) It is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.[8]

In our model case it is obvious that the removal can be qualified as "wrongful". Vida and Milan have joint custody over Mihailo. In taking these illegal actions, Vida ignored Milan’s right as a parent and prevented him from exercising those rights.

In order to issue a positive judgment for the return of the child which is, as we previously mentioned, the primary object of the Hague Convention, the judge has to verify the fulfillment of two conditions covered in Article 12 of the Convention: (1) that the child was abducted or unlawfully retained within the meaning of Article 3; (2) that a period of less than one year has elapsed between the abduction or retention of the child and the commencement of the proceedings before judicial and administrative authority of the contracting state where the child is located.

In our case, both requirements are fulfilled. If the judge would strictly follow the provisions of the Convention he would most likely issue a positive decision on the child’s return. However, there are circumstances that indicate that Milan has symptoms of serious mental disorder which

[8] Article 3 of the Hague Convention

may call into question his parental capacities. Can those circumstances be the ground for non-return of the child?

It is a judge's obligation to thoroughly consider all the circumstances of the case, to hear the child and both parents, in order to issue a decision in the child's best interest. Therefore, there is a likelihood that the process will take more than six weeks. The primary goal of this and every other proceedings, regarding the relationship between a child and its parents, is to safeguard the child's best interest, which is, in this case, to live with the parent and in an environment that is most suitable for his physical and psychic development. But yet, the application of article 13 (b) is continuously restricted because the purpose of the Convention is to prevent parents from taking the law in their hands and to return children as soon as possible to their home country to enable the competent courts to determine issues concerning the welfare of the child.

5. Grounds for Non-return of the Child

Although the Hague Convention, as its primary objective determines the prompt return of children wrongfully removed to or retained in the other Contracting State, it also provides certain exceptions under which the return of a child may be denied: (1) when the proceedings have been commenced after the expiration of the period of one year from the date of the wrongful removal, in case it is demonstrated that the child is now settled in its new environment – Article 12; (2) if a person, institution or other body which opposes the return of the child establishes that the person, institution or other body having the care of the person of the child were not actually exercising the custody rights at the time of removal or retention – Article 13 (a); (3) if a person, institution or other body which opposes the return of the child establishes that he or she had a consented to or subsequently acquiesced in the removal or retention – Article 13 (a); (4) 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 – Article 13 (b); (5) if 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 – Article 13.2, and (6) if the return would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms – Article 20.

The main challenge facing the judicial or administrative authority in charge, when applying these provisions in specific cases, is to avoid to make a decision on the custody and other parental rights and to examine with a thorough consideration if a particular exception may be applied, in the same time.

The decision on the return of the child should not prejudge the merits, since only the authority competent for that purpose in the country of the habitual residence of the child is in charge to deal with matters regarding the exercise of custodial and other parental rights.

The issues that may ensue in the appraisal of circumstances surrounding this particular abduction are numerous. The exception that can be relevant for our case, considering the allegations for domestic violence, is the exception listed in Article 13 (b).

5.1. Non-return Based on Article 13 (b) in Cases of Domestic Violence

Article 13 (b) of the Convention stipulates that the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that 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".

The abducting parent who claims that the parent left childless is the perpetrator of the domestic violence, usually tends to prove that a danger of a repeated violence falls under the "grave risk" or that the return would place the child in an "intolerable situation". However, it is questionable whether and under which circumstances domestic violence can be subsumed under this exception.

Historically, domestic violence use to be regarded as a "private, domestic matter" and extensive abuse of wives by their husbands was broadly tolerated. Even in the early 80s, at the time when the Hague Convention was adopted, the domestic violence was still not a topic and maybe that is the reason why domestic violence is not explicitly listed as a reason for refusal of return of a child. Soon after, process of law reform began in many jurisdictions, which has slowly resulted in justice systems becoming more responsive to the needs of women and children who are victims of familial abuse. There are, however, also many jurisdictions in the world where society

and the justice system continue to minimize or disregard issues of domestic violence, and little or no protection is afforded to women who are victims of abuse by their husbands. [9]

Such allegations require great caution and should not ever be overlooked. The problem in international child-abduction cases is that they must be examined to the extent necessary for deciding on the application of the exception in Article 13 (b), with avoiding to enter the merits of the case. It can be very difficult to make a decision not to return a child, which can irreparably affect the parent left behind, without a fully established factual situation. The position that it is necessary to make a complete insight in the family situation is supported by the recommendations of the Permanent Commission of the Hague Conference as follows: "Where Article 13 (b) of the 1980 Convention is raised, concerning domestic or family violence, the allegation of domestic or family violence and the possible risks for the child should be adequately and promptly examined to the extent required for the purposes of this exception. [10] It is very important to establish whether there was an actual abuse in a particular case, because these allegations can very often be a means of abuse of a parent opposing the return, whose aim is to avoid the jurisdiction of a court in a country where the child has a habitual residence in the proceedings concerning the custody.

If this exception was widely interpreted, the parent who took the child would have been given the unfair advantage of "forum shopping" in order to obtain a presumably favorable decision in the custody arrangement. [11] Anyhow, the very fact that there is a history of disturbing or violent behavior in the family is not enough. A parent who claims that there has been a violence, has not only the obligation to make the existence of domestic violence probable, but also that there is a "grave risk" for a child if it returns to the country of habitual residence.

[9] N. Bala, J. Chamerland, "Family Violence and Proving "Grave Risk" for Cases under the Hague Convention Article 13 (b)",*Queen's University Legal Research Paper No. 2017-091*, 2017, p. 6

[10] Conclusions and Recommendations and Report of Part I of the Sixth Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1966 Hague Child Protection Convention (1-10 June 2011) drawn up by the Permanent Bureau, available on https://www.hcch.net, § 100, Conclusions § 36

[11] D. Bozin, "The Hague Child Abduction Convention's Grave Risk of Harm Exception: Traversing the Tightrope and Maintaining Balance Between Comity and the Best Interests of the Child", *University of Tasmania Law Review* 35, 2016, p. 5

The main difficulty in this regard stems from the fact that it is not clear whether certain act can be qualified as domestic violence, since different legislations differently define this term, which prevents the uniform interpretation and application of this exception.[12]

The second issue is the intensity and duration of violence. It should not be understood from the interpretation that violence must exist over a long period of time or of several individual acts of violence, since, depending on the circumstances, only one act of violence can create an intolerable situation in the family in which the child lives. However, the one-off act of violence makes difficulties in proving the existence of "grave risk", in the sense of Article 13 (b). It could be argued that the act of violence occurred in only one occasion does not automatically mean that the violence will be repeated. However, this is only a matter of proof, which does not affect the possibility that a serious act of violence will result in the courts rejection of the request for the return of the child, especially in cases where the child is mature enough to understand the seriousness of any act of violence. The fact that the Convention on the prevention and combating of violence against women and domestic violence of Council of Europe [13] defines "domestic violence" as "all acts of physical, sexual, psychological or economic violence" in the Article 3 (b) does not necessary imply that every act of violence is automatically represented serious danger in the sense of Article 13 (b) of the Hague Convention.

The last, but not least is the matter of proofs – how can an abducting parent show beyond doubt that the violence was perpetrated, especially in cases where the violence is only psychological? It would be excessive to require that family violence can only be proven with a final civil or a criminal judgment, bearing in mind that these proceedings can take years and that the decision on the return of the child should be made within the short deadline of six weeks. We may conclude that for the application of Article 13 (b) any evidence can be sufficient, since the Convention in the same Article provides that in considering the circumstances referred to in the Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence. In the absence of a final judgment, reports from the police or the social service, in case that violence was reported, may be sufficient. Regarding this issue, we

[12] Z. Ponjavić,"Cross-border Child Abduction in Cases of Domestic Violence", *Collection of works of the Law Faculty in Niš - Protection of Human and Minority Rights in the European Legal Area* (in Serbian), *LXII,* 2012, p. 225

[13] Convention on preventing and combating violence against women and domestic violence, *Council of Europe, Treaty Series - No. 210 Istanbul,* 11.V.2011

must take into consideration that the burden of proof, according to the Convention, is on a parent who opposes the return of a child, which may not be easy, since he is situated in another country.

In our case, fortunately for the victim of spousal abuse, although predominantly psychological, the French court has managed to obtain substantive evidence that fully confirmed her allegations - the listing of mobile operator which proves that Milan and Vida had connected phone numbers and that they were online from 9 to 11 hours a day on the workdays. Another evidence that has confirmed the presence of a pathological persecution is the child's statement that "he and his dad had listened to his mother every day prevent that something happens to her."

5.1.1. The Interpretation of the "Grave Risk" and "Intolerable Situation"

Danger, as it is stipulated in the Article 13 (b), can be objective - physical danger, or subjective, defined as psychological trauma. A physical danger to a child undisputedly exists if the child has been abused and neglected, as well as if the state of child's habitual residence is in the course of a war or an epidemic. These circumstances can also lead to a psychological trauma of the child, but when it comes to domestic violence, the question is: is it necessary that the violence was directed towards the child? Questionless is that the presence of spousal abuse can be enough to cause a child's psychological trauma, depending on its age, type and frequency of violent behavior, as well as its intensity. Adoption of violent patterns of behavior that occurs in families with a history of violence can also be considered a form of psychological trauma. However, the question arises as to the extent to which the child must be in physical danger, as well as the intensity of the potential psychological trauma that may be the sufficient for the refusal of the child's return.

In our case, it is a matter of violence of uncommon quality and high intensity, which is why it is possible to argue that the violence which child attended may, at the same time be a form of psychological torture for him, and as such an "intolerable situation" in the sense of Article 13 (b) of the Convention. This especially if the child, as in our case, is at school age and therefore fully aware of the fathers odd behavior. Moreover, Milan included the child in the control and surveillance over his mother and kept him isolated from every social contact. Although not diagnosed by a physician, all the circumstances of the case show that Milan suffers from serious mental disorders. No less important for the correct decision in this case is the fact that Milan is

not able to sustain himself, and therefore does not have the ability to satisfy all the needs of the child in that age. From the aforementioned, we may conclude that Mihailo was an indirect victim of violence primarily directed towards his mother.

As far as comparative law is concerned, the situation is very different and there is not always the same approach, even within the same country. For instance, in case Parsons v. Styger[14] the Supreme Court of Ontario rendered a decision to return a child from Canada to California (USA), since the violence of the husband was directed against the mother, not the child. At the same time, the mother did not provide enough convincing evidence of violence against her. However, in another well-known case, Pollastro v. Pollastro[15], the Ontario Court of Appeal refused to return the child because the mother, who removed the child, managed to prove that she was a victim of violence, committed by her husband. According to this decision, the violence of one parent against the another could put a child in situation of physical or psychological danger, even if violence is not directly used against the child. After the decision, the courts in Canada are increasingly accepting the idea that a grave risk of physical and psychological condition of a parent poses at the same time a grave risk to the child, which justifies the application of the exception in Article 13 of the Hague Convention.

Getting back to our case: a narrow interpretation of the exception in Article 13 (b) would lead to a decision to return the child, since it is undisputed that Milan has never been violent towards Mihailo. But the question is, would such a decision be in the child's best interest?

5.1.2. The Child's Opinion and the "Best Interests of the Child"

Article 13 (2) of the Hague Convention stipulates that the competent authority may refuse to order the return of the child if it determines 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.

In addition, the Hague Convention cannot be interpreted in a vacuum, but in the context of the general principles of international law. Although the Convention does not prescribe an explicit obligation to hear a child when deciding on (non) return, such an obligation arises from the

[14] *Parsons v. Styger* (1989), 67 O.R. (2d) 1 (L.J.S.C.), aff'd (1989) 67 O.R. (2d) 11 (C.A.)
[15] *Pollastro v. Pollastro* [1999] 45 R.F.L. (4th) 404 (Ont. C.A.)

Convention on the Rights of the Child (1989), which in Article 12 obliges the contracting states to provide a child capable of forming his own opinion the right to freely express that opinion on all matters concerning him. Due attention shall be paid to the child's opinion in accordance with his age and maturity. To this end, the child shall in particular be provided with the opportunity to be heard in all judicial and administrative proceedings concerning him, either directly or through a representative or an appropriate authority, in a manner consistent with the procedural rules of the national law. The Convention also provides in Article 3 (1), that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

The child's participation in the proceedings regarding his wrongful cross-border abduction could be of great value in determining the "best interests of the child" in the context of the application of the exception prescribed in Article 13 (b) of the Hague Convention. In support of the view that the child should be heard, it shall be mentioned that the child's opinion does not bind the court when deciding. After all, the recommendations of the Permanent Commission of the Hague Conference back that standpoint: "A child has the right to be heard directly by a person trained to work with children and to be sufficiently informed about the proceedings in which he participates and possible outcomes of the proceedings, respecting children's age and maturity."[16] In other words, the child should be protected as a participant in the proceedings and not protected from participating in the proceedings.[17]

The doctrine of the rights of the child, proclaimed by the Convention on the Rights of the Child and accepted in numerous sources of international law, is important because it recognizes the child as an independent subject of rights, and not just as the object of the rights of others. It requires that questions concerning the child shall be considered from the child's perspective, and not only from the perspective of parents, from the paternalistic point of view. The practical consequence of the application of this doctrine is reflected in the mandatory implementation of the "best interests of the child" formula, which today constitutes one of the fundamental

[16] Conclusions and Recommendations and Report of Part I of the Sixth Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1966 Hague Child Protection Convention (1-10 June 2011) drawn up by the Permanent Bureau, available on https://www.hcch.net, Recommendations § 50

[17] R. Shutz, "The Hague Child Abduction Convention: A Critical Analysis", *A&C Black*, 2014, p. 115

principles of family law, and implies that all who make decisions concerning the child must take into account this formula, given the fact that the child has limited ability to take care of their rights on their own.[18] In this regard, even the preamble of the Hague Convention states that "the interests of children are of paramount importance in matters relating to their custody".

The problem that could arise when applying this legal standard in the event of an international child abduction is its different interpretation in different contracting states, bearing in mind the cultural, political and social circumstances, and the fact that the determination of its content falls within the authority of the competent body of the child's habitual residence. Establishing the child's best interests implies a comprehensive examination of both the family situation and a whole range of circumstances, in particular factual, emotional, psychological, material and medical, on the basis of which a balanced and sensible assessment of the interests of all stakeholders should be made. Based on all that, it shall be decided what the best solution is for wrongfully removed child.[19] Therefore, when deciding on the return of the child and on possible application of the grounds for refusal under Article 13 (b), it is important that the best interests of the child are established only to the extent necessary for the decision to grant a return, which in practice may be problematic, as in the case of establishing the existence of domestic violence. Another question that arises is what to do if the child's wishes and his best interests collide. Both theory and practice are concordant in this case - the best interests of the child should prevail.[20] The best interest of the child should always have priority and may, depending on its nature and seriousness, outweigh the interests of the parents.[21]

In the process before the court in France, questioned by the psychologists who were conducting a conversation with him, on his opinion regarding his return to Serbia, Mihailo stated the following sentence: "I want to live with my dad, but I want to see my mother every day". The assessment of the team of psychologists was that Mihailo was afraid of his father and that he wanted to protect his mother. Their estimation was also based on his behavior in the presence of the mother and the father. Mihailo was much more relaxed with mother than with the father. Their opinion was not only that he was the witness, but also an indirect victim of violence.

[18] *Ibid*., p. 109
[19] ECHR, *Maumousseau and Washington, v. France,* (Application no. 39388/05), § 74
[20] R. Schutz, p. 117
[21] ECHR, *Płaza v. Poland*, (Application no. 18830/07), § 71

6. Interplay between Article 8 of the ECHR and the Hague Convention

The Hague Convention cannot be applied "aloof", in a legal vacuum. A domestic court applies in the same time not only the Hague Convention, which in principle requires the prompt return of the abducted child, and the Convention on the Rights of the Child, entailing that in all actions concerning children state authorities follow the best interest of the child, but also the European Convention on Human Rights (hereinafter the ECHR), which provides the right to respect for family life. Interference by a public authority with the exercise of this right is possible, *i.a.*, for the prevention of disorder or crime, for the protection of health or for the protection of the rights and freedoms of others – Article 8 (2). On the plus side is that - in contrast to per se ambiguous application of the Hague Convention in the contracting states - the very fact that the Strasbourg Court is competent to ascertain whether in applying the Hague Convention the domestic courts secured the human rights set forth in the ECHR diminishes the risk of divergent case-law. For, divergent implementation of the Hague Convention is at the moment "the most controversial issue with which the Hague Convention is confronted and which may even affect the further fate of the Convention". [22]

The Strasbourg Court's examination concentrates on the aspect of the procedure that can be scrutinized *a posteriori*; only in rare cases has the Court directly criticized the actual decision on the merits as adopted by the national authorities.[23] This Court must ensure that the decision-making process leading to the adoption of the impugned measures by the domestic court was fair and allowed those concerned to present their case fully.[24]

The European Court of Human Rights has adopted the "best interest of the child" formula as a key element for its judgments, even if the expression does not appear in Article 8 of the ECHR.[25] This court recognizes in recent case of *X vs. Latvia* [26], whilst finding a violation of Article 8, that the philosophy inherent in the Hague Convention is restoration of the status quo; reiterates that in the area of international child abduction the obligations imposed by Article 8 on the contracting

[22] S. Marinković, *op.cit.*, p. 275.
[23] I. Roagna, *Protecting the Right to Respect for Private and Family Life Under the European Convention on Human Rights*, Strasbourg, 2012, p. 94.
[24] ECHR, *Neulinger and Shuruk v. Switzerland*, 6 July 2010 (Application no. 41615/07)
[25] I.Roagna, *op. cit.*, p. 44.
[26] ECHR, X v. Latvia, 26 November 2013 (Application no. 27853/09)

states must be interpreted in the light of the requirements of the Hague Convention; states that the child's best interests do not coincide with those of the father or the mother.

But in his concurring opinion to this judgment of the Grand Chamber (rendered by nine votes to eight), judge Pinto de Albuquerque adduces additional reasoning to the judgment, opening new perspectives on the topic. Apart of stating that in virtually all cases the ECHR and the Hague Convention march hand in hand, when they do not, it is up to the ECHR to guide the way (not the opposite), and emphasizing that the Strasbourg Court's remit is limited to the child's welfare-based defences to return, judge de Albuquerque sheds new light on the meaning of non-return grounds stipulated in Art. 13b of the Hague Convention. "While it is axiomatic that 'restrictions' to human rights must be interpreted narrowly, defences to return are not, technically speaking, 'restrictions' to any specific human right. Such defences are, in the light of the ECHR, mere grounds for rebuttal of a presumption, and they are not necessarily subject to a restrictive interpretation." He concludes that "a restrictive reading of the defences, based on an outdated, unilateral and over-simplistic assumption in favour of the left-behind parent and which ignores the real situation of the child and his or her family and envisages a mere 'punitive' approach to the abducting parent's conduct, would defeat the ultimate purposes of the Hague Convention."

As we see it, the concurring opinion of judge de Albuquerque, who juxtaposes and interlocks the Hague Convention, the ECHR and the Convention on the Rights of the Child, could allow broader interpretation of "grave risk", "harm" and "intolerable situation", meaning not only taking into account even distant psychological harm or indirect violence or danger to the child as non-return ground, but also nearly-on-the-merits establishing of the best interest of the child whilst applying the Hague Convention. That would be quasi-abolition of - 1980 intended – factual, provisional nature of the protection guaranteed by the Hague Convention.

8. Conclusion

Although the authors of the Hague Convention on the Civil Aspects of International Child Abduction sought to provide an effective instrument that, without much formalism and protraction, enables the rapid return of the abducted child to the country of his habitual residence, Art. 13 (b) of the Convention foresees grounds for refusing to return a child, which 'complicates' this matter. The French court in our case is in a delicate situation when it evaluates

domestic violence for the purposes of the application of the Convention. On the one hand, the French court should not convert into a quasi-criminal or quasi-civil court that provides protection against domestic violence, but at the same time it is necessary that the court - when tackling topics of the best interests of the child and his security and returning the child to the country of habitual residence – establishes in the particular case whether the child is indirect victim of violence.

Of course, if Serbia was a EU member state, the Brussels II Regulation (EC) No 2201/2003 would be applies, so the court would order the return of the child if the existence of an adequate protection of the child upon his return is proven, despite the exception in Art. 13. of the Convention (Article 11, Paragraph 4 of the Regulation). But applying only the Hague Convention, the request for the return of the child should be rejected, because otherwise the child would be at grave risk of suffering violence, which could leave harmful effects primarily to its mental development. For the purpose of application of Article 13 (b) of the Convention, it is irrelevant that the child is not a direct victim of violence.

Anyhow, the Convention should be so construed that, whenever possible and in the child's interest, the child shall be returned to the country of his habitual residence because a longer stay of a child in another country in the new social environment leads to the child's adaptation to that environment. We can conclude that, in cases of child abduction, time does not work in favor of the parent left behind, but that it does not mean that the abduction itself in certain cases, such as the one presented in this paper, is not in the child’s best interest.