INTERNATIONAL CHILD ABDUCTION: A SHORT COMPARISON BETWEEN THE HAGUE CONVENTION AND THE REGULATION N. 2201/2003

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Abstract: This article aims to make a brief comparison between two of the main international documents dealing with international abduction of children: the Hague Convention on the Civil Aspects of International Child Abduction and the Brussels II Regulation (EC) No 2201/2003 (also called Brussels IIA or II bis), which is an European Union regulation on conflict of law issues in family law between member states; in particular those related to divorce, child custody and international child abduction. The methodology used is the descriptive one, based on the comparative method and the revision of international documents and texts about the topic.

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Summary: 1. Introduction; 2. The Hague Convention on the Civil Aspect of International Child Abduction; 3. The European Regulation N. 2201/2003; 4. Cases analyzed by the European Court of Justice; 5. Comparison and conclusion; 6. Bibliography.

1. INTRODUCTION

This essay aims to compare two of the main international documents regarding child abduction: the *Hague Convention on the Civil Aspects of International Child Abduction* (1980) and the EU Regulation 2201/2003.

First of all, it is important to give a definition of child abduction. It is the case when a child is taken away from the State of his or her habitual residence without the consent of the person who has actual parental responsibility of him or her. For the two documents, there is no difference in distinguishing between abduction and retention: both of them are illicit actions that can give rise to a lawsuit promoted by the parent left-behind, who generally asks for the return of the child.

In addition, it is also relevant to define the expression "habitual residence". There is no general definition in the two documents because the international lawmaker preferred to give this work to national courts by making a case by case analysis of every single situation. National judges consider many elements in order to determine if a child has his habitual residence in a certain place: for instance, they can consider the age of the child in order to evaluate the bounding elements between the child and the habitual residence.

The *European Court of Justice* made an effort and tried to give a definition in a preliminary ruling decision:

> the concept of 'habitual residence' under Article 8(1) of the Regulation must be interpreted as meaning that it corresponds to 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[4]

Another effort to give a definition was made by the *Committee of Ministers*: "in determining whether a residence is habitual, account is to be taken on the duration and the continuity of the residence as well as of other facts of a personal or professional nature which point to durable ties between a person and his residence".[5]

The aim of both international documents is to pursue the "best interest of the child". This can be ensured with two means: by the command of a judge establishing the return of the child to his habitual residence or by the command of a judge on the groundlessness of the wrongful removal or retention.

A remark needs to be made on the irrelevance of the country of origin as an argument to enforce the requirement of return. Sometimes the two concepts are not coincident, especially in consideration of international families. The European freedom of movement of people increased the chances of international child abduction: the majority of cases discussed by international courts are about the exodus of women with their

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[4] Case C-523/07, *A*, paragraph 44.

[5] Committee of Ministers. *Resolution 72(1) - On the Standardization of the Legal Concepts of "Domicile" and of "Residence", nº 9*. 206th meeting of the Ministers' Deputies, 1972. Available at: <http://www.refworld.org/pdfid/510115e12.pdf>. Accessed on: 23 mar. 2020.

child to their country of origin, after having followed the working husband to another nation.

2. THE HAGUE CONVENTION ON THE CIVIL ASPECT OF INTERNATIONAL CHILD ABDUCTION

The idea of the Convention was born in 1976, when a "Canadian representative suggested that the issue be added to the agenda on Miscellaneous Matters".[6] When the States discussed the rules that could be applied, almost all of them agreed that it was not necessary to have an international tribunal, but they needed cooperation among them.[7]

In 1979 a small group - three people at the time - decided to reunite with the purpose of finding "an approach towards a future convention"[8] and this was named as the first Special Commission.[9] That group was the origin of the creation of the Central Authority system, because they believed that this would have been the best answer to the cooperation pursued by the States.[10] This small group was responsible for the draft of the Convention.

This Special Commission announced that "It did not go into the merits of the custody issue, rather it focused on the premises that the best interest of the child required that children should not be subjected to unilateral removals or retentions. Consequently, they should be returned as quickly as possible to

[6] STRÖM, Anki. *INTERNATIONAL CHILD ABDUCTION*: Domestic Violence on the Global Arena. Lund University, Sweden, 2002. p. 25.
[7] STRÖM, Anki. *INTERNATIONAL CHILD ABDUCTION*: Domestic Violence on the Global Arena. Lund University, Sweden, 2002. p. 25.
[8] STRÖM, Anki. *INTERNATIONAL CHILD ABDUCTION*: Domestic Violence on the Global Arena. Lund University, Sweden, 2002. p. 25.
[9] STRÖM, Anki. *INTERNATIONAL CHILD ABDUCTION*: Domestic Violence on the Global Arena. Lund University, Sweden, 2002. p. 25.
[10] STRÖM, Anki. *INTERNATIONAL CHILD ABDUCTION*: Domestic Violence on the Global Arena. Lund University, Sweden, 2002. p. 25.

their habitual residence".[11]

The Hague Convention on the Civil Aspects of International Child Abduction was signed in 1980 and it "is the primary civil law mechanism for parents seeking the return of the children from other treaty partner countries".[12] The document is considered as *sui generis*[13] because the text is based on cooperation among the Contracting States on the judicial and administrative authorities, and it does not deal with specific rules of family law, such as the right of custody.[14]

This Convention is originated from the Hague Conference on Private International Law which had 82 States and one Regional Economic Integration Organization[15] as members. The description about the document is:

> The *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* is a multilateral treaty, which seeks to protect children from the harmful effects of abduction and retention across international boundaries by providing a procedure to bring about their prompt return. The "Child Abduction Section" provides information about the operation of the Convention and the work of the Hague Conference in monitoring its implementation and promoting international co-operation in the area of child abduction[16]

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[11] BEAUMONT, Paul; MCELEAVY, Peter. *The Hague Convention on International Child Abduction*. Oxford, 1999. p.21.

[12] Office of Children's Issues. *The Hague Convention on the Civil Aspects of International Child Abduction: Legal Analysis*. Available at: <https://issuu.com/molosongololo/docs/legal_analysis_of_the_convention>. Accessed on: 23 mar. 2020.

[13] A "sui generis" system simply means "one that is of its own kind". - International Intellectual Property Institute. Is a Sui Generis System Necessary? - Benefit Sharing Agreements. 01/14/2004, New York. p. 1.

[14] DORIA, Isabel Izaguirre Zambrotti. *Competência Internacional Em Casos De Sequestro Interparental: Uma Análise Do Artigo 16 Da Convenção Da Haia De 1980.* Monografia. Universidade de Brasília - UnB, 2015.

[15] Hague Conference on Private International Law. *Members States of the Conference.* Available at: <https://www.hcch.net/en/states/hcch-members>. Accessed on: 23 mar. 2020.

[16] Hague Conference on Private International Law. *Child Abduction Section.* Available at: <https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction>. Accessed on: 23 mar. 2020.

The aims of the Convention are stipulated by Article 1, which determines that the signatory States of the document must "secure the prompt return of children wrongfully removed to or retained in any Contracting State" and "ensure that rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States".[17]

An important principle that guides the Convention is the 'the best interest of the child', this means that it is important to guarantee her interests and rights. The relevance of the child in international law, is given by the consideration of the child as a special subject of rights.[18] Because of that, there are two important documents in UN's system that deal with children: *Declaration of the Rights of the Child* and *Convention on the Rights of the Child*.[19]

In accordance with the *Ministero Degli Affari Esteri e Della Cooperazione Internazionale*,[20] there are three conditions that must be met in order to apply the Convention:

> 1) the state of habitual residence and the state where the child is abducted have both signed the convention;
> 2) the child is younger than 16 years old[21] (when the child turns 16 years of age, the proceeding stops);
> 3) the person asking for the return has the effective parental responsibility of the child before the removal.

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[17] Article 1 of the Hague Convention on the Civil Aspects of International Child Abduction.

[18] DORIA, Isabel Izaguirre Zambrotti. *Competência Internacional Em Casos De Sequestro Interparental: Uma Análise Do Artigo 16 Da Convenção Da Haia De 1980*. Monografia. Universidade de Brasília - UnB, 2015. p. 17.

[19] DORIA, Isabel Izaguirre Zambrotti. *Competência Internacional Em Casos De Sequestro Interparental: Uma Análise Do Artigo 16 Da Convenção Da Haia De 1980*. Monografia. Universidade de Brasília - UnB, 2015. p. 17.

[20] Ministero Degli Affari Esteri e Della Cooperazione Internazionale. Direzione Generale per gli Italiani all'Estero e le Politiche Migratorie Ufficio IV. *Bambini contesi: Guida di orientamento*. Available at: <https://www.esteri.it/mae/approfondimenti/20110210_guida_bambini_contesi.pdf> . Accessed on: 23 mar. 2020.

[21] Article 4: *"*The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years *".*

Therefore, the Convention is not always implemented in all the circumstances and in the way the petitioner wants it to happen.

Article 5 of the Convention determines what is the right of custody and the right of access. The first "shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence", and the second one "shall include the right to take a child for a limited period of time to a place other than the child's habitual residence".

This difference is important, because when a State has to decide if the child was abducted or not, it has to know who has the actual right of custody and who has the right of access. In fact, the greatest number of cases of retention are consequently due to the proper exercise of a parent right of access.

The purpose of the Convention is to restrain the prejudice of the eradication of a child from his place of habitual residence.[22] The international lawmaker uses the term wrongful, and not illegal removal in the document because it is not relevant to the existence of a previous act of certification of parental custody in order to ask the return of the child.[23]

An example of this is Article 8, which determines that "any person, institution or other body claiming that a child has

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[22] MARTONE, Angela. *La sottrazione dei minori tra normativa europea ed internazionale*. Tesi. Dipartimento di Diritto Pubblico Generale e Teoria e Storia Delle Istituzioni. Università Degli Studi Di Salerno, Salerno, 2012. p. 65. Available at: <http://elea.unisa.it/bitstream/handle/10556/1013/tesi%20A.%20Martone.pdf;jsessionid=282FC7D3E3D8706C43B3821ACF2A30E3?sequence=1>. Accessed on: 23 mar. 2020.

[23] MARTONE, Angela. *La sottrazione dei minori tra normativa europea ed internazionale*. Tesi. Dipartimento di Diritto Pubblico Generale e Teoria e Storia Delle Istituzioni. Università Degli Studi Di Salerno, Salerno, 2012. p. 66. Available at: <http://elea.unisa.it/bitstream/handle/10556/1013/tesi%20A.%20Martone.pdf;jsessionid=282FC7D3E3D8706C43B3821ACF2A30E3?sequence=1>. Accessed on: 23 mar. 2020.

been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child".

An important rule inserted into the Convention is the obligation to create Central Authorities with the duty of dealing with the problem of child abduction. All the Contracting States have an obligation to create a Central Authority and they are allowed to have more than one when the state have autonomous territorial organizations, more than one legal system in the territory or it is a Federal State.[24]

Examples of States that had ratified the convention and can establish more than one Central Authority are: Brazil, United States and Russian Federation, because all those countries are Federal States. It is not applied in Italy, France and Spain because they are Unit States.

The existence of the Central Authority is really important in the mechanisms of the application of the Convention. The reason has been already mentioned above: the States believed that the best way to cooperate was by having an autonomous system that has the duty to apply the rules of the Convention.[25] Under Article 7 of the convention, the Central Authority

> shall take all appropriate measures
> a) to discover the whereabouts of a child who has been wrongfully removed or retained;
> b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;
> c) to secure the voluntary return of the child or to bring about

[24] Article 6: "A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities. Federal States, States with more than one system of law or States having autonomous territorial organisations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State".

[25] STRÖM, Anki. *INTERNATIONAL CHILD ABDUCTION*: Domestic Violence on the Global Arena. Lund University, Sweden, 2002. p. 25.

> an amicable resolution of the issues;
> d) to exchange, where desirable, information relating to the social background of the child;
> e) to provide information of a general character as to the law of their State in connection with the application of the Convention;
> f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;
> g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;
> h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;
> i) to keep other each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

Furthermore, the use of this mechanism ensures the free access in terms of costs to the proceeding for the left-behind parent or relative.[26]

In the Italian system, there is a specific law (64/1994) that ratified the Convention and governed the procedural aspects of the Central Authority in cooperation with the National courts. The sensitivity of the problem of child abduction requires the use of precautionary rules to guarantee the minimum risk for the welfare of the child.[27]

One of the main issues about this Convention is the

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[26] LUPOI, Michele Angelo. *Gli aspetti processuali della sottrazione internazionale di minori: il rapporto tra regolamento UE n. 2201 del 2003 e convenzione dell'Aja del 1980*. Judicium: Il processo civile in Italia e in Europa, 2012. Available at: <https://www.judicium.it/wp-content/uploads/saggi/384/LupoiII.pdf>. Accessed on: 23 mar. 2020.

[27] LUPOI, Michele Angelo. *Gli aspetti processuali della sottrazione internazionale di minori: il rapporto tra regolamento UE n. 2201 del 2003 e convenzione dell'Aja del 1980*. Judicium: Il processo civile in Italia e in Europa, 2012. Available at: <https://www.judicium.it/wp-content/uploads/saggi/384/LupoiII.pdf>. Accessed on: 23 mar. 2020.

application of Article 16, because it determines that the State with jurisdiction is the one where the habitual residence of the child is, and that State can decide first while the other Contracting State has to wait for the first decision.[28] The habitual residence is the element of connection of the case, which means that the Contracting State of habitual residence is the one, which has the jurisdiction to deal with the child abduction.[29]

This rule, established in Article 16[30] is called a "negative rule" of competence, which means that the other Contracting State cannot do anything about the child abduction until the one, which has jurisdiction, has decided about it, even though it does not decide in a reasonable time.

3. THE EUROPEAN REGULATION N. 2201/2003

The Regulation 2201/2003 is concerned about the "jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility".[31] This Regulation is a specification of the above-mentioned Convention and it contains supplementary rules that are closer to the European system.

The matrimonial and the parental responsibility fields have not always been separated:[32] in the previous regulation (CE

[28] STRÖM, Anki. *INTERNATIONAL CHILD ABDUCTION*: Domestic Violence on the Global Arena. Lund University, Sweden, 2002. p. 42.
[29] STRÖM, Anki. *INTERNATIONAL CHILD ABDUCTION*: Domestic Violence on the Global Arena. Lund University, Sweden, 2002. p. 42.
[30] Article 16: "After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice".
[31] Description given by the Regulation.
[32] As stated in the "*whereas"* n. 5 of the Regulation, "In order to ensure equality for all children, this Regulation covers all decisions on parental responsibility, including

1347/2000), the decision on parental responsibility was taken within the decision for the dissolution of the marriage. The subsequent regulation has been written in line with the transformation of society: nowadays only a few couples decide to marry and many people have children without a previous marriage between them.

By creating a bond between matrimonial question and parental responsibility, a large amount of people is not included in the protection given by the law. In order to give protection to every peculiar situation, the lawmaker granted the application of this regulation even to that child who is the son of just one parent of the couple (if the other is a stepparent).

The peculiar condition of the child, consisted in his incapability to identify and protect his own rights or interests, needs to be ruled following peculiar principles. The most important is the "best interest of the child" but considering the fact that the EU Regulation is a specification of the Convention, the principle is the same, thus there is no need of further descriptions.

This first principle derives another important one, the "hearing of the child". In every proceeding for the return of the child, the judge shall give him the possibility to be heard about his preferences unless it is considered inappropriate because of his age or degree of immaturity. The judge has the duty to decide whether it is necessary or not to hear the child, even though the infringement of this principle is one of the reasons for the non-recognition for judgements relating to parental responsibility.[33] In fact, the non-audition can be considered as a violation of the

measures for the protection of the child, independently of any link with a matrimonial proceeding".

[33] Art 23: "A judgment relating to parental responsibility shall not be recognised: [...] (b) if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought; [...]".

right of defense granted for the child too.[34]

The Regulation does not have rules to decide the method and the time for collecting the statements of the child. In the decision Aguirre Zagarra vs. Pelz,[35] the Court of Justice stated that the only requirement for a proper collecting of the hearing is the freedom of expression of the willingness of the child.

A further relevant principle is the "right of access". For the proper growth of the child, she needs to have relationships with both parents (when this is possible) and this opportunity is given by this principle. In the Regulation, the right of access is granted not only for the left-behind parent, but also for grandparents and other relatives of the child.

The peculiarity of the argument is underlined in articles from 40 to 45 of the Regulation.[36] It is stated that there is no need of exequatur for the execution of decisions (even non-definitive) concerning the return of the child and the right of access under two conditions:[37]

1) the decision is enforceable in the State where it has been taken;
2) the decision has been certificated according to the standard form in Annex III.

The proper functioning of the European objective of free movement of people, money, goods and services must be granted by an effective system of rules providing the facilitation of procedures. This principle has its correspondence in article 60,[38] stating that the Regulation has a prominent role over certain international conventions such as our above-mentioned

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[34] QUERZOLA, Lea. *Regole Europee e giustizia civile*, a cura di P. Biavati e M.A. Lupoi, Bononia University Press, 2013. p 84

[35] Case C-491/2010, *Aguirre Zagarra vs. Pelz*, paragraphs 65-66.

[36] They are all contained in Section IV entitled *"*Enforceability of certain judgments concerning rights of access and of certain judgments which require the return of the child*"*.

[37] See art 41 of the Regulation.

[38] Article 60: "In relations between Member States, this Regulation shall take precedence over the following Conventions in so far as they concern matters governed by this Regulation: [...] (e) the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*"*.

Convention.

Furthermore, it is important to underline the special jurisdiction granted for the cases of child abduction. Under Article 10,[39] the judge who has the power to decide on this field has to be from the country where the child is habitually resident and the exceptions to this rule are very strict.

Even though statistics about these matters are hopeful, there is still a significant problem due to the fact that parents keep using child as pawns in the adult game of divorce. The EU lawmaker made an effort in balancing the two main principles of *favor divortii* for free movement of people and defense of the best interest of the child.

4. CASES ANALYSED BY THE EUROPEAN COURT OF JUSTICE

The first case that should be analyzed is the Case C-523/07. The facts of the case were that Ms. A, mother of C, D and E, lived in Sweden with her husband and their stepfather Mr.

[39] Article 10: "In case of wrongful removal or retention of the child, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction until the child has acquired a habitual residence in another Member State and: (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 Member State for a period of at least one year after the person, institution or other body having rights of custody has had or should have had knowledge of the whereabouts of the child and the child is settled in his or her new environment and at least one of the following conditions is met: (i) within one year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child, no request for return has been lodged before the competent authorities of the Member State where the child has been removed or is being retained; (ii) a request for return lodged by the holder of rights of custody has been withdrawn and no new request has been lodged within the time limit set in paragraph (i); (iii) a case before the court in the Member State where the child was habitually resident immediately before the wrongful removal or retention has been closed pursuant to Article 11(7); (iv) a judgment on custody that does not entail the return of the child has *been* issued by the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention".

F in December 2001. However, D and E were before under the care of municipality X in Finland and the reason for that was the violence of their stepfather against them.

After that, in the summer of 2005, they went to Finland to spend the holidays and lived in caravans; therefore, the kids did not go to school. On 30th of October 2005 they asked the municipality Y for social housing. On 16th November of the same year, the Welfare Committee decided to place the kids with a foster-family under the Law 683/1983 because they considered the kids as abandoned.

Consequently, Ms. A and Mr. F asked to override that decision, but the Committee rejected the petition and ordered to give the kids to a childcare unit. Because of that, Ms. A decided to start an action before the Kuopion hallinto-oikeus[40] for the annulment of the decision and asked for the return of the children. She defended herself stating that she let the kids spend their mid-November holidays with their stepfather's sister, and she was not abandoning them.

However, on the 25th of October 2006 the Kuopion hallinto-oikeus agreed with the Welfare Committee, stating that the Committee acted within its powers under the Law 710/1982. More than that, the Court noticed that the conditions of living in Finland were better compared with the conditions in their house. Ms. A tried to appeal to the Sweden court alleging that their permanent residence was there and they were Swedes since the 2nd of April 2007. Then, the case fell within the jurisdiction of the Swedish courts.

The European Court made three questions about this case:

> 1. (a) Does … [the] Regulation … apply to the enforcement, such as in the present case, of a public-law decision made in connection with child protection, as a single decision, concerning the immediate taking into care of a child and his or her placement outside the home, in its entirety,

[40] An administrative court in the city of Kuopion, Finland.

> (b) or, having regard to the provision in Article 1(2)(d) of the regulation, only to the part of the decision relating to the placement outside the home?
> 2. How is the concept of habitual residence in Article 8(1) of the regulation, like the associated Article 13(1), to be interpreted in Community law, bearing in mind in particular the situation in which a child has a permanent residence in one Member State but is staying in another Member State, carrying on a peripatetic life there?
> 3. (a) If it is considered that the child's habitual residence is not in the latter Member State, on what conditions may an urgent measure (taking into care) nevertheless be taken in that Member State on the basis of Article 20(1) of the regulation?
> (b) Is a protective measure within the meaning of Article 20(1) of the regulation solely a measure which can be taken under national law, and are the provisions of national law concerning that measure binding when the article is applied?
> (c) Must the case, after the taking of the protective measure, be transferred of the court's own motion to the court of the Member State with jurisdiction?
> 4. If the court of a Member State has no jurisdiction at all, must it dismiss the case as inadmissible or transfer it to the court of the other Member State?[41]

The most relevant part of this case, according to our *essay*, is the discussion about the concept of permanent residence, because this concept is essential to discuss child abduction. Therefore, the Court stated, as an answer to the second question, that:

> Therefore, the answer to the second question is that the concept of 'habitual residence' under Article 8(1) of the Regulation must be interpreted as meaning that it corresponds to 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

[41] Case C-523/07, *A*, paragraph 20.

> 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[42]

The second case that is important to analyses is the Case C-491/10 between Joseba Andoni Aguirre Zarraga and Simone Pelz. The first is from Spain and the second is from Germany, they have been married since the 25th of September 1998. They had a child named Andrea who was born on 31st of January 2000 and had his habitual residence in Spain. However, in 2007 the couple decided to separate before the Spanish court.

There, both parents asked for the right of custody of Andrea and on 12th of May 2008, the Court of First Instance and Preliminary Investigations No 5 of Bilbao gave the custody to Mr. Aguirre Zarraga, while his ex-wife was granted the right of access. Consequently, to that judgment, Andrea went to her father's home because a body providing psychosocial services to the courts, identified in their report that the right of custody should have been given to the father, to ensure the maintenance of the family, school and social environment of the child.

The mother decided to move to Germany with her new partner and her daughter and this is one of the reasons she did not get the custody, because the court decided that it was against the conclusions of the report and the well-being of the child.

In August 2008, after summer, Andrea spent some time in Germany with her mother and she did not return to Spain since then. Because of that, the Court of First Instance and Preliminary Investigations No 5 of Bilbao forbade Ms. Pelz, any other relative of her or person close to Andrea to come to Spain, suspending her right of access.

On 21st of April 2010, the judge dismissed the appeal of Ms. Pelz about hearing Andrea because of the law applicable in Spain that allows the hearing only in specific cases. However, the proceedings were still pending before the Audiencia

[42] Case C-523/07, *A*, paragraph 44.

Provincial.

In Germany there were two proceedings. The first one was made by Mr. Aguirre Zarraga, asking for the return of the child based on the Hague Convention of 1980, and the Celle Local Court upheld the petition on 30th of January 2009. However, Ms. Pelz appealed against the decision and on 1st of July 2009 the Celle Higher Regional Court upheld her appeal. Therefore, Mr. Aguirre Zarraga's application was dismissed based on the Article 13[43] of the Convention.

The Celle Higher Regional Court clarified that Andrea was heard and showed that she did not want to come back to Spain to live with her father and the expert heard by the court concluded that her opinion should be taken into consideration.

The second proceeding was started by the Court of First Instance and Preliminary Investigations No 5 of Bilbao based on article 42 of Regulation No 2201/2003 because the court had also made an order relating to rights of custody in respect of Andrea.

On 26th of March 2010 the Federal Office of Justice sent a note to the Court reminding the Court that under Article 44(3) the decision made by the Spanish court should have been enforced in the German territory. Ms. Pelz, however, disagreed with the enforcement and asked from Court the non-recognition of the Spanish decision.

The Court decided that the Spanish decision would have been neither recognized nor enforced because the court did not hear the child about her wishes. Nevertheless, on 18th of June 2010, Mr. Aguirre Zarraga appealed against that decision before the Celle Higher Regional Court requesting "that the judgment be set aside, that the claims of Ms. Pelz be dismissed and that the judgment of the Juzgado de Primera Instancia e Instrucción

[43] Article 13: "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".

No 5 de Bilbao of 16 December 2009 be enforced by operation of law as an order to return Andrea to her father".[44]

The Celle Higher Regional Court considered that the not hearing of the child was a serious infringement of a fundamental right, even though the Article 42 of the Regulation nº 2201/2003 has a general rule. Because of that, that court made two notes: the first one is that the Court in Spain did not use Andrea's view about the custody, and the second one is that it did not use the adequate method to deal with this matter, because of the protection of the Charter of Fundamental Rights.

A problem found in the case by the German court was that when the Spanish Court made the certification about the decision that was provided by the Regulation,[45] and it put that Andrea was heard in the judgment, was not true.

Because of all this situation, the Celle Higher Regional Court decided to request two things from the European Court of Justice:

> 1. Where the judgment to be enforced issued in the Member State of origin contains a serious infringement of fundamental rights, does the court of the Member State of enforcement exceptionally itself enjoy a power of review, pursuant to an interpretation of Article 42 of [Regulation No 2201/2003] in conformity with the Charter of Fundamental Rights?
> 2. Is the court of the Member State of enforcement obliged to enforce the judgment of the court of the Member State of origin notwithstanding the fact that, according to the case-file, the certificate issued by the court of the Member State of origin under Article 42 of [Regulation No 2201/2003] contains a declaration which is manifestly inaccurate?

The importance of the hearing of the child is the main

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[44] Case C-491/2010, *Aguirre Zagarra vs. Pelz*, paragraph 33.

[45] Article 42 Return of the child: "In the event that the court or any other authority takes measures to ensure the protection of the child after its return to the State of habitual residence, the certificate shall contain details of such measures. The judge of origin shall of his or her own motion issue that certificate using the standard form in Annex IV (certificate concerning return of the child(ren)). The certificate shall be completed in the language of the judgment".

part both in the case and in this essay, because it is one of the most important principles established in the Regulation. About that, the European Court of Justice decided that if a Court does not agree with the necessity of the hearing of the child is neither a violation of the Article 24[46] of the Charter of Fundamental Rights nor a violation of the Article 42(2)[47] of the Regulation 2201/2003; however "that right does require that there are made available to that child the legal procedures and conditions which enable the child to express his or her views freely and that those views are obtained by the court",[48] because of "the child's best interests and the circumstances of each individual case, in order to ensure the effectiveness of those provisions, and to offer to the child a genuine and effective opportunity to express his or her views".[49]

5. COMPARISON AND CONCLUSION

In the document named "Practice Guide for the application of the Brussels IIa Regulation", the EU Commission has drawn a list for the comparison between the rules contained in the two documents concerning the return of the child.

The first difference relates to the recognition and

[46] Article 24: *"*The rights of the child 1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity. 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration *".*

[47] Article 42. Return of the child: *"*2. The judge of origin who delivered the judgment referred to in Article 40(1)(b) shall issue the certificate referred to in paragraph 1 only if: (a) the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity; (b) the parties were given an opportunity to be heard; and (c) the court has taken into account in issuing its judgment the reasons for and evidence underlying the order issued pursuant to Article 13 of the 1980 Hague Convention *".*

[48] Case C-491/2010, *Aguirre Zagarra vs. Pelz,* paragraph 65.

[49] Case C-491/2010, *Aguirre Zagarra vs. Pelz,* paragraph 66.

enforcement of the decision in the States. Under art 13 of the Convention, the required State can decide to reject the decision of return "if there is a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation".[50] On the other hand, the European principle to abolish the exequatur is underlined in art 11 of the Regulation: there must be an automatic enforcement of the decision because of the mutual trust between Member states.

There is a controversial issue concerning the Hague Convention in case domestic violence is committed against women abroad and the mother decides to return the child to her country without the father's knowledge or permission. In these situations, the mother can claim the exception to the application of the Hague Convention provided for in article 13. However, when denounced by the former companion as kidnappers, the authorities can determine the immediate return of the child to the country where the parent is.

In Brazil, for example, even with norms concerning the best interest of the child and the adolescent, present in Law 8.069/1990 and in Law 11.340/2006, which also recognizes domestic and family violence against women as a violations of human rights, the authorities have not considered the allegation of violence suffered by the woman as sufficient argument to prevent the return of the child to the presence of the parent and potential aggressor, penalizing the female victim of violence as an international kidnapper of the own child. The allegation that this situation is not covered by the situations described in Article 13 of the Convention has provoked several criticisms, provoking the mobilization of important institutions, in favor of charges by the competent authorities for proper application of international

[50] EUROPEAN COMMISSION. *Practice guide for the application of the Brussels IIa Regulation*. European Union, 2014. Available at: <https://op.europa.eu/en/publication-detail/-/publication/f7d39509-3f10-4ae2-b993-53ac6b9f93ed>. Accessed on: 23 mar. 2020.

regulations.[51]

Merle H. Weiner believes that "reforming the Hague Convention on Child Abduction is an important task. While every country should adequately protect domestic violence victims, and while women and their children should not need to flee transnationally to find safety, sometimes such flight is necessary. Sending those victims' children back to the places from which they fled is the wrong approach".[52]

Another important difference is the possibility of a child hearing. In the Regulation this chance is regulated under art 11 n. 2.[53] On the other hand, in the Hague Convention there is no explicit rule that specifies the hearing of the child, although there is a general rule that states to consider the objections of the child about the return.[54] The final outcome is the same for the two documents, but the international lawmaker has not ruled a specific right for the child to be heard.

A big difference between those documents is the establishment of an international tribunal to deal with the child abduction. The Hague Convention, when it was made, determined a Central Authority to handle with, instead of having an international tribunal to decide the matters. In contrast, the EU Regulation determined that the European Court of Justice

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[51] FRIEDRICH, Tatyana Scheila; CRUZ, Taís Vella. Mães e sequestradoras: a relativização da violência doméstica e familiar na aplicação da Convenção sobre Aspectos Civis do Sequestro Internacional de Crianças pela autoridade brasileira. In: BERTOTTI, Bárbara Mendonça et al. (Orgs.). Gênero e resistência: memórias do II encontro de pesquisa por/de/sobre mulheres. Vol. 2. Porto Alegre, RS: Editora Fi, 2019. p. 37-65.

[52] WEINER, Merle H. International Child Abduction and the Escape from Domestic Violence. *Fordham Law Review*, New York, v. 69, issue 2, p. 593-706, 2000.

[53] Article 11, n. 2, Reg 2201/2003: "When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity".

[54] Article 13, n. 2, Hague Convention: "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".

should decide about the matters in case of a misunderstanding.

Finally, both of the international documents impose a time limit for the courts to judge on the abduction cases. The deadline is 6 weeks because the prosecution of the dispute over this period could be harmful to the growth of the child. If the Court cannot decide in this period of time, the Convention[55] asks to "state the reasons for the delay", whilst the Regulation[56] asks proofs of exceptional circumstances that excuse the delay.

It is possible to assert that both documents have the same aim, which is to guarantee the protection of the child and all his rights. Although the two documents have similar rules, they are applied in different situations: the Hague Convention is international and embraces States with different cultures and different perspectives, being more general. On the other hand, the EU Regulation deals with States that have a great number of rules in common and with similar targets, and that is why it is more specific. However, both documents fulfil their obligations and do not interfere in each other's sphere, making the international system work in its own way.

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[56] Article 11, n. 3, Reg 2201/2003: "A court to which an application for return of a child is made as mentioned in paragraph 1 shall act expeditiously in proceedings on the application, using the most expeditious procedures available in national law".

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