

**The Legal Context of International Child Abduction:
the best interests of the child in international law?**

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Executive summary

This research report describes which legal instruments play a role in cases concerning international child abduction with a focus on, the most important legal text, the Hague Convention on the Civil Aspects of International Child Abduction, hereinafter the Hague Convention or HCCA. The purpose of this report is to examine what needs to change in the legal approach towards child abduction cases in order to improve the protection of children.

In the first chapter definitions and context of international child abduction are provided. Chapter two covers an analysis of several important legal documents in relation to child abduction cases such as; the Hague Convention, the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, the United Nations Convention on the Rights of the Child, Brussels II bis (Council Regulation (EC) No 2201/2003) and bilateral agreements. The main aim of the Hague Convention is to protect children from the harmful effects of parental abductions by securing the prompt return of those children to the country of their habitual residence (Article 1). The Convention contains two provisions on which the immediate return of a child can be refused. The most important ground on which refusal of the return of the child is justified is if there is a grave risk that the child could be exposed to physical or psychological harm (Article 13). The Convention's procedural nature, does not allow a court in the State of refuge to enter into an analysis of the merits of the case. The issue of custody and access should take place in the court in the country of the child's habitual residence.

Over the years there has been a shift from abducting fathers to abducting mothers. This has led to criticism of the Convention's return principle for not being in the best interest of the child. Additional bottlenecks of the Hague Convention concern slow procedures, lack of necessary knowledge and the role of domestic violence in child abduction cases. These obstacles are discussed in chapter 3. Long proceedings are initially caused by the lodgement of appeal in cassation. Therefore, restricting the right of appeal could be an approach to speed up proceedings. The problem of lacking knowledge could be addressed by the concentration of jurisdiction, since at the moment the Netherlands do not concentrate jurisdiction to one or a number of courts. The aspiration of courts to closely follow the spirit and purpose of the Convention has led to a rigorous approach to domestic violence when interpreting Article 13 defences. However, courts should pay more attention to the unique circumstances of domestic violence in child abduction cases and deal adequately with the specific context of violence and its impact in individual cases. Besides, a more

pro-active approach is suggested in order to ensure that a child is safe and protected when he or she returns to the country of habitual residence.

This research report includes a case studies in the fourth chapter, which shows that The Hague Convention is correctly applied by Dutch courts. Generally, courts in the Netherlands do not experience any difficulties in determining whether an abduction is wrongful or not under the Hague Convention. The grounds to refuse the return of the child are correctly applied as well.

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Preface

Throughout my studies at the Hague School of European Studies, I developed a broad interest in European and International law, especially after following a minor programme that focused on this topic. Alongside my studies I participated in the actions of a Non-Governmental Organisation which combats sexual exploitation of children.¹ The combination of my interest in international law and the position of children in international affairs led to the choice for the research subject: International Child Abduction. This research gave me the opportunity to enlarge my knowledge on this topic and to learn about its jurisdiction and the various legal instruments that play an important role in this complex, international issue. My main aim is to present a comprehensive analysis on the enforcement and implementation of the 1980 Hague Convention on the Civil Aspects of International Child Abduction, which is the key legislative text in child abduction cases. In addition I hope to contribute in some way to the academic debate on this subject.

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¹ ECPAT: End of Child Prostitution and Child Trafficking

1. Introduction

In recent years, the number of international child abduction cases has increased. The growing issue of child abduction is related to the increase in international relations and marriages and globalisation combined with cultural and legal differences concerning the position of children. In order to find suitable solutions to this international issue and protect the child's best interest, particular legal instruments have been established to enforce institutionalised cooperation among countries. These legal instruments and their effects will be examined throughout this study, with a focus on - the key legislative text - the Hague Convention on the Civil Aspects of International Child Abduction.

The term 'child abduction' is largely a media creation in the way it is perceived among the general public. In the context of international private law it is used to indicate the unilateral abduction by parents, guardians or close family members (Beaumont & McEleavy, 1999, p.1). The dictionary defines abduction in general as '*the act of taking someone away by force or cunning; kidnapping*' and in the law context as: '*the illegal carrying or enticing away of a person, especially by interfering with a relationship, as the taking of a child from its parent*' (Collins English Dictionary, 2011). Referring to The Hague Convention on the Civil Aspects of International Child Abduction (hereinafter The Hague Convention or HCCA), international child abduction is the wrongful removal or retention of a child from its place of habitual residence to another country (Art. 1 HCCA), which is also the definition that most authors use. This definition will be used throughout this study since it is the official, legal definition. *Removal* is when one parent takes the child out of the home country without the other parents' permission. *Retention* is when the child has leaves the home country with the permission of the other parent, but the child is not returned as expected.

We can distinguish two types of child abduction: incoming cases and outgoing cases. Each Contracting State must establish a Central Authority, with the purpose, as described in Article 7 HCCA, to "*co-operate with each other and promote cooperation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention*". In the Netherlands, the Ministry of Justice has a department that carries out the responsibilities of the Central Authority. The first step to take when a child is abducted is to send a request to the Central Authority, who then tries to find the abducting parent and the child and sends a letter requesting; to return the child and noting that a request to return the child will be filed at the court if the child is not returned voluntary. If the abductor responds and voluntarily returns the child, the work of the Central Authority is completed. If the abducting parent

does not contact the Central Authority, the case is sent to the District Court. It is possible that the court requires the Child Protection Board to investigate and report the situation of the child. The judgment of the District Court is instantly enforceable, even if appeal is filed (Ruitenbergh, 2006, p. 9 - 18)

There is no formal definition of *habitual residence* because the term is intended to be free from technical rules. The court should assess the facts and circumstances of each case to determine the habitual residence of the child. Over the years, the absence of a formal definition has provided several obstacles with different interpretations in different legal systems. It is not clear whether the court should put the emphasis exclusively on the child or primary on the intention of the parents prior to the removal or retention. A case that has highly influenced the importance of the parental intention is the *Mozes v. Mozes* case. In this case, the mother took the three children from Israel, to the United States for a fifteen month stay in April 1997. A year later, the mother applied for a divorce. In May 1998, the father requested the return of the children under the Hague Convention and the court dismissed his petition. Thereafter, the father appealed. While the focus was primarily on the children's contacts in the new environment, courts should not conclude that a former habitual residence has been abandoned, even if the new habitual residence has been deemed appropriate for the child. The aim of the Convention is to prevent abductions, therefore it should not be an easy action for a parent to change the habitual residence without consent of the other parent. Moreover, the court's function is to decide whether a parent is trying to change the *status quo* and not to decide whether a child is happy in its current environment. The court stated that even if a child adapts in a new environment and forms intense attachments, it does not immediately make that environment a child's habitual residence. Even if the children had spent more than a year in the US, they were still habitual residents of Israel. The court decided that a settled intention to leave the former habitual residence is an important element before a child can attain a new one. The parental intention focus has been endorsed in other decisions, so that the stay abroad of the child for an extended period of time did not change the existing habitual residence, if there was not a shared intention of the parents. After the Court of Appeals decision to remit the case to the District Court, the parents reached an agreement and the mother and children moved back to Israel. Each case has a new factual situation, which makes it hard to assess the interpretation of habitual residence. For instance, it can be a permanent move, a hesitant relocation, one which is open-ended or possibly open-ended or a relocation for a clear demarcated period of time (*Mozes v. Mozes*, 2001).

The assignment provider ‘Stichting Oost West Thuis Best’ (OWTB) (There is No Place Like Home) is a Dutch based charity foundation, founded in June 2009, that deals with the prevention and resolution of the increasing number of international child abduction cases related to the Netherlands. The foundation OWTB noticed that at present there is a lack of knowledge and information for the victims and a lack of experts in this field. The mission of the foundation is to provide better information, guidance and support in child abduction cases and custody issues. More specific, OWTB aims to increase knowledge, create awareness and provide support and advise in: missing children, parents and guardians; (international) custody and visitation rights regarding children; (international) abduction of children; the improvement of the physical and mental health and the well-being of children who are victims in the above mentioned situations. In 2012, negotiations on international agreements related to private international law will take place in the Hague and this study will help the foundation on how to position itself during such negotiations. This paper attempts to provide the foundation with information on the legal aspects of international child abduction, by answering the following research question: ***“Which international agreements have an effect on child abduction and what needs to change for an improved protection of abducted children?”*** Both desk and field research have been conducted to collect information for this study. Desk research has been done by the use of books, articles, journals and digital sources. Field research has been done by the use of three interviews with experts. In the international agreements that have an influence on international child abduction will be defined in the second chapter, with the focus on the Hague Convention, which is the most important legislative text throughout this study. In order to further research how well the Hague Convention has responded to the problem of international child abductions, a number of cases in the Netherlands has been studied in chapter 4. The last chapter gives conclusions and recommendations on how protection of abducted children may be improved.

2. International agreements and conventions

2.1 The Hague Convention

International child abduction did not receive specific attention until the Hague Conference took up the topic in the late seventies. Before 1970, several efforts were made in order to deal with some of the issues involved, but these were unsuccessful. For example, the *European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children*, turned out to be of limited value in practice (Beaumont & McEleavy, 1999, p.3). On 5 October 1961, the Hague Convention *Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants* was concluded. Contracting States to this Convention were: Austria, China, France, Germany, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Spain, Switzerland and Turkey² (HccH, 2011, Status Table). The drafters considered to include a provision addressing the removal of a child's habitual residence. Article 6 of the Draft provided that if the habitual residence of a child was transferred from one State to another, measures taken by the authorities of the State of the former habitual residence, would remain in force, until the authorities of the new habitual residence would terminate or replace them. Eventually, it was dropped because the Special Commission was not able to agree on a definition for this phenomenon (Beaumont & McEleavy, 1999, p.3).

The problem of international child abduction is related to social-legal and technical developments, like the rise in individual mobility and international marriages and relationships. Additionally, there has been a breakdown in traditional family structure, an increase in divorces or separations and of children born outside marriage. There were limited possibilities of recovering abducted children. Courts were often unwilling to take action without first investigating what was in the child's best interests. This led to long, drawn-out proceedings and the longer they lasted, the less likely that the child would benefit from being returned. In addition, the parent had to pay for the legal costs. At the meeting of The Permanent Bureau of the Hague Conference in January 1976, the problem of child abduction was introduced. A year later, the Permanent Bureau and the International Social Service, started to research the subject. This research involved an analysis of the legal issues and the sociological aspects of child abduction. In 1978, a Report together with the Dyer Questionnaire (questionnaire on international child abduction by one parent by Adair Dyer) was distributed to governments. The results of the questionnaire showed a rejection of an

² See Appendix I for the Status Table of the Hague Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Infants

international tribunal for child abductions. Nevertheless, there was a demand for a form of cooperation and a central authority system. In 1979, the Special Commission met to negotiate upon an approach, which could become the foundation of the future convention. The Special Commission refers to the preparatory meetings on a specific topic which precede a Diplomatic Session. The following issues had to be discussed: recognition and enforcement procedure, the summary of return of the child, the harmonization of jurisdiction and administrative cooperation. During the negotiations, no progress was made on the recognition and enforcement criteria. The Special Commission agreed on the creation of a Central Authority system to promote administrative cooperation. Two types of summary return were concluded. If a child had its habitual residence in one Contracting State and was removed or retained in another, the parent who had lawful custody would have the right to have the child returned immediately to him or her, by applying to the Central Authority of the State of refuge within six months. In addition, the court in the State of refuge, could decline the return of the child if it found that it could be seriously prejudicial to the child's interest. If more than six months had passed, the court in the State of refuge would only assume jurisdiction if it believed that the child was habitually resident within that State and the child had been so resident for not less than a year, or if it was necessary to protect the child from physical danger. Moreover, the court would only make a decision after it had communicated with the Central Authority. A custody order was needed to apply all the above rules. In November 1979, the *Sketch of a Preliminary Draft of a Convention on International Child Abduction by One Parent* was presented to the second Special Commission and negotiations started. The rules on the harmonization of jurisdiction had been declined and there was no agreement on the recognition and enforcement of custody, so a practical solution was needed. This led to the rule of returning a child regardless of the existence of any custody order in the State of the abductor, even if a hearing could indicate that the child should be permitted to live in the State of the abductor. The Commission wanted a security of a clause or reservation in the Convention to give the courts the possibility to decide what was in the child's best interest. In the meeting in October 1980, a restrictive public policy clause was accepted, which would allow the States to reject the return of the child if returning would have been incompatible with the fundamental principles of the law relating to the family and children in the State addressed. The 25th of October 1980 the Hague Convention on the Civil Aspect of International Child Abduction was available for signature. At present, 85 countries signed the Convention ³ (HccH, 2011, Status Table). On September the 1st in 1990 the Convention entered into force in the Netherlands. The Convention is

³ See Appendix II for the Status table of the Hague Convention on the Civil Aspect of International Child Abduction

private law and is therefore only binding to the Contracting States. In a child abduction case, both countries need to be Contracting States and are only bound by ratification or accession (Bannon, 2011, p. 114). Usually, one Contracting State applies on behalf of the parent or guardian who seeks for the return of the child to the other State. Applications are made through the Central Authorities which are established in each country that signed The Hague Convention. The general principles of the Convention are universal, however, it should be mentioned that the Contracting States can interpret the Convention differently. There are also articles that have not been adopted by some States (Hutchinson, Roberts & Setright, 1998, p. 4). The aims of the Convention are defined in Article 1 HCCA as following: *a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.* Art. 3 HCCA states that the removal or retention of a child is wrongful where it is in breach of rights of custody and at the time of removal or retention, those rights were actually exercised. The international element is not mentioned in Art. 3 HCCA, but in the Preamble it is stated that the aim of the Convention is “*to protect children internationally from the harmful effects of their wrongful removal or retention*”. Article 4 states that a child is somebody less than sixteen years old. Although the Convention does not give a definition of custody rights, it notes that those rights include rights related to the care of the child and in particular *the right to determine the child’s place of residence* (Art. 5 HCCA). It further requires, that custody rights exist by law, by judicial or administrative decision, or by a legal agreement under the law of the State of the prior habitual residence (Art. 3 HCCA). This means that a Court Order from the State of the prior habitual residence might be necessary for application of the Convention. The domestic law of the that Contracting State, decides whether the rights of custody have been breached. This decision is taken by the authority or by a Court Order related to custody (Davis, Rosenblatt & Galbrait, 1993, p.18). The Convention has a preventive objective and the objective to secure the instant reintegration of the child into its habitual environment. The main aim of the Convention is the re-establishment of the *status quo*, by the child to the State it has been removed or retained from. There are three reasons to presume that the prompt return is the best for the well-being of the abducted child. Primarily, it will minimize the harmful effects of children who are abruptly removed from their environment. Secondly, it will deter parents and other family members from retaining or removal of children. Thirdly, the dispute will be resolved in the most appropriate court, which is generally in the place of the child’s prior residence (Schuz, 2004, p. 721). The drafters rejected the options of applicable jurisdictional rules. Article 16 HCCA states that the court in the State of refuge does not have jurisdiction to decide on the rights of custody and access, unless the child does not need to

return because one of the exceptions (Art. 13 and Art. 20 HCCA) are applied to the case. Article 19 HCCA that a decision under the Convention on the return of the child does not influence a later decision on the merits of any custody issue. Questions on custody rights, should take place before the competent authorities in the State where the child is removed from (Pérez-Vera, 1982, p.430). Removal or retention is not necessarily contrary to a child's interest and can sometimes be justified. The Preamble of the Convention states that the States desire to protect children internationally from the harmful effects of their wrongful removal or retention and not from the actions themselves. Professor Pérez-Vera, notes there can be reasons which have to do with the child, or with the environment with which it is most closely connected, to make exceptions to the general obligations of the Conventions (Pérez-Vera, 1982, p. 432). Furthermore, the achievement of a hearing to determine the child's future is an important aim of the Convention. When a child is abducted, the authorities should investigate the facts in order to determine if a child should be returned or not. (Beaumont & McEleavy, 1999, p. 33) According to Lowe (2005, p. 95), the speed of proceedings should be improved. Returning a child becomes (more) complicated when a long time has passed. Explicit time limits and deadlines are needed for trial, court decisions, appeals and executions. Chapter 4 goes into detail of this problem and other obstacles of the Hague Convention.

In outgoing cases where the Hague Convention cannot be applied, the Dutch Central Authority sends the case to the Ministry of Foreign Affairs, which subsequently sends the request immediately to the Dutch embassy or consulate in the concerning country. Subsequently, the embassy or consulate tries to find a solution through diplomatic means (Centrum IKO). Although the Hague and European Conventions cannot be applied in abductions to Non-Contracting States, the Implementation Act⁴ regulates incoming cases from Non-Convention countries. Basically, requests from Non-Contracting States should be handled the same way as other cases of abductions from Contracting States, but case law shows that in those cases, orders for return are often declined (Lowe and Ruitenbergh, 2005, p. 5).

2.2 The European Convention

The European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, hereinafter the European Convention, was signed in May 1980. This convention entered into force in the Netherlands on 1 September 1990. Its primary aim is to protect children by the recognition and enforcement of custody decisions of

⁴ Uitvoeringswet Verdragen inzake internationale ontvoering van kinderen van 2 mei 1990

one State in another. Its second aim is the restoration of custody in child abduction cases. The Hague Convention takes precedence in cases where both Conventions can be applied (Davis, Rosenblatt & Galbraith, 1993, p. 34). During the drafting, the Council of Europe considered child abduction as a separate problem. As a consequence, the European Convention became a slightly disconnected instrument, which has not had major success. The recognition and enforcement of custody decisions is not seen as useful to resolve child abductions by the drafters of the Hague Convention. Certain articles of the European Convention can exemplify this view. Article 7 of the European Convention states that custody decisions in a Contracting State shall be recognised and enforced in every other Contracting State. Nevertheless, in Articles 9 and 10 of the European Convention a list of defences on which recognition and enforcement of custody orders may be refused are enumerated, instead of giving indirect grounds of jurisdiction for automatic recognition (Beaumont & McEleavy, 1999, p. 221). Also Article 12 of the European Convention makes declaratory provision. This is a notable difference with The Hague Convention, where no exceptions can be made and the criteria of Article 3 HCCA need to be met at the time of removal or retention.

2.3. The United Nations Convention on the Rights of the Child

On 20 November 1989, the United Nations Convention on the Rights of the Child, hereinafter the UNCRC, has been adopted by the UN General Assembly and entered into force in September 1990. Almost all the nations have ratified the Convention, with exception of the United States and Somalia. The Convention sets out the civil, political, economic, social and cultural rights of children. The objective of the Convention is to protect children from discrimination, neglect and abuse, in times of peace and during armed conflict (United Nations, n.d.). In the UN Convention there are several articles that are related to the Hague Convention. Those are: the right to have protection of his or her welfare (which is provide by several provisions of the CRC, for example Art. 3(1) and 19 UNCRC), the right to maintain contact with both parents (Art. 7, 9 and 10 UNCRC), the right to have his or her views respected (Art. 12(1) UNCRC) and the right to be heard (Art. 12(2) UNCRC). Mention should also be made of Art. 11 UNCRC, which encourages the Member States to address the problem of international non-return and promotes accession to existing bilateral and multilateral treaties. Moreover, Art. 35 UNCRC, which encourages Member States to take all appropriate measures on national, bilateral and multilateral level to prevent child abduction.

Schuz (2004) notes that The Hague Convention contains parental rights instead of children rights and thus makes the parents the victims instead of the children, due to the use of the terms of *wrongful removal* and *wrongful retention*, which are a consequence of breach of custody rights, which are parental rights. On the other hand, the removal or retention is wrongful when it restrains the child from having contact with one of the parents when the child is living in another country, which is a child right (p. 728). In some cases, the custody rights test of The Hague Convention fails to protect the child's right to maintain contact with his or her parents. For instance, in England and Wales a father doesn't have custody rights when he is not married to the mother, unless he has obtained those rights by the Court or the mother. This means that if the mother abducts the child, the father who was practising parental duties, has no rights under The Hague Convention and the Convention fails in protecting the child's right to have contact with the father. Another example of a similar situation is in the case of a parent who is left behind and only has access rights. Under Art. 5 of the Convention access rights include the right to take a child for a limited period of time to a place other than the child's habitual residence. In this case, the parent can request support of the Central Authority under Art. 21 of The Hague Convention to have those rights protected and respected in the place of refuge. Nonetheless, case law reveals that the obligations imposed by Art. 21 are limited and the Convention has a weak approach in the enforcement of access rights. Thus, the difficulties for the left-behind parent to achieve access to his or her child deny the child to maintain contact with his or her parent. Nevertheless, there are courts that solved this issue by making the distinction between custody and access less strict by a flexible interpretation (Schuz, 2004, pp. 728-731). According to Dyer (1993), "the relative softness of article 21 was the price which was paid for the rigorousness of the provisions on the return of abducted children" (p. 287).

Regarding the child's right to have his or her views respected (Art. 12(1) CRC), the enforcement of the third ground of Art. 13 of The Hague Convention to refuse return of the child, may be criticized. In Article 13 it is noted that it may be ordered to refuse the return of the child if the court finds that the child does not wish to be returned and is old enough to assume that his or her view might be relevant to the verdict of the court. Nonetheless, it does not oblige the court to assess the opinion of the child. If the abducting parent does not prove the child's objection to return, the court does not ascertain the view of the child, which does not satisfy Article 12 of the CRC. We may take it for granted that the parent that is raising a defence will plead the child's view to the court, but this is not certain. Therefore, Article 13 should impose an obligation to the court to examine the child's view in order to make sure that the child's view is made known. In some countries the child's right to be heard is enforced by national procedures. For instance, in Israel, the Court is not

allowed to make a decision before it has heard the child, if the child is mature enough, that it is appropriate to take into account his or her view. Whilst in many countries the judges do not hear the child directly, in some countries like France, the US and Scotland, it is more usual for judges to give the child the opportunity to express his or her objection by meeting the child. In addition, The Hague Convention does not include a provision that enables the child him/herself to make an application to return, while it is a child's right to express his or her views under Article 12 CRC. It is submitted that permitting children to initiate an application could be difficult where the left-behind is not capable to care of the child or does not want to.

It can be held that The Hague Convention is inconsistent with Article 3 CRC, which provides that in all actions concerning children, the best interest of the child shall be a primary consideration. In the Murray case, the court stated that an application under The Hague Convention focuses on where and in which court issues concerning the best interest of the child will be judged and that issues concerning the welfare of the child are not relevant in such an application. However, Article 3 UNCRC notes that the child's welfare should be a primary consideration in *all* actions, so a decision on where the case is heard and by which court should be comprised as well (Shuz, 2004, pp. 743-744).

2.4 Brussels II bis

Brussels II bis, hereinafter Brussels, is an EU Regulation⁵ that came into force in March 2005 in all the EU Member States with an exception of Denmark, which opted out. It substitutes the former Brussels Convention on matrimonial matters of 1998. Brussels II bis aims at standardising the rules in the EU Member States regarding jurisdiction and improving the recognition and enforcement of decisions in matrimonial and custody issues (Europa, 2004, Summaries of EU legislation). The Regulation is an elaboration of The Hague Convention and whilst it does not replace it, it does have precedence over the Hague Convention if it is favour of the left-behind parent (N. Whiterod, personal interview, April 28, 2011). Brussels contains provisions on jurisdiction in another country in order to speed up proceedings. It allows the court of the prior residence of the child to take jurisdiction and it offers two situations in which the court of the prior residence has jurisdiction in the country to which the child has been abducted (Art. 8 and 10 Brussels). A decision on an application for return of a child shall be issued no later than after six weeks after the application was made, unless it is not possible due to exceptional circumstances (Art. 11(3) Brussels). Brussels also stresses the right of the child to have his or her views heard (Art. 11(2) Brussels). It further

⁵ Council Regulation (EC) No 2201/2003

provides that a court is not allowed to decline a return without having heard the parent who applied for the return of the child (Art. 11(5) Brussels). Mention should also be made of Art. 11(4) Brussels. This provision limits Art. 13(b) HCCA, by noting that courts are not allowed to refuse the return of a child, “*if it is established that adequate arrangements have been made to secure the protection of the child after his or her return*”. However, the article does not assume that measures are actually taken and that the child will be truly protected when he or she returns. When a non-return order has been filed under Art. 13 HCCA, a copy of the non-return order and other documents must be sent to the court in the State of the child’s habitual residence within one month of the decision of non-return (Art. 11(6) Brussels). The court that receives the documents, must notify the parties and invite them to make submissions within three months. Then the court can examine the issue of custody. If does not receive any submissions is must close the case (Art. 11(7) Brussels). Remarkable is that even though non-return is ordered under Art. 13 HCCA, the court in the state of the child’s habitual residence, may determine the return of the child (Art. 7(8) Brussels). Another important feature is Art. 12(2) Brussels, which states that a country can have jurisdiction even if the child’s habitual residence is not in that country, on condition that the child has a close link with that country, it is in the best interest of the child and all parties agree on that country having jurisdiction. If no decision can be reached on the habitual residence of the child, the country where the child is located at that moment will have jurisdiction (Art. 13 Brussels). Moreover, Art. 15 Brussels permits that a case is being transferred from one state to another. Art. 42 Brussels states that the court in the country where the child was living before the abduction decides that the child must be returned, the country to which the child has been abducted to must recognise and enforce this decision, even if the latter has sent a non-return order before the judgment (Hodson, 2005). Although the HCCA and Brussels cannot converge toward each other since cases of the latter are judged by a provisional judge and HCCA cases are judged by a Children’s Court Judge and in Brussels, the possibility remains that contradictory decisions are made in the end. For example in the *Inga Rinau* case, the mother had taken the child from Germany to Lithuania. The return order was refused, but the father Court of Appeal decided that the child must return to Germany. Under Article 11(8) Brussels, the court decided that custody of the child was awarded to the father. In this case, one state applied the Hague Convention and the other state Brussels II bis.

2.5 Bilateral agreements

Some countries have independent bilateral agreements relating to matters of international custody and child abduction. Bilateral agreements all have the same objective: to guarantee efficient cooperation among countries in issues regarding custody and international. However, their scope

and how they are put into practice vary significantly (Gosselain, 2002, pp. 11-12). According to van Bueren (1993, p. 39), it is a disadvantage that the two states are allowed to shape their agreements to reflect the needs of the signatories, which may be different from international standards. On the other side, the fact that that they are more flexible and give the possibility to focus on a specific subject and they only have to integrate the compromises required by one state is advantageous. We can distinguish different types of bilateral instruments⁶. Firstly, there are bilateral conventions on administrative and judicial cooperation, which can be subdivided into limited cooperation agreements and agreements inspired by multilateral conventions. Secondly, we distinguish consular agreements on cooperation and thirdly administrative agreement protocols. Limited cooperation agreements aim at cooperation in custody and access issues by taking the required actions to find out where the child is, to promote voluntary return of the child, to give information on the needs of the child and on any measures taken to protect the child. An example of such an agreement is the “Convention relating to children of mixed separated French-Algerian couples of 1988” (*Convention relative aux enfants issus de couples mixtes séparés franco-algériens*), between France and Algeria, in which a mechanism has been established for cooperation among the French and Algerian Ministries of Justice. Aims of this agreement are to search and locate children in custody issues, enforce the Ministries of Justice to give information on the living conditions of the child, enforce cooperation between those Ministries in order to achieve the voluntary return of the child and to support the implementation of decisions concerning custody and access rights. The other subcategory, bilateral agreements inspired by multilateral convention actually speaks for itself. Those agreements have been inspired for example by the Hague Convention and have the following common principles: the habitual residence as an essential element to protect the child; the equal status on custody and access rights; restoring the status quo in the best interest of the child; and automatic right to legal aid. In addition, these bilateral agreements have “mixed consultative committees”, were authorities of the Ministries of Foreign Affairs and Justice assemble in order to smoothen the progress in complex cases that have been submitted to them by the respective States. The second type of bilateral agreements are the consular agreements on cooperation, which are inspired by more universal conventions such as the UNCRC and the Vienna Convention on Consular Relations of 1963. The agreements have the objectives to encourage and execute cooperation between the countries, with the intention of regulating the issue of custody rights and protecting children’s rights. Countries that have established consular agreements on cooperation are Australia, Canada, Lebanon, Egypt and France and have the following points in common: the child’s rights to have personal, direct and regular

⁶ See Annex I for examples of bilateral agreements.

contact with both parents must be respected; the parent's access rights must be respected and an Advisory Commissions must be set up to ensure the harmonious resolution of family matters, in particular custody and access matters. The Advisory Commissions consist of civil servants, from the Ministry of Foreign Affairs and International Trade, the Ministry of Justice and the Interior and the Royal Police. Finally, administrative agreements protocols may be established between two countries, with the aim of handling difficulties and maintain an open relationship among the Member States. The agreements are founded on standards of cooperation, discussion and information together with the establishment of "mixed consultative committees", who have the task to reconcile civil litigations. The two last types of bilateral agreements (consular agreements on cooperation and administrative agreements protocols) distinctive themselves by the creation of consultative committees, who examine cases on custody an access right to find solutions by amicable means. These committees are supposed to meet annually. However, due to lack in financial support and availability they are not able to meet every year. A positive aspects of the committees is that they discuss case-by-case specific issues in the implementation of access rights and that improvements are made in the efficiency of the action of Central Authorities in Islamic Member States. For instance, during one of the meetings of the Franco-Lebanese committee, improvements were made by organising collective access right in the Lebanon and the Lebanese authorities admitted some request for access by mothers from France. Wrongful removals and retentions between Egypt and Canada have decreased since their bilateral agreement. Nevertheless, it should be noted, it takes a long time before results are achieved by consultative committees and through cooperation with Central Authorities and that the number of results is few. Furthermore, application is influenced by political, cultural and judicial factors. It is a fact that bilateral agreements have difficulties in the enforcement of decisions concerning custody and access. Decisions of foreign courts are often not recognized and enforced by courts in Muslim countries on the grounds of inconsistency with national public order, under the Koranic law. Public order merges with the concept of best interest of the child, which is the (Islamic) education of the child by his father in his country. As a consequence there are difficulties in taking a child out of the country without permission of the father, even when for example in an exequatur procedure the judge decided to return the child to the mother (Gosselain, 2002, pp. 12- 26).

The bilateral agreement between France and Portugal, the *Convention of Judicial Cooperation concerning the Protection of Minors* of 1984 is considered successful as these countries do not use the Hague Convention. Conversely, treaties between France and Morocco and Tunisia do not seem very successful. In some bilateral agreements with Islamic countries, it is permitted to refuse the

return of a child on grounds of public policy, while in The Hague Convention it was essential to remove the public policy clause to be successful. Another example of conventions with a dangerous feature are those between Luxembourg and France and Luxembourg and Belgium. These treaties address the nationality of the parent(s) and child(ren), whilst in the Hague Convention the nationality of the parties do not play any role, which is one of the most important elements of the Convention (Dyer, 1993, pp. 283-284).

The Netherlands has presently no bilateral agreements. In 1999, the Committee of the Right of the Child recommended in its 'Concluding Observations' the Dutch government to consider bilateral agreements with countries that did not ratify the Hague Convention (UNHCR, 1999, p. 4), such as Surinam, Turkey and Morocco. The Dutch Government rejected this advice and declared it prefers the use of multilateral agreements and is afraid that by making bilateral agreements would withhold countries from signing multilateral agreements (Meuwese, Blaak & Kaandorp, 2005, p. 115). In 2006, discussion on drafting a convention between Morocco and the Netherlands took place, but at that time the Minister of Foreign Affairs declared that such a treaty was not opportune. Research of Centre International Child Abduction (Centrum IKO) shows that the amount of cases between the Netherlands and Non-Convention countries were 18 in 2009 and 15 in 2010. The majority of those abductions were to Muslim countries, of which Iraq stood out, with 3 cases in 2009 and 4 cases in 2010 (Jaarverslag Centrum IKO, 2010, p. 13). Bilateral agreements are mainly concluded between Western and Islamic countries. The difference between civil law in Western countries, where law and religion are separated and religious law in Muslim countries can create obstacles in international law issues. In the opinion of Menninga of the Child Abduction Association in the Netherlands, the establishment of bilateral conventions is essential, particularly with Muslim countries in view of the fact that the cultural differences between the Netherlands and those countries may play an important role in family law (M. Menninga, personal interview, January 4, 2011). Whiterod (attorney at law) agrees on the fact that the Netherlands would benefit from bilateral agreements and notes that they should be signed with every country that is no party to the Hague Convention. Every child being taken to a Non-Convention State should be reason enough to consider an agreement with that country (N. Whiterod, personal interview, April 28, 2011).

The main legal instrument applied in child abduction cases is the Hague Convention. In European countries the Regulation Brussel II bis can be applied, which is an elaboration of the Hague Convention and does not replace the Convention. Applications under the Hague Convention do not

allow courts to enter into the merits of the case, leaving determination on custody to the courts of the child's prior habitual residence . Various Western countries have decided to conclude bilateral agreements with Islamic countries in order to enhance cooperation with regard to the obstacles of child abduction. The implementation of these agreements has obtained tangible results. However, it remains difficult to overcome the differences between the Western legal systems and the religious law in Islamic States in application of agreements and enforcement of decision. The Netherlands do not have any bilateral agreements on international child abduction. It is recommended that the Dutch government establishes such agreements with those Non-Convention countries were children are abducted to and from.

3. Bottlenecks of the Hague Convention

The Hague Convention was signed on 25 October 1980. In this 30 years period the world has changed, in particular respect to growing internationalisation and globalization of civil society. On the contrary, the Convention itself has not changed since 1980 and is therefore often criticized as being out-dated. At the time of the drafting of the Convention, child abductions by parents were predominantly perpetrated by fathers during or after a divorce; mainly fathers left with the child(ren) from a Western country to an Arabic country. Research has shown that, today, parental abductions are often committed by Western mothers who moved to the country of the father of the child but afterwards want to return to their country of origin (Beaumont & McEleavy, 1999, p. 3). Before discussing the bottlenecks of The Hague Convention some of the successes of the Convention are highlighted. First of all, the Convention rapidly entered into force (in about three years). After the Convention was adopted, it was instantly open to sign and Canada, France, Greece and Switzerland, instantly signed. Subsequently, other countries continued to ratify and access with a steady pace. Secondly, there has been good case law, since most of the judge's decisions followed the aim and spirit of the Convention tightly. Furthermore, the emulation of the Convention can be seen as a success. One example is the bilateral treaty between France and Portugal that has been functioning so well that they don't need to use The Hague Convention. In addition, child abduction has become a well-known topic, even though the 70's provided a rough patch with difficulties in defining this topic. Today, the content of child abduction is largely known and understood (Dyer, 1993, pp. 274-284). Despite those successes, the Convention faces some challenges in its implementation and enforcement. These points of improvement are discussed in the following paragraphs.

3.1 Delays in proceedings

Up until now there have been too much delays in proceedings. In a lot of countries there are no strict deadlines for hearings, which results in long drawn-out proceedings. Nevertheless, there are countries who have courts handling down decisions very quickly by having strict and short periods for hearings and some children are returned in less than a week. One country that is ideal in the speed of proceedings is the United Kingdom, where children are often returned in less than 6 weeks. In 1993, in a French court used the accelerated *procédure de référé* (emergency interim proceeding) to return a child (Dyer, 1993, pp. 285-291). Long proceedings can be very harmful to a child. The longer the procedure takes, the more the child becomes attached to the country it is abducted to and the less it will feel connected to its prior residence, which can be damaging when eventually return is ordered (Ministerie van Veiligheid en Justitie, 2008, pp. 2-5). The Netherlands

has been criticized for its slow procedures and is in this regard one of the slowest countries in the European Union (Lowe and Ruitenberg, 2005, p. 25). In the Netherlands, handling a request to return a child usually takes about a year, but it may, and often does, take years when the abducting parent does not cooperate and refuses to return the child after the decision. The parent to whom the ruling is disadvantageous usually continues legal proceedings until the highest court (first instance, appeal and cassation). In cassation, Article 3(1) as well as Article 13(1)(b) HCCA are brought forward. The abducting parent often claims, that his or her action was not wrongful (under Article 3 HCCA) as the left-behind parent agreed on it. The abducting parent often argues that it is dangerous to return the child because it will be exposed to physical or psychological harm (under Article 13(1)(b) HCCA). Article 11 HCCA requires the judicial authority to handle down a decision within six weeks which corresponds to the time limits of de Court of First Instance and the appeal. The problem is that appeal in cassation allows courts in the Netherlands 33 weeks to reach a decision, which means it is impossible to secure the execution of Article 11 HCCA and thus the immediate return of the child. A possible solution to speed up legal proceedings would be to restrict the legal remedies by prohibiting the appeal in cassation (with an exception of cassation applications in the interest of the law). The question whether this would be contradictory to the ECHR can be answered negatively. Article 6 ECHR provides the right to a fair trial, but not the right to appeal against a decision. Article 2 of Protocol No. 7 to the ECHR provides the right of appeal, but only in criminal matters and does not note that the matter should be reviewed by more than one review authority. The next question is whether the limitation of appealing should also apply to left-behind parents who request the return of the child in an exequatur procedure under Brussels II bis. Under Article 33 Brussels II bis the parties are permitted to lodge an appeal against the decision on the application for a declaration of enforceability. In addition, Article 34 Brussels II bis provides a second possibility to appeal. In order to answer the above question, the purposes of the HCCA and Brussels II bis must be distinguished. Unlike Brussels II bis, the Hague Convention does not focus on the enforceability of decisions, but on restoring the *status quo*. Therefore, the HCCA does not include any provisions regarding decision-making, recognition and implementation of decisions. The grounds on which enforcement and implementation of a decision on custody can be rejected under Brussels II bis totally differ from the grounds on which a return order may be refused under the Hague Convention. Hence, the limitation of remedies should only apply in the Hague Convention cases.

3.2 Return mechanism

Key aspect of the Hague Convention stating that the child's best interest is best protected by having the problem settled in the court of the country of habitual residence is often criticized in the view that returning the child might not always be the best action to take. Courts have rejected the argument that return of the child is inconsistent with the best interest of the child and sometimes ordered the return of a child while it was not consistent with his or her welfare. In the *Murray* case it is held that the best court to determine on issues concerning the best interest of the child is the one in the country of the child's habitual residence (Schuz, 2004, pp. 742-744). In the view of Whiterod, the court in the child's prior residence would be the best to handle the case because the judge is familiar with circumstances such as the living conditions, living environment of the child and the school system in the country. Therefore, it is in the child's best interest to return him or her as soon as possible and let the appropriate judge in that country decide on the merits of the case (N. Whiterod, personal interview, April 28, 2011). Beaumont and McEleavy express the view that the automatic return mechanism was effective in the stereotypical situation where the father abducted the child to his country of origin and that today it is much harder to apply in what has become the new typical situation where the mother abducts the child. They note that return does not mean re-establishing the *status quo*, but a change of custodial parent or a change in the living situation. In cases like this, it is often damaging for the child to return him or her. Nevertheless, courts cannot undermine the Convention and consequently children have been returned even in cases where the father had mistreated the mother, threatened to kill the children and abused them (Beaumont and McEleavy, 1999, p. 138). According to Menninga, the majority of abducting mothers is a victim of domestic violence and the Hague Convention facilitates domestic violence by restricting mother to leave with their children. Menninga further comments that application of the Hague Convention is dubious because courts are not allowed to research the matter of domestic violence and thus decisions that are not in the best interest of the child are handled down (M. Menninga, personal interview, January 4, 2011). Whiterod points out that in an abusive situation, the matter should be brought to court instead of fleeing to another country, which will harm the children even more because they probably will have to return. Therefore, the move to another country should be undertaken after permission of the judge instead of before (N. Whiterod, personal interview, April 28, 2011). According to Kaye more attention for domestic abuse is necessary in child abduction cases. It is not always easy for women who are victims of domestic violence to obtain help to protect herself and the child(ren). Abused women are often isolated from their family and friends, especially when they experience language barriers and cultural differences. As a result, it may be hard to find support in the country of habitual residence (Kaye, 1999, p. 194). An additional

counterargument to the automatic return criticism is that the return premise is the best for the child in most cases and the immediate return rule reduces the chance that parents abduct their child(ren) and therefore benefits all children. This means that the welfare of some children needs to be immolated to protect the interest of a larger group of children (Schuz, 2004, p. 745).

3.3 Lack of knowledge and experience

In child abduction cases, lawyers often lack in the necessary knowledge of the procedures and their implementation (van Bueren, 1993, p. 16). Some countries have problems implementing the Hague Convention, as with Spain in the starting phases. However, through several meetings Spain has been encouraged improve its implementation, which has resulted in improvement of the Spanish Central Authority performances. It is difficult to address the noncompliance of countries because the Convention lacks a mechanism to guarantee that Member States correctly implement the Convention or for handling the Countries that do not fulfill their obligation (Bannon, 2011, p. 153). As Beaumont and McEleavy (1999) note: “Faced with sustained non-compliance there is little Contracting States can do; certainly there is no mechanism proscribed within the text of the Convention....Ultimately, in the absence of any sanction the operation of the Convention depends upon the goodwill of the signatory States” (p. 242). The *Guide to Good Practice* sets out the importance of concentrating jurisdiction in child abduction cases and it lists the following advantages: “an accumulation of experience among the judges concerned; and, as a result, the development of mutual confidence between judges and authorities in different legal systems; the creation of a high level of interdisciplinary understanding of Convention objectives, in particular the distinction from custody proceedings; mitigation against delay; and greater consistency of practice by judges and lawyers” (Guide to Good Practice, 2003, p. 29). The Netherlands should take this suggestion into consideration since there is a lack of experience with - and detailed knowledge of the Hague Convention. The main reason for this is that, in general, judges handle one or two child abduction cases a year and therefore are not specialised in the topic. For instance in Sweden and England, all child abduction cases are handled in one court; the *Stockholms tingsrätt* and the *Family Division of the High Court* in London. In France, jurisdiction is concentrated in 35 courts of the total 181 *Tribunaux de grande Instance*. Germany has only 22 courts of the 800 *Amtsgerichte* dealing with child abduction (Lowe and Ruitenbergh, 2005, p. 25).

Notwithstanding the fact that the Hague Convention has had some achievements, there is room for improvement on a number of aspects. The problem of slow procedures needs to be addressed, for example by limiting the possibility to lodge an appeal twice. Secondly, the problem of lacking

knowledge and experience should be addressed by concentrating jurisdiction to one or a number of courts. The opinions on the return mechanism vary, in particular when domestic abuse plays a role in the abduction. It is suggested that courts take action to recognize the special circumstances of domestic abuse in order to ensure the safety of abducted children.

4. Case study in the Netherlands

As pointed out in the prior chapters the Hague Convention has frequently been criticised. In order to examine how the convention has been applied a case study has been conducted. Judgements on custody rights, habitual residence and refusal grounds are examined as these are the main elements in child abduction cases. In addition, application of the non-removal clause is discussed.

4.1 Custody rights

As mentioned in Chapter 2, the principle of custody is vital in child abduction cases as a removal or retention is wrongful where it is in breach of custody rights (Art. 3(a) HCCA) and gives the parent(s) with those rights the right to decide the child's place of residence (Art. 5(a) HCCA). Case law shows that Dutch judges have no difficulties in applying those two provisions. An example of a judgement on custody is the one in which the court of Alkmaar gave a decision on 21 December 1994. The mother, father and child were resident in Florida and the mother left to the Netherlands with the child, without accordance of the father, who subsequently requested return of the child. The court decided the removal was wrongful and filed a return order. The mother lodged an appeal against this decision arguing that the father agreed on the move to the Netherlands, so that the child could do a medical study. The plan was that the father would join them later. The father argued, that he and his wife never agreed on settling down in the Netherlands, although he did say they would move to the Netherlands to the parents of the mother because. The court noted that there was not enough evidence to believe there was a joint intention to settle in the Netherlands. The mother also argued that she was the one who primarily cared for the child, but the court rejected this argument. In its final decision, the court determined that at the time of the removal the parents exercised joint custody and thus both had the right to decide the child's residence under Article 5(a) HCCA. Therefore the removal was considered wrongful under Article 3 HCCA and the child had to return to Florida (Dohmen & Frohn, 2001, pp. 17-18). A similar case (in which parental intention is cited by the mother) with a different decision is the case in which the Court of Appeal in Leeuwarden gave a verdict on 20 December 1991, later discussed in 4.2.

The argument of being the parent who primarily takes care of the child (as put forward in the case above) has not been successful in the past. It has been rejected in the case in which the Court of Appeal decided on 4 December 1999. In this case the father claimed that he was most responsible for the care of the child as the mother was the wage-earner and the court decided that this did not mean the father was the only one with custody rights. The court noted that if the parent who mainly takes care of the child has full custody, this would mean that all working parents would be

excluded from custody rights, which is obviously unfair. In the case in which the court of Breda handed down a decision on 23 December 1994. The mother claimed that the father (who requested return of the child) had no custody rights because he was working more than 60 hours a week and she was always taking care of the child. Also in this case, the court rejected this argument, stating that it is possible that one parent takes more care of the child in a household and it does not mean that the other parent loses his custody rights in such a situation. Case law shows that abduction of children is often related to a vacation to the country of origin of one of the parents. In those cases, when the left-behind parent requests return of the child(ren), the abducting parent argues that authorization to visit to the family in the Netherlands or vacation was given by the other parent and that therefore the action is not wrongful. The case in which the court of Amsterdam gave a verdict on 15 April 2000 can illustrate this. The habitual residence of the father, mother and children was in Illinois (USA) and the mother planned to visit the family in the Netherlands from 24 Mai 1998 to 31 July 1998. On 11 June 1998, the mother informed her husband (by fax) that she was not returning to Illinois. On 13 October 1998 the mother's lawyer informed the father about a request for divorce. The father then requested return of the children at the Central Authority. The mother states that her action was not unlawful as the father had agreed on the removal. Her arguments were rejected by the court, who emphasized that it is not about the approval to leave for vacation, but the non-approval to stay after the vacation (Dohmen & Frohn, 2001, pp. 17-18).

In the case in which the Court of Appeal in Amsterdam gave a verdict on 11 February 1999. The parents exercised joint custody of their children in Greece. The children flew to the Netherlands on 21 June 1998 to visit the family and are supposed to come back on the 30th of July. On 30 June, the mother goes to the Netherlands and stays there with the children. The father demands return of the child under the Hague Convention. On 8 February 1999 the court of Amsterdam awards temporarily custody of the child to the mother during the divorce proceeding. In defence of the abduction the mother claims that the father gave permission to go to the Netherlands. Moreover, she argued that the father signed a statement, in which he provisionally agreed that the children would stay with the mother. The court decided that the parents exercised joint custody under Article 5 HCCA and thus the father also had the right to decide the child's place of residence. The declaration of the father was insufficient to prove that the father agreed on the children having their new residence in the Netherlands. Furthermore, the mother argued that the decision of the court of Amsterdam on 8 February 1999 gave the mother the right to decide the children's place of residence. The court disagreed, stating that the decision of 8 February 1999 was not opposing the return order, referring to Article 17 HCCA, which provides that a decision on custody, given in the

requested State, is not a ground for refusing a return order. Therefore, the court decided that the removal was wrongful under Article 3 HCCA (Dohmen & Frohn, 2001, p. 18)

4.2 Habitual residence

Father, mother and child were resident in Virginia (USA) and the mother left with the child to the Netherlands with authorization of the father. In March 1991 the father asked the mother to return the child and she refused. In June, the Dutch court confided the child to the mother. On 26 July 1999 the court in Virginia granted the father temporary custody of the child and the Central Authority requested return of the child. The mother argued that the retention was not wrongful as the habitual residence of the child was in the Netherlands and the decision of the Virginian court on the father's temporary custody was not contrary to the custody rights of Article 3 HCCA. The court noted that sustainability and parental intention play an important role in determining the habitual residence. The parents had agreed that the mother would search for a job for the father in the Netherlands, who then would join the mother and child. The house in Virginia was sold and the mother was applying for social benefits. Based on this information, the court concluded that both parents had the intention to reside together in the Netherlands. The court decided, based on the stay of the child in the Netherlands from January to July 1999 and the intention of the parents to settle in the Netherlands, that this country was the child's habitual residence. In addition, it could not be proved that the father exercised custody rights on the date of retention. In brief, the residence of the child immediately changed at the moment that the mother and child settled down in the Netherlands as agreed with the father and therefore the retention was not wrongful (Dohmen & Frohn, 2001, pp. 19-20)

4.3 Grounds for refusal

Multiple claims have been based on the ground of refusal of Art. 13(1)(b) HCCA. The first and most important ground to refuse a return order is Article 13 HCCA. Under this provision, return of the child may be refused if a) the left-behind parent didn't have custody rights at the time of the removal or retention, or had approved or acquiesced in the removal or retention; or b) there is a risk that the children would be exposed to physical or psychological harm when being returned. Additionally, return may be refused if the court finds that the child does not want to return and he has an age at which the court believes it is appropriate to take into account of his or her views (Art. 13(2) HCCA). The case in which the court in Leeuwarden handed down a decision on 14 April 2000 will be used to illustrate application of Art. 13(1)(a) HCCA. The mother who took the children from America to the Netherlands for a vacation, argued that her husband acquiesced in the

retention, since he did not take immediate action against the retention. The mother argued she sent a fax on June 1998 to her husband, but the court deemed the fax rather vague and notes that the father could not conclude from the fax that the children would not return. Moreover, the court stated that there was no reason for the father to believe the children were not coming back since the vacation to the Netherlands was supposed to be until 31 July 1998. When the father found out that the mother quitted her job in the US and received a letter of the mother's lawyer, he realised the mother was not going to return and took *expeditiously* actions to apply for return of the children. The court concludes that for this reason there was no acquiesce in the retention and thus the retention was wrongful. The question to be answered in discussing this case would be: what is *expeditiously*? In the case in which the Court of Appeal in Amsterdam decided on 12 March 1992, the judge decided there is no consent or acquiesce when legal action is taken within the period of one year of Article 12 HCCA. Conversely, the court of 's Hertogenbosch decided on 30 September 1993, that since the father did not take any action within the two months that the child was away, he has acquiesce in the removal or retention. The Court of Appeal then determined that the father only acquiesced in a temporary stay, which is not acquiesce under Art. 13(1)(a) HCCA. In another case, the Supreme Court emphasized that no difference between temporary stay and definitive stay is made in Art. 13(1)(a) HCCA. The court stated that the issue is whether permission for not returning was given instead of permission for temporary stay or definitive stay and concluded that the father did not agree on the retention (Dohmen & Frohn, 2001, pp. 20-21). In the case in which the Court of Appeal gave a verdict on 23 December 1994, the mother noted that her daughter got emotionally attached to her younger brother and plead for application of Art. 13(1)(b) HCCA. Invocation of Art. 13(1)(b) was justified by the court, which agreed that returning the child and separating her from her mother and little brother, would be a traumatic experience for the child.

A further defence argument that parents use to refuse a return order is related to criminal prosecution. In some countries, child abduction is a criminal offence and the abducting parent could be prosecuted in the country to which return is ordered. This was the case in which the Court of Appeal of 's Hertogenbosch decided on 20 Mai 1994. Father and mother were resident in California (US) with their daughter. Following a divorce agreement, the mother could have been obliged to return to the Netherlands with her daughter (under the immigration law) unless a permanent residence permit was granted to her. The mother did not await the decision on the residence permit and left to the Netherlands with her child. The court came down to the following decision: the mother had committed a crime under the Californian law by taking the child to the Netherlands. The father refused to sign a declaration in order to prevent prosecution of the mother,

which meant that the child would probably not see her mother again when returning to the US. This led to a justified invocation of Art. 13(1) and non-return was ordered. Under Dutch law, abduction of a minor where someone else has lawful custody under is a punishable act.⁷ Nonetheless, there are not many prosecution of abducting parents in the Netherlands due to the fact that only parents who do not have custody and access rights can be prosecuted, which is often not the case (Hart, 2001, p. 149). Another example of application under Art. 13(1)(b) is the case in which the Court of 's Hertogenbosch gave a verdict on 16 February 1995. The father and mother, resident in Florida (VS) had joint custody of their child and the mother left to the Netherlands, whereupon the father applied for return of the child through the Central Authority. In her defence, the mother stated that the child would be exposed to a harmful situation in Florida. The court rejected the defence, ordering return of the child and noting that if the home situation would appear to be dangerous for the child, measures could be taken to protect the child from being harmed. The Court of Appeal annulled this verdict, finding that the father would not be capable to take care of the child and would not be able to receive help from his parents since they were living 500 km away or pay a day nursery. However, most defences (similar to the case above) under Art. 13(1)(b), of parents arguing that the left-behind parent would fail in taking care of the child due to for example a full-time job, are rejected. Neither does it cover matters as better economic or educational prospective in the other country. Clear circumstances that justify application under Art. 13(1)(b) are violence, abuse and alcohol, drug or gambling addiction of the other parent. An example of a case that shows a serious risk the child would end up in a dangerous situation is the case in which the court of 's Hertogenbosch decided on 16 February 1995. In this case the mother claimed that the father was a drug dealer who had been sentenced to unconditional imprisonment and had been arrested for drunk driving. The court rejected the defence under Art. 13(1)(b) HCCA. At the Court of Appeal, the mother also stated that the father has no income and is often unemployed. Then, the Court of Appeal determined that the father would not be capable for taking care of the child and cancelled the return of the child. A case of domestic violence is the case in which a decision was handed down on 6 June 1996 by the court of Amsterdam. In this case, the mother in Surinam lodged a complaint of domestic violence in presence of the children and left with the children to the Netherlands. She claimed that the husband threatened to kill her, used a gun and explained to the thirteen year old son how to use a firearm to shoot on people. The court determined that this was a clear situation of an Art. 13(1)(b) exception. In the case in which the court of 's Hertogenbosch returned a verdict on 13 February 1992 invocation of Art. 13(1)(b) HCCA concerned the environment in which the child lived. The mother went from the Netherlands

⁷ Article 279 Criminal Code (Wetboek van Strafrecht)

to England with the children and when the father joined them, she ended the relationship and announced that she and the children were going to stay in England. The father returned to the Netherlands and in a later visitation to England he took the oldest child with him to the Netherlands. When return was requested by the Central Authority, the father requested application of Art. 13(1)(b) HCCA. According to the father, the grandfather of the children had a drinking problem, the mother's boyfriend was sentenced for sexual abuse in a shelter for girls and the children were in a neglected and dirty state when he visited them. The court found the evidence insufficient to apply Art. 13(1)(b) (Dohmen & Frohn, 2001, pp. 21-23).

Aside from Art. 13 HCCA, Art. 20 HCCA provides grounds to refuse the return of a child. Art. 20 HCCA provides the right to refuse the return of the child if the fundamental principles of the demanded State concerning the protection of human rights and fundamental freedoms do not permit the return of the child. After about ten years that the Hague Convention entered into force, this ground for refusal has only been invoked a few times and not once successfully (Dyer, 1993, p. 280). An example is the case in which the court of 's Hertogenbosch handled down a decision on 13 February 1992. In this case, the father based his defence on Art. 20 HCCA in relation to Art. 8 ECHR (right to respect for private and family life), stating that the child had the right to have his family live in the Netherlands respected. In addition, he invoked Art. 3(1) of Protocol No. 4 of the ECHR: "*No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national*". The court came to the decision that it is not plausible that those principles fall under Art. 20 HCCA and rejects the defence (Dohmen & Frohn, 2001, p. 24).

4.4 Non-removal clause

In the case in which the Court of Appeal in 's Gravenhage gave a verdict on 31 March 1995, the *non-removal clause* has been applied. In the divorce proceedings, the court in Porirua (New-Zealand) gave in February 1994 temporarily custody to the mother and access to the father. The case would be handled further in April. On 23 March the mother left to the Netherlands with the children. Thereafter, the court filed an Amended Interim Custody & Access Order, which prohibited the parents to leave New-Zealand with the children, not knowing this already happened. On 1 July, the court in Porirua filed an Order of Declaration, stating that the father is joint guardian and the removal was wrongful under Article 3 HCCA, whereupon the Central Authority requested return of the child. The court in Dordrecht, took into consideration the Order of Declaration of 1 July referring to Article 14 HCCA. On the basis of Article 14 HCCA, the court in the requested

State (in this case the Netherlands) may take notice directly of the law in the State of habitual residence (in this case New-Zealand). The court concluded that the father had custody rights under Articles 3 and 5 HCCA and orders return of the children. The mother subsequently lodged an appeal against the return order, under Article 13(1)(b) HCCA, pleading that the children risked to be physically or psychologically harmed in New-Zealand. The court however ordered return of the children requesting that measures should be taken to ensure the safety of the children, under Article 7(h) HCCA. The court believed that this could be established through cooperation between the Central Authorities, which might take some time and therefore decided the return was not immediate, but would be determined at a later time. A similar case is the one in which the Court of Appeal of 's Hertogenbosch handed down a decision on 9 November 1995. The court in the US, filed a Plan of Implementation, wherein joint custody was lodged and prohibition to move from the US without first giving sixty days advance notice to the other parent. Then the mother left with the children to the Netherlands and refused to return them. In April 1995, the court in America awarded the father permanent care, custody and control of the children. The father applied for return of the children. The court in the Netherlands applied the Hague Convention *by analogy* and recognized the decision of April 1995. The court concluded that the removal was wrongful as the parents had joint custody of the children. In a similar case, in which the mother left with the child from Curacao to the Netherlands, the court decided that there was no application *by analogy* of the Hague Convention. The court based this decision on the fact that the father did not request the return of the child, which is the aim of the Hague Convention, but requested a decision on custody rights (Court of Appeal in Leeuwarden, 1 April 1998, NJ 1999, 164).

Overall, Dutch courts have no difficulties in complying with the Convention's return principle. In relation to the definition of custody, there are no problems in judging on the wrongfulness of the removal or retention. Abducting parents often don't realise their actions are wrong when approval for a vacation has been given by the other parent and are unconscious of the fact that approval for a vacation does not mean permission for a continued stay in the Netherlands. In most cases, refusal of return is accepted under Art. 13(b) HCCA. The other grounds of refusal (Art. 13(a) and Art. 20 HCCA) are less successful. The argument of being the primary caretaker of the child (because the other parent does not have time due to his job to care for the child) is not seen as a reason to refuse to return the child under Art. 13(b). In addition, behaviour of other family members or other relatives of the other parent is not applicable as a ground for refusal. Valid reasons are alcohol, drug or gamble addiction of the other parent, violence and abuse. Art. 20 HCCA has not been applied successfully in any case.

5. Conclusion and recommendations

The main legal instruments in the Netherlands on the issue of international child abduction are: the European Convention, Brussels II bis, the UNCRC, the Implementation Act and the most important one, the Hague Convention. The obstacles occurring when applying the Hague Convention concern slow procedures, lack of necessary knowledge and the role of (domestic) violence in cases. The main criticism to the Hague Convention concerns the automatic return mechanism. There is a strong disagreement on the fact that immediate return of the child is in his or her best interest. Some commentators argue that it is harmful for the child to return him or her after being abducted to the Netherlands, assuming that the child will have the best care in the Netherlands and not in the country it is taken to. Besides, it is argued that courts do not sufficiently take into account the fact that abducting mothers often flee with their child(ren) from a violent home situation and both mother and child leave to end an unsafe situation. When return is ordered mother and child might be forced back into this insecure environment. However, those critics do not realise that the return mechanism also means the forced return of a child abducted *from* the Netherlands. It must be kept in mind that the return mechanism is based on the thought that a child has been taken away against the will of the other custodial parent, who also has the right to have contact with his or her child. Moreover, those critics are not conscious of the fact that the court in the country of prior residence is the most appropriate to determine what is in the best interest of the child since they know the country and the environment the child was living in prior to the abduction. Without the automatic return mechanism, courts would have to enter into the merits of the case, which would result in even longer drawn-out proceedings. It can be concluded that by implementation of the return mechanism, the Hague Convention protects the collective interests of children rather than the individual. In general, Dutch courts have no difficulties in complying with the Convention's return principle. The Hague Convention is correctly applied and courts do not have any trouble determining whether a removal or retention is wrongful under the Convention. Nevertheless, the Netherlands can be criticized for not concentrating jurisdiction to a limited number of courts. At present, jurisdiction in first instance is granted to all the courts. De rechtsmacht is in eerste aanleg toegekend aan alle rechtbanken. This has the negative result in practice that judges who handle such cases have very little detailed knowledge on issues concerning child-abduction. This is because relatively few cases actually come before court so judges have little opportunity to get acquainted with such cases.

The main objective of the Hague Convention, the immediate return of the child, is not always achieved due to delays in the proceedings. At the moment, it is possible for the party for which the

ruling of the court is disadvantageous to appeal against a decision twice, firstly at the Court of Appeal and secondly at the Supreme Court, which results in proceeding dragging on for at least one year (often even longer) and thus harming the child (when return is ordered) who became attached to its new environment. Long drawn-out proceedings could be prevented by the limitation of remedies by prohibiting the lodgement of appeal in cassation.

The establishment of a monitoring body could improve the application and implementation of the Hague Convention, like the Committee on the Rights of the Child which monitors the interpretation of the UNCRC. At this moment there is no monitoring body who can decide whether the Convention is implemented correctly. Moreover, there are not many conferences on international child abduction for judges and lawyers. It is suggested to organise more conferences with trainings for judges and where judges and lawyers can exchange information and experiences in order to improve Convention performance. It is further recommended to concentrate jurisdiction of child abduction cases by limiting the number of courts dealing with child abduction cases, like in England, Sweden and France in order to solve the issue of lacking knowledge and expertise of legal professionals on the issue of child abduction. Furthermore, up until now, the Netherlands has refused to conclude bilateral agreements out of fear that it would withhold countries from signing multilateral agreements. In order to have a legal instrument to apply when the Hague Convention is not applicable and to improve cooperation between the Netherlands and Non-Convention States it is advised that the Netherlands establishes bilateral agreements with Non-Convention States

In order to improve the best interests of the child and to ensure its protection it is suggested to strengthen certain Convention Articles. Soft provisions as Article 11(4) Brussels II bis and Article 7 HCCA, which determine that provisional measures need to be taken in order to secure the safety of children who are ordered to return, need a more proactive approach, by verifying whether or not effective measures have been taken before return is enforced, and the child is in fact protected and safe. Also, enforcement of access rights provided by Article 21 HCCA needs to be strengthened in order to ensure that a child maintains contact with both parents. A further essential provision that needs a stronger implementation is Art. 13(2) HCCA, which provides a ground to refuse return of the child based on his or her opinion, if the child is old enough to assume that his or her view might be relevant to the court's decision. This provision does not indicate the age the child must have attained and neither does it force courts to assess the child's wishes and judgment in the case. Stressing the importance of the child's view in international child abduction cases it is therefore suggested to enforce examination of the child's opinion.

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Appendices

Appendix I: Status table of the Hague Convention of 5 October 1961

Contracting States to the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of infants

States	S ¹	R/A/Su ²	Type ³	EIF ⁴	Ext ⁵	Auth ⁶	Res/D/N ⁷
Austria	28-XI-1966	12-III-1975	R	11-V-1975		1	N
China, People's Republic of			C				N
France	29-XI-1961	11-IX-1972	R	10-XI-1972		1	N
Germany	22-X-1968	19-VII-1971	R	17-IX-1971		1	
Italy	15-XII-1961	22-II-1995	R	23-IV-1995		1	
Latvia		24-I-2001	A*	25-III-2001		1	
Lithuania		23-X-2001	A*	22-XII-2001		1	D
Luxembourg	3-I-1963	13-X-1967	R	4-II-1969		1	Res
Netherlands	30-XI-1962	20-VII-1971	R	18-IX-1971		1	N
Poland		26-V-1993	A*	25-VII-1993		1	Res
Portugal	29-IX-1967	6-XII-1968	R	4-II-1969		1	N
Spain	27-V-1986	22-V-1987	R	21-VII-1987		1	N
Switzerland	18-XI-1964	9-XII-1966	R	4-II-1969		1	N
Turkey		25-VIII-1983	A*	24-X-1983		1	Res

1) S = Signature

2) R/A/Su = Ratification, Accession or Succession

3) Type = R: Ratification;

A: Accession;

A*: Accession giving rise to an acceptance procedure; click on A* for details of acceptances of the accession;

C: Continuation;

Su: Succession;

Den: Denunciation;

4) EIF = Entry into force

5) Ext = Extensions of application

6) Auth = Designation of Authorities

7) Res/D/N = Reservations, declarations or notifications

Appendix II: Status table of the Hague Convention of 25 October 1980

Contracting States to the Convention of the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980

States	S ¹	R/A/Su ²	Type ³	EIF ⁴	Ext ⁵	Auth ⁶	Res/D/N ⁷
Albania		4-V-2007	A*	1-VIII-2007		1	Res
Argentina	28-I-1991	19-III-1991	R	1-VI-1991		1	D
Australia	29-X-1986	29-X-1986	R	1-I-1987		1	D
Austria	12-V-1987	14-VII-1988	R	1-X-1988		1	
Belarus		12-I-1998	A*	1-IV-1998		1	Res
Belgium	11-I-1982	9-II-1999	R	1-V-1999		1	
Bosnia and Herzegovina		23-VIII-1993	Su	6-III-1992		1	
Brazil		19-X-1999	A*	1-I-2000		1	Res
Bulgaria		20-V-2003	A*	1-VIII-2003		1	Res
Canada	25-X-1980	2-VI-1983	R	1-XII-1983	13	1	D, Res
Chile		23-II-1994	A*	1-V-1994		1	D
China, People's Republic of			C			2	D, N
Costa Rica		9-XI-1998	A*	1-II-1999		1	
Croatia		23-IV-1993	Su	1-XII-1991		1	
Cyprus		4-XI-1994	A*	1-II-1995		1	
Czech Republic	28-XII-1992	15-XII-1997	R	1-III-1998		1	Res
Denmark	17-IV-1991	17-IV-1991	R	1-VII-1991		1	Res
Ecuador		22-I-1992	A*	1-IV-1992		1	
Estonia		18-IV-2001	A*	1-VII-2001		1	Res
Finland	25-V-1994	25-V-1994	R	1-VIII-1994		1	Res
France	25-X-1980	16-IX-1982	R	1-XII-1983		1	Res, D
Georgia		24-VII-1997	A*	1-X-1997		1	
Germany	9-IX-1987	27-IX-1990	R	1-XII-1990		1	D, Res
Greece	25-X-1980	19-III-1993	R	1-VI-1993		1	Res
Hungary		7-IV-1986	A*	1-VII-1986		1	
Iceland		14-VIII-1996	A*	1-XI-1996		1	Res
Ireland	23-V-1990	16-VII-1991	R	1-X-1991		1	
Israel	4-IX-1991	4-IX-1991	R	1-XII-1991		1	Res
Italy	2-III-1987	22-II-1995	R	1-V-1995		1	

Latvia		15-XI-2001	A*	1-II-2002		1	Res
Lithuania		5-VI-2002	A*	1-IX-2002		1	Res
Luxembourg	18-XII-1984	8-X-1986	R	1-I-1987		1	Res
Malta		26-X-1999	A*	1-I-2000		1	
Mauritius		23-III-1993	A*	1-VI-1993		1	Res
Mexico		20-VI-1991	A*	1-IX-1991		1	
Monaco		12-XI-1992	A*	1-II-1993		1	Res
Montenegro		1-III-2007	Su	3-VI-2006		1	
Morocco		9-III-2010	A*	1-VI-2010		1	
Netherlands	11-IX-1987	12-VI-1990	R	1-IX-1990		1	D, Res
New Zealand		31-V-1991	A*	1-VIII-1991		1	Res
Norway	9-I-1989	9-I-1989	R	1-IV-1989		1	Res
Panama		2-II-1994	A*	1-V-1994		1	Res
Paraguay		13-V-1998	A*	1-VIII-1998		1	
Peru		28-V-2001	A*	1-VIII-2001		1	
Poland		10-VIII-1992	A*	1-XI-1992		1	Res
Portugal	22-VI-1982	29-IX-1983	R	1-XII-1983		1	
Romania		20-XI-1992	A*	1-II-1993		1	
Serbia		29-IV-2001	Su	27-IV-1992		1	
Slovakia	28-XII-1992	7-XI-2000	R	1-II-2001		1	Res
Slovenia		22-III-1994	A*	1-VI-1994		1	
South Africa		8-VII-1997	A*	1-X-1997		1	Res
Spain	7-II-1986	16-VI-1987	R	1-IX-1987		1	
Sri Lanka		28-IX-2001	A*	1-XII-2001		1	Res
Sweden	22-III-1989	22-III-1989	R	1-VI-1989		1	Res
Switzerland	25-X-1980	11-X-1983	R	1-I-1984		1	
The former Yugoslav Republic of Macedonia		20-IX-1993	Su	1-XII-1991		1	
Turkey	21-I-1998	31-V-2000	R	1-VIII-2000		1	Res
Ukraine		2-VI-2006	A*	1-IX-2006		1	
United Kingdom of Great Britain and Northern Ireland	19-XI-1984	20-V-1986	R	1-VIII-1986	7	1	N, Res
United States of America	23-XII-1981	29-IV-1988	R	1-VII-1988		1	Res
Uruguay		16-XI-1999	A*	1-II-2000		1	
Venezuela	16-X-1996	16-X-1996	R	1-I-1997		1	Res

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- Den: Denunciation;
- 4) EIF = Entry into force
- 5) Ext = Extensions of application
- 6) Auth = Designation of Authorities
- 7) Res/D/N = Reservations, declarations or notifications

Appendix III: Bilateral agreements

- Australia and Egypt: “Agreement between the Government of Australia and the Government of the Arab Republic of Egypt regarding Cooperation on Protecting the Welfare of Children”, Cairo, 22 October 2000;
- Belgium and Morocco: “The Agreement Protocol establishing a Belgian-Moroccan consultative committee on civil matters”, Rabat, 29 April 1981;
- Belgium and Tunisia: “The Agreement Protocol establishing a Belgian-Tunisian consultative committee on civil matters”, Tunis, 7 April 1989;
- Canada and Egypt: “Agreement between the Government of Canada and the Government of the Arab Republic of Egypt regarding Cooperation on Consular Element of Family Matters”, Cairo, 10 November 1997;
- Canada and Lebanon: “Agreement between the Government of Canada and the Government of the Lebanese Republic regarding Cooperation on Consular Matters of a Humanitarian Nature”;
- France and Algeria: “Franco-Algerian Exchange of Letters on Cooperation and Judicial Assistance”, Algiers, 18 September 1980;⁴³ followed by the “Convention between the Government of the French Republic and the Government of the Algerian Democratic Republic on children of separated mixed Franco-Algerian couples”, Algiers, 21 June 1981;
- France and Egypt: “Convention between the Government of the French Republic and the Government of the Arab Republic of Egypt on judicial cooperation in civil, social, commercial and administrative matters”, Paris, 15 March 1982;
- France and Lebanon: “Agreement between the Government of the French Republic and the Government of the Lebanese Republic regarding Cooperation in some elements of family matters”, Paris, 12 July 1999;
- France and Morocco: “Convention between the Government of the French Republic and the Kingdom of Morocco on the status of persons and the family and on judicial cooperation”, Rabat, 10 August 1981;
- France and Tunisia: “Convention between the Government of the French Republic and the Government of the Tunisian Republic on judicial cooperation in matters of custody, access and maintenance obligations”, Paris, 18 March 1982.