Palacký University in Olomouc
Faculty of Law

Conflict of Laws and the Determination of the Jurisdictional Competence Concerning the Abduction of Children of Foreign Nationality

Master Thesis

Kanga Ndjel Arlette Mireille

Olomouc 2023

Palacký University in Olomouc
Faculty of Law

Kanga Ndjel Arlette Mireille

Conflict of Laws and the Determination of the Jurisdictional Competence Concerning the Abduction of Children of Foreign Nationality

Master Thesis

Olomouc 2023

I hereby declare that this master's thesis on the topic of Conflict of Laws and the Determination of the Jurisdictional Competence Concerning the Abduction of Children of Foreign Nationality is my original work and I have acknowledged all sources used.

In Olomouc 08/16/2023

Kanga Ndjel Arlette Mireille

Acknowledgements

The success of this thesis is due to the assistance of my family, my friends and my supervisor. First and foremost, I would like to express my gratitude to Mgr. Slavomír Halla, Ph.D., my supervisor. Your constructive criticism and encouragement throughout my work motivated me to complete this thesis.

I would also like to express my gratitude to my father, Mr. Ndjel Nkouague, who has held my hand from the beginning of my studies until now, and who has also participated in this work by edifying me in my research and giving me concrete explanations. At the same time, I'd like to thank my mother, Mrs. Koat Gertrude, for her moral support, her encouragement has been a source of strength, especially during my discouragement at a certain point in my studies. I thank my parents for their financial and moral support. I would also like to thank my dear sister Mpandjel Ermeline for always being there for me.

Furthermore, I extend my thanks to my boyfriend Pavel Kochta and his family for their moral support and encouragement. Their support was instrumental in motivating me to successfully complete this thesis. Thanks to Elvis Tangue for taking his time to correct this work. Also, I thank my brothers and friends who have supported me throughout my academic journey. Finally, I would like to thank a friend named Kevin for generously lending me his computer to write this thesis.

Table of Contents

List of Abbreviations

A.F. P	Agence France-Presse
A.L.	Alinéa
Arrêt	Décision de justice
A.R.T	Article
C.A.S.S	Cour de cassation
Cass. 1re civ.,	Cour de cassation, première chambre civile,
C.C.	Convention collective
C.E.H. D	Cour européenne des droits des hommes
C.E	Conseil d'état
CEMAC	The Economic and Monetary Community of Central Africa
CEDEAO	Economic Community of West African States
C.I.D. E	Convention relatives aux droits des enfants
C.I.C.R.	Convention internationale des droits des enfants
C.I. J	Cour internationale de justice
C.I. V	Civile
C.F.R. R	Centre français de recherche sur le renseignement
C.R.C	Chambre régionale des comptes
C.P.C	Code de procédure civile
D	Dalloz
D.R	Droit
E.S. F	Etude sans frontière
E. U	Union européenne
FR	France
G.A.Z. Pal	Gazette du Palais
G.P. A	Gestation pour autrui
H.C. R	Agence des nations unies pour les refugies.
L.G.D. J	Librairie générale de droit et de jurisprudence

J.D.J	Journal des droits des jeunes
O.I.T	Organisation international du travail
O.P	Office des publications de l'Union européenne
O.R.D	Ordonnances
O.T.A.N	L'Organisation du Traité de l'Atlantique Nord ;
P.D.F	Format de fichier permettant de conserver les caractéristiques d'un document.
P.U.F	Presse universitaire de France
R.E.C	Reçoive.
R.E.P	Revue d'économie politique
P.	Page
P.O.C	Proof of concept
R.E.V	Revue
REG	Règlement
U.N.H.C.R	United Nations High Commissioner for Refugees
U.R.L	Localisateur universel de ressources
VOL	Volume

Introduction

Child abduction is very often defined as a violation of custody rights, this phenomenon is taking on a worldwide dimension due to its generalization. It has become so worrying that it has repeatedly attracted the attention of international organizations and public authorities in all the countries of the world. Statistical data shows that child abduction in its criminal and terrorist aspects is very common in some countries. In fact, in 1999, Colombia, Mexico, Brazil, the Philippines, Venezuela, Ecuador, Russia, Nigeria, India and South Africa were classified as "the riskiest countries.[1] In 2008, Mexico, Pakistan, Venezuela, Nigeria, India, Afghanistan, Colombia, Somalia, Brazil and Honduras were the riskiest countries.[2] In the state of BIHAR in 2002, 54723 children were kidnapped.[3,4,5] Colombia with 3500 cases in 2000,[6] 282 cases in 2010,[7] 123 cases in 2011. Venezuela between 600 and 1800 cases per year in the 2010s,[8,9] Nigeria 630 cases between 2016 and 2017.[10] A NATO report on terrorism noted a total of 1923 cases of kidnapping in 2011. The main countries affected are Somalia (473), India (285), Afghanistan (246) and Pakistan (201).[11] According to the French Center for Research on Intelligence (CFRR), between 20,000 and 30,000 people are kidnapped each year in the world, a quarter of whom are Western nationals, not counting cases of kidnapping not reported by the State and the families, who are kept discreet or even for fear of reprisals.[12] According to the specialized consultant John CHASE, the kidnapping industry's turnover was 500 million dollars (377 million euros) in 2010. for 100 to 200 insured Western

[1] (in) BRIGGS, Rachel « The Kidnapping Business » [archive], on Guild of Security Controllers Newsletter, November 2001
[2] "The French are the most kidnapped in the world after the Chinese" [archive], on 20 minutes.fr, 20 October 2009.
[3] PRAKASK, Pierre « India: India: crimes without punishment in Bihar» [archive], on la liberation.fr, 13 February 2004.
[4] (in) "55,000 children kidnapped in 2016 in India: Report" [archive], at The Times of India.com, 8 July 2018 (accessed 8 June 2019)
[5] FIGARO & AFP, « The murder of a girl for 130 euros scandalizes India» [archive], at the Figaro.fr, 7 June 2019 (accessed 8 June 2019).
[6] (in) « Colombia: Kidnap capital of the world » [archive], bbc.co.uk.
[7] Juan Martin Soler, "Colombia: kidnappings up 20% since the beginning of the year" [archive], on Amerique24.com, 4 July 2011.
[8] BARRETO Juan « Venezuela, Caracas, the most dangerous capital in the world » [archive], on RFI.fr, 28 December 2012
[9] AFP, « The kidnapping business: flourishing and mostly unpunished in Venezuela » [archive], on 20 minutes.fr, 11 November 2011.
[10] YANSANE, Sidy « Nigeria: how kidnapping has become an extremely profitable business for criminals » [archive], on Jeune Afrique.com,19 June 2017.
[11] (en) « 2011 Annual Terrorism Report » [archive] [PDF], sur coedat.nato.int, Centre of Excellence Defense Against Terrorism, mars 2012.
[12] Agnès Bun, «Fear of terrorist risk, a source of profit for insurers » [archive], on Slate.fr, 15 June 2011

victims.[13] Dorothee MOISAN, a journalist with Agency France Presse, estimates the value of this business at 1 billion euros.[14] According to a study by the world leader in kidnapping and ransom insurance (HISCOX) in 2009, the main kidnapping method is piracy. These statistics sufficiently demonstrate its worldwide extension well as its financial and economic impact on the other. From this point of view, the study of child abduction is not lacking, allows us to identify not only the different theoretical aspects of child abduction as well as its legal framework, but also the difficulties of its repression or its social eradication.

In this vast field, several themes can be considered, some of them coming from sociological approaches and others from a legal point of view. One could be tempted to simply analyze the causes, the manifestations and the repression of child abduction. This is not the case here, since we are looking at the legal instrument and the different jurisdictions that technically frame this phenomenon when it is examined before we realize the enormous difficulties that result from it. Therefore, this work is based on the conflict of laws and the determination of jurisdictional competence regarding the abduction of children of foreign nationality. Difficulties arise in this context not only due to marital conflicts, but also in situations where the nationality of abducted children abductors. In this context, one may be led to ask two fundamental questions, namely that of the determination or choice of the legal instrument to be used by the judge when examining the situation and that of the determination of the competent. jurisdictions in the matter. In order to try to answer these questions, two lines of thought seem necessary. The first involves. an analysis of the ambiguity of the question of the determination of the legal instrument in matters of child abduction by foreign abductors. The second part is to consider the complexity of the institutional framework in matters of child abduction by foreign abductors.

[13] CONESA, Pierre « A geopolitics of kidnapping » [archive], on Libération.fr, 27 December 2012.
[14] MOISAN, Dorothée «Hostage taking, a juicy business for many people» [archive], on La Nouvelle République du Centre-Ouest.fr, October 31, 2013.

Part One - The Ambiguous Question of Determining the Legal Instrument for the Abduction of Children by Foreign Abductors

Abductions are judged based on the relationship between the abductee and the abductor. However, Determining the applicable law in cross-border child abduction disputes involving foreign abductors is complex. The judge in charge of the dispute must rely on traditional rules of jurisdiction, including jurisdiction of attribution, territorial competence, and the time elapsed since the abduction. This work analyzes the legal problems raises by transnational child abduction, through a theoretical presentation of the term "child abduction," (1.) before considering a study of the conflict of laws generated by this transnational phenomenon (2.).

1. Theoretical Account of the Concept of Child Abduction

Child abduction is the retention of a minor from anyone with legal responsibility for the child. However, this chapter deals with different concepts and forms of child abduction. (1.1.) before considering the rules and principles guaranteeing children's legal security, which are important but also subject to difficulties and controversy (1.2.).

1.1. Definitions and forms of child abduction

1.1.1. Definitions

Abduction:

The word abduction comes from the Middle French enlièvement in the sense "action of lifting", derived from the verb enlever in the sense "to lift up". It was also, derived from the Latin verb "levare" this word is attested in French in the modern sense since 1551. In short, child abduction, child theft, child abduction, child kidnapping or child abduction is the act of taking a minor (a person who has not reached the age of majority) and holding him or her without the authorization of his or her natural parents or legal representatives.

Parental Abduction:

Is the unlawful detention of a child by a family member without the consent of the legal guardian. It is an offence under family law. These cases occur after the divorce or separation of the parents.[15]

Parental responsibility:

Means all the right, duties powers responsibilities and authority which by law a parent of a child has in relation to the child and his property.[16]

Parental authority:

Is defined as a collection of the rights and duties aimed at the child's interests.[17] This means in the other words: care and protection, the maintenance of personal relationship, education, legal

[15] https://www.demarches.interieur.gouv.fr/particuliers/enlevement-parental-non-representation-enfant
[16] Section3(1) children Act 1989.
[17] Art .371-1 French CC. PICAL,9/2014 N 322,29-32

representation determination of residence, maintenance obligation towards the child, administration of property and civil liability of the parents for damage caused by their child.[18]

International abduction:

Occurs when a family member or relative leaves the country with the child in violation of a custody or access order.[19]

Right of custody:

It is defined as a right granted by the judge at the time of a divorce or a legal separation, concerning the custody of the child, to one of the spouses.[20] There are two types of custody rights:

Exclusive custody:

Is the custody attributed to one of the parents in most cases of divorce and legal separation, the parent who did not have the right of custody benefits from the right of visit.

Alternating custody:

Also called shared custody, is the custody attributed to both spouses by the judge and the children live in turn with one or the other parent.

Nonfamily abduction:

Is an episode in which a nonfamily perpetrator takes a child by the use of physical force or threat of bodily harm or detains the child for a substantial period of time (at least 1 hour) in an isolated place by the use of physical force or threat of bodily harm without lawful authority or parental permission, or an episode in which a child younger than 15 or mentally incompetent, and without lawful authority or parental permission, is taken or detained or voluntarily accompanies a

[18] PICAL, 9/2014 N 322,29-32 National Report : France, Part B, Question 7.
[19] LEQUETTE, Y., 1991. Définition de l'enlèvement international d'enfant et du risque grave couru par l'enfant. Revue Critique de Droit International Privé, (02), p.407.
[20] PATOUT, Etienne. ROSTOVTSEVA, Natalia, vladimirona. L'enlèvement d'enfants : perspectives européenne et russe. Revue internationale de droit compare / année 2015/67-2/pp.499-519 accessible at Perse.fr/docridc-0035-3337-2015-num-67-2-20513.

nonfamily perpetrator who conceals the child's whereabouts, demands ransom, or expresses the intention to keep the child permanently. [21]

Abduction by strangers:

This is the unlawful removal of children by a person whose identity is usually unknown. This form of abduction is often done for the purpose of ransom, illegal child trafficking or child slavery.

The principle of non-discrimination:

It is a principle that fights against all social inequalities different treatments inflicted on people whether it is in terms of education, work, health, nationality, religion, age or sex. This principle therefore advocates the equality of men; in other words, all treatment of individuals must be done in the same way without any distinction.[22]

The principle of the respect of the child's opinion:

It is established by the CRC and guarantees the child the right to freely express his or her opinion before all decision-making bodies on all matters concerning the child.[23]

1.1.2. The forms of child abduction.

The problem of form refers to the presentation of the different types of child abduction. It can be an abduction by a parent or by an unknown person.

Abduction of a child by a parent:

This is the most common form of child abduction, for which there is not enough statistics worldwide; If Efforts to solve this problem have been fruitful in developed societies with well-established legal culture and institutions to facilitate the seizure of a victimized parent in order to organize the legal return of the child.

---

[21] FINKELHOR, David, Heather Hammer, and Andrea J. Sedlak. "Non-family abducted children: National estimates and characteristics (NCJ196467)." Washington, DC: Office of Juvenile Justice & Delinquency (2002). p2

[22] CASTELLARIN, Emanuel. Le principe de non-discrimination. 2017.p171-196 accessible a https://www.researchgate.net/publication/340649652

[23] BERTHY-CAILLEUX, Ariane. Le droit de l'enfant d'exprimer librement son opinion sur toute question l'intéressant - article 12 alinéa 1 de la CIDE - va-t-il devenir caduc ? Dans Journal du droit des jeunes 2009/7 (N° 287), pages 22 à 24 DOI : 10.3917/jdj.287.0022. URL: https://www.cairn.info/revue-journal-du-droit-des-jeunes-2009-7-page-22.htm

In these conditions, the parent who is the victim of the abduction of a child invokes the link of kinship which is not dissolved because of the separation of the spouses by the divorce; or the parent who is the victim expresses rather his relief to see that the child is abducted by the abducting parent and invokes that as a discharge in front of the problems which can be posed by the children under his roof (nutrition, health, schooling..).

Abduction could also be linked to the economic situation of some parents. Most often, parents with low purchasing power may not be able to take care of the children under their roof. Moreover, the organization of administrative and judicial procedures, the cost of which is not within the reach of all populations in the global South, is a hindrance to the evolution of institutional mechanisms put in place to put an end to the problem of parental child abduction and other forms of abduction in general.

Very often, during divorce proceedings, the parent who has not been awarded custody of the child decides to flee abroad with the child, refusing to return the child to the parent whose custody has been legally awarded by the judge. This form of parental abduction is called international abduction.

Kidnapping of a child for ransom:

This is an act by which an individual or a group of individuals with bad intentions holds a child against his or her will and demands in return a large sum of money from the child's relatives or family members for his or her release.

This situation is common in countries such as Nigeria, where armed terrorist gangs operate or kidnap children from private Muslim schools called SALIHU TANKO and demanded an initial sum of 30 million naira, the equivalent of $90,000 Canadian dollars, which had been paid to them by parents and school officials. Even After collecting sum, the kidnappers who considered that the ransom to be low and-tend to demand more.[24]

This form of kidnapping has become very common nowadays. It is often done by terrorist sects of armed gangs.

[24] https://www.lapresse.ca/international/afrique/2021-07-26/rapt-d-eleves-au-nigeria/le-porteur-d-une-rancon-lui-meme-enleve.php.

Abduction for adoption:

These are abductions of newborns, often done by desperate women who are having difficulties giving birth but who generally refuse to go through the normal adoption process. Sometimes they do it in order to save their marriage, decide to abduct someone else's baby and pretend to be pregnant for a while. In addition, some abductions are made with the purpose of being sold abroad to families wishing to adopt the children although they do not know the exact origin of these children.

Abductions for sexual slavery:

These are abductions that involve the sexual exploitation of children for commercial purposes; In other words, the sale of minors who have not reached the age of sexual maturity and who are subjected to abuses such as child prostitution, forced marriage, striptease, rape and even child soldiers.

1.2. The Best Interests of the Child Principle

The principle of the best interests of the child is a fundamental principle of the CRC (Convention on the Rights of the Child), introduced in 1989. While its content and definition may vary, it is widely adopted in national and supranational legislation. This principle requires states to prioritize the best interests of the child when there are conflicting interests and to ensure the implementation of their rights. It is also recognized as a right, a principle, and a procedural rule, as stated in Article 40, paragraph 2(b)(iii) of the CRC (Convention on the Rights of the Child). Before comprehending its scope and consequences (1.2.2.), reflecting on its meaning is crucial. (1.2.1.)

1.2.1. Meaning of the principle of the best interests of the child.

Before looking at a definition for which there is currently no consensus (1.2.1.1.), it is important to present the legal foundations of the best interests of the child principle (1.2.1.2.).

1.2.1.1. Towards a definition of the principle of the best interests of the child

Several authors have been interested in the concept of the principle of "the best interests of the child" since its statement in Article 3 of the International Convention on the Rights of the Child.

Different points of view have emerged, making the understanding of its content so complex that it is difficult to render it faithfully.[25,26,27]

Governments, or adults, may abuse the principle of the best interests of the child to justify actions that violate children's rights. For example, some defend corporal punishment, arguing that it teaches children boundaries and is therefore imposed "for the benefit of the child" in the long term.

Some have prevented adopted children from getting to know their biological families on the grounds that they were "selfish". Still others took tribal children from their families, forced them into boarding schools and "civilized" them for their own benefit. The principle of the best interests of the child cannot be invoked to justify violations of children's rights.

However, it is not always possible to define the best interests of the child clearly and precisely, especially in the long term. The result has been a heated debate about the interpretation of Article 3 and the best interests of the child principle.

The article has been criticized for being too vague and too general. It was then argued that what is in the best interests of the child varies over time and depends in each case on the resources, level of development and culture of the country in which the child lives.

Child labor is an inconsistent application of the best interest principle. In developing countries, families often live solely on the income of the entire family, including children. Another example is the concept of education. Some societies exclude girls from school on the grounds that learning to do housework is more important to their future needs than education.

Unsafe work for children does not contribute to their well-being. The right to an education based on equal opportunity is fundamental.

The definition of the best interests of the child suggests that it can be interpreted differently depending on the context.

1.2.1.2. The legal foundations of the principle of the best interests of the child.

Article 3, paragraph 1 of the International Convention on the Rights of the Child sets out the best interests of the child in the clearest terms: "in all actions concerning children, whether

[25] CARBONNIER jean, droit civil, 21e Edition, Thom2, la famille, l'enfant, le couple. PUF,2002, P 85
[26] EDEL « intérêt supérieur de l'enfant une nouvelle maxime d'interprétation. »
[27] THOMAS Dumourtie, revue du droit de l'homme dans le site https://DOI.Org-10.4000 revue dh 10189.

undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".

Less than a simple legal text of international scope, this legal provision already establishes one of the legal bases on which any question of law concerning the child will have to be considered by all the administrations in charge of examining it before deciding.

Article 2, paragraph 1 of the United Nations Convention on Human Rights establishes the obligation of States Parties to respect the rights set forth therein and paragraph 2 of the same text adds the obligation of States Parties to take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians or family members.

Article 6: of the same convention relating to the right of the child to be followed and development must be considered in determining what constitutes the best interests of the child.

Article 12 provides in these terms that: “States Parties shall assure to the child who can form his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

This will include giving the child the opportunity to be heard in any judicial or administrative proceedings affecting the child, either directly or through an appropriate representative or organization, in a manner consistent with the procedural rules of national law.”

These articles and laws show that the principle of the best interests of the child must guide the elaboration of the laws of each State party and serve as a guide for the interpretation of the entire international convention on the rights of the child.

Numerous international texts have been inspired by the International Convention on the Rights of the Child to incorporate the notion of the best interests of the child,[28] such as:

- Additional protocols to the CRC such as the optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict adopted by General Assembly resolution 54/263 on 25 May 2000, the optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography adopted by General Assembly resolution 54/263 on 25 May 2000.

[28] UNHCR, Directives du HCR sur la Détermination Formelle de l’Intérêt Supérieur de l’Enfant Communiqué Provisoire, mai 2006. Page 8.

- The 1994 Hague Convention on Protection of Children and Co-operation in Respect of Inter-State Adoption of Refugees and Displaced Persons.
- The United Nations High Commissioner for Refugees Guidelines on the Protection and Care of Refugee Children, 1994.
- The African Charter on the Rights and Welfare of the Child of 1990.
- The ILO Convention no.182 on the worst forms of child labor of 1999 and no. 138 on the minimum age.
- The European Convention on the Exercise of Children's Rights of 1996 signed by the member states of the Council of Europe integrating the CRC in the European law...
- Beyond the above-mentioned international standards, each State party member of the international convention on the rights of the child must therefore integrate the related provisions in order to secure the best interests of the child.

1.2.2. The scope of the best interests of the child

The absence of consensus on the definition of the principle of the best interests of the child and the resulting legal uncertainty raise controversies and contradictions around this rule (1.2.2.3.), even the case-law (1.2.2.2.), some consequences can be identified that deserve to be analyzed (1.2.2.1.).

1.2.2.1. The influence of the principle of the best interests of the child.

Since the entry into force of the CRC (convention on the rights of the child), several States Parties have given importance to the implementation of the provisions of article 3, paragraph 1, of this text, considering the best interest of the child is above all the responsibility of specially created institutions. We can note the creation of certain jurisdictions or judicial chambers in charge of examining questions of children's rights and certain institutions in charge of social affairs that deal with the problems of minors and assist them whenever their interests are at stake.

The consequences of the best interests of the child have changed the behavior of several legislators and decision-making bodies. The "magic" notion of the best interests of the child since the implementation of the CRC (convention on the rights of the child) has had a double influence on the child himself and on the decision-making bodies.

Regarding children, one can note a panoply of rights granted to the child whose object is generally its protection. One of the most prominent rights is the right to be heard (according to the terms of article 3 of the Convention on the Rights of the Child) before any administrative, judicial or social body in which his or her interests are at stake.

Regarding decision-making bodies, the various administrative, judicial and social authorities are now obliged to take into consideration the best interests of the child, which appears to be a normative reference on which the judge can base the interpretation of a text or to set aside its application, or even to interpret a legal category.

The consecration of the notion of the best interests of the child in an international convention gives it a supra-legislative value. The courts give this concept several functions such as:

- An arbitral function: against several claims opposing the exercise of a right. This function is manifested between two claims, between two conflicting laws. This is how this function is illustrated in matters of separation where the interest of the child allows the judge to decide between the opposing claims of the father and the mother.
- The restrictive function: in this function, the decision-making authorities may restrict or deny a right belonging to an individual or a group of persons, considering the best interests of the child; for example, custody rights may be denied or partially granted to one of the spouses in case of separation.
- The control function: it is very often illustrated during the verifications, or the investigations made by the organizations near the administrations, the parents in order to preserve the best interest of the child. The latter also ensures that the rights and obligations of the children are correctly executed.
- The function of solutions: this notion arises with the aim of helping to take decisions towards the child in other words, it allows the children to take adequate solutions to their problems.[29]

[29] PICHONNAZ P., article cite, p.163 (2.1)

1.2.2.2. Best interests of the child case-law

Mennsson case

Facts and procedure

The case takes place in California during the years 2000, the couple Dominique and Sylvie had led a judicial fight for almost 18 years.

In fact, the couple could not have a child. They had called upon a family friend to be their surrogate mother because Silvia, Dominique's wife, was suffering from a congenital malformation and therefore could not carry a baby. Since the surrogacy procedure was legal in California, the couple's friend agreed to be the surrogate mother of their child and as a result of the sperm of the father and the oocytes, twin girls named Fiorella and Valentina were born.

Subsequently, birth certificates were acquired in the United States indicating that both Silvia and Dominique were the parents of the twins.

However, difficulties arose when time to transcribed of children's birth certificates to the French civil status.

The establishment of the birth certificates and the registration of the children on the family booklet was refused by the consulate of the United States in Los Angeles. A procedure was engaged against these two spouses under reason of: The case was filed against the couple on the grounds of "entrimise for the purpose of surrogacy."

Procedure

In 2013, in order to refuse any transcription of civil status certificates of children born by surrogate motherhood, the first civil chamber of the Court of Cassation had mentioned a fraud to the French law by stipulating that the birth of a child: « This is the culmination of the whole process of agreement on surrogate motherhood during pregnancy, an agreement that violates French law, is fraudulent and does not invalidate public order even if it is legal abroad »[30]

Subsequently, the court affirmed that "in the presence of fraud, neither the best interests of the child guaranteed by article 3, paragraph 1 of the International Court of Children's Rights, nor respect for private and family life in the sense of article 8 of the Convention on Human Rights and

[30] Cass. 1re civ., 13 sept. 2013, n° 12-30138 ; Cass. 1re civ., 13 sept. 2013, n° 12-18315 : AJ fam. 2013, p. 579, obs. Chénedé F., Haftel J.et Domingo M.

Fundamental Freedoms can be usefully invoked''.[31]Here the court demonstrated the predominance of public policy over the best interests of the child.

This led the high court to: "Exclude the regulation of public order and morality in the law of genealogy, since the fate of the child upon arrival carries all the consequences of the prohibition, and thus invalidates the prohibition itself.''[32]

According to Marie-Xavier Catto's explanation: "Surrogate motherhood is currently prohibited for two main reasons of public order: The unavailability of the human condition and the unavailability of the human body stem from the naturalistic conception of the family. By denying these controversial entries is to assert that there is a real conflict between the child's interest in establishing two-parenthood and the rights of women. Defending the best interests of the child against the denial of foreign transcripts justifies overriding the effects of the ban on some speech. This is the same as voluntarily adopting the custom abroad, but it is prohibited in France. It is therefore clear that the benefits of children born from the desire to become parents outweigh the risks of exploitation of women abroad.''[33]

On April 06, 2011, the Court of Cassation ruled on the Mennesson case as well as the Labasse case by declaring: « in the current state of positive law, it is contrary to the principle of the indisponibility of personal status, essential principle of French law, to give effect, with regard to filiation, to an agreement concerning surrogate motherhood, which, even if lawful abroad, is null and void as a matter of public policy. »[34]

The French Court of Cassation has therefore ignored international instruments that place the best interests of the child first.[35] According to Article 3 of the Convention on the Rights of the

[31] Cass. 1re civ., 13 sept. 2013, n° 12-30138 ; Cass. 1re civ., 13 sept. 2013, n° 12-18315 : AJ fam. 2013, p. 579, obs. Chénedé F., Haftel J. et Domingo M.

[32] Hauser J., RTD civ. 2007, p. 557 note sous TGI Lille, 22 mars 2007 – Mirkovic A., D. 2012, p. 878, note sous CA Rennes, 21 févr. 2012, n° 11/02758 : Fabre-Magnan M., La gestation pour autrui. Fictions et réalité, 2013, Fayard, p. 67

[33] Catto M.-X., « La gestation pour autrui : d'un problème d'ordre public au conflit d'intérêts ? », in séminaire Droit des femmes face à l'essor de l'intérêt de l'enfant, La Revue des Droits de l'Homme, n° 3, juin 2013 : http://revdh.files.wordpress.com/2013/06/7seminairecatto1.pdf

[34] Cass. 1re civ., 6 avr. 2011, n° 10-19053 et Cass. 1re civ., 6 avr. 2011, n° 09-17130 : D. 2011, p. 1064, obs. Labbée X.

[35] La convention internationale des droits de l'enfant (CIDE) dite aussi convention de New York, adoptée par l'Organisation des Nations unies le 20 novembre 1989 et entrée en vigueur, en France, le 2 septembre 1990, dans laquelle la notion d'intérêt supérieur de l'enfant apparaît sept fois dans six articles différents (les articles 3-1, 9-1, 18, 21, 37 et 40) – l'article 3-1 pose d'ailleurs cette notion comme un des principes fondamentaux sur lesquels s'appuie la convention : « l'intérêt supérieur de l'enfant doit être une considération primordiale » ; la convention de La Haye du 29 mai 1993 sur la protection des enfants et la coopération en matière d'adoption internationale ; la convention européenne sur l'exercice des droits de l'enfant du 25 janvier 1996 (bien qu'elle ait été signée le 4 juin 1996 par la

Child, any intervention affecting children must take precedence over any other interest.[36] The United Nations Commission on the Rights of the Child justifies this advantage by stating that: "children differ from adults in their physical and psychological development" and have different emotional and educational needs."[37]

On January 22, 2019, an advocate stated: "Article 8 of the Convention on the Rights of the Child provides that States Parties undertake to respect the right of children to retain their legally recognized identity, including their nationality, name and family ties, without unlawful interference. Where a child is unlawfully deprived of some or all elements of his or her identity, States Parties must provide appropriate support and protection so that the child's identity can be restored as soon as possible. Furthermore, under Article 3(1) of the CRC (International Convention on the Rights of the Child), the best interests of the child shall always be a primary consideration in all actions concerning the child, including parentage."[38] The European Court has affirmed and confirmed the primacy of the best interests of children in a variety of situations where the interests of children outweigh the interests of the public, public order and the interests of adults.[39]

France, cette convention, qui comporte sept références à l'intérêt supérieur de l'enfant, n'a été ratifiée par la France que le 1er août 2007) ; la charte des droits fondamentaux de l'Union européenne du 7 décembre 2000, dont l'article 24, alinéa 2, énonce : « Dans tous les actes relatifs aux enfants, qu'ils soient accomplis par des autorités publiques ou des institutions privées, l'intérêt supérieur de l'enfant doit être une considération primordiale » ; la résolution « Vers une stratégie européenne sur les droits de l'enfant », adoptée par le Parlement européen le 16 janvier 2008, qui souligne que « toute stratégie sur les droits de l'enfant devrait se fonder sur les valeurs et les quatre principes fondamentaux inscrits dans la Convention des Nations Unies relative aux droits de l'enfant : protection contre toutes les formes de discrimination, intérêt supérieur de l'enfant comme considération primordiale, droit à la vie et au développement et droit d'exprimer une opinion, qui soit prise en considération, sur toute question ou dans toute procédure l'intéressant »

[36] Qu' « elles soient le fait des institutions publiques ou privées de protection sociale, des tribunaux, des autorités administratives ou des organes législatifs », comme le précise l'article 3 de la CIDE.

[37] Comité des droits de l'enfant des Nations Unies, observation générale n° 10, CRC/C/GC/10, 25 avr. 2007, p. 5.

[38] Décision du Défenseur des droits n° 2019-016, du 22 janvier 2019 : https://juridique.defenseurdesdroits.fr/doc_num.php ?explnum_id=18789.

[39] CEDH, 28 juin 2007, n° 76240/01, Wagner et J.M.W.L c/ Luxembourg : La Cour a estimé que la décision de refus d'exequatur d'une adoption plénière effectuée à l'étranger par les juridictions nationales se fondant sur les règles de conflit de lois nationales « omet de tenir compte de la réalité sociale de la situation ». En n'admettant pas l'existence juridique des liens familiaux créés par l'adoption, les juridictions nationales ont fait subir à l'adoptant et l'adopté des inconvénients dans leur vie quotidienne. « L'enfant ne se voit pas accorder une protection juridique rendant possible son intégration complète dans la famille adoptive ». Or l'intérêt supérieur de l'enfant doit primer. CEDH, 16 déc. 2011, n° 115297/09, Kanagaratnam c/ Belgique : Compte tenu de « la situation d'extrême vulnérabilité de l'enfant », la Cour a, par ailleurs, condamné la Belgique s'agissant de la détention d'une mère et de ses enfants dans « un centre fermé pour illégaux » en faisant expressément référence à l'intérêt supérieur de l'enfant « tel qu'il est consacré par l'article 3 de la convention des Nations Unies relative aux droits de l'enfant qui doit prévaloir y compris dans le contexte d'une expulsion ».

The June 26, 2014, ruling, merely confirmed the law case regarding the protection of family rights;[40] It concluded that France had violated the European Convention on Human Rights and refused to transcribe the minutes in the case of Mr. Mennesson and the wife of Mr. Labasse accused of Civil Identity Documents for children born by surrogate motherhood.[41]

1.2.2.3. Controversies and contradictions around the principle of the best interests of the child.

The application of this principle in national legislation has given rise to very variable interpretations, generating disputes that can go as far as the diplomatic level in situations of international divorce. For example. By enshrining the best interests of the child as a legal tool, the CRC is changing the balance between the rights of individuals within the family unit in the signatory states.

In the absence of a strict definition, the risk of parental erasure and the abuse of authority by judicial and administrative authorities are denounced. This point of view weakens the provisions of article 9 of the CRC, which give full power to the administrative and judicial authorities to decide on other measures according to their understanding of the principle.[42,43]

Many jurists and law teachers have emphasized the risk of legal insecurity linked to the use of overly broad and undefined concepts such as the best interests of the child. Jean Carbonnier[44] invoked it in these terms: "it is the magic notion". Nothing is more elusive, more likely to encourage judicial arbitrariness.

There are philosophies to prove that the interest is not objectively grasped, and it will be necessary that the judge decides on the interest of others. It is maintained that childhood is noble, plastic and significant stage in preparation for adulthood. What is sown in the child will affect how the child will grow into a man, which pseudo-science would authorize the judge to prophesy.

---

[40] CEDH, série A, 27 oct. 1994, n° 297-C, Mutatis mutandis, Kroon et autres c/ Pays-Bas, § 32 ; CEDH, 1re sect., 3 mai 2011, n° 56753/08, Négrepontis-Giannisis c/ Grèce.

[41] CEDH, 5e sect., 26 juin 2014, n° 65941/11, Labassee c/ France : https://hudoc.echr.coe.int/eng# {%22itemid%22 : [%22001-145180%22]} ; CEDH, 5e sect., 26 juin 2014, n° 65192/11, Mennesson c/ France : https://hudoc.echr.coe.int/eng# {%22itemid%22 : [%22001-145179%22]}.

[42] Goldstein, Freud, Solnit, « Dans l'intérêt de l'enfant et Avant d'invoquer l'intérêt de l'enfant », traduit et présenté par Laurent Séailles, édition ESF 1983.

[43] VERDIER Pierre, Pour en finir avec l'intérêt de l'enfant, JDJ-RAJS no 280 - décembre 2008.

[44] Doyen Jean Carbonnier - Dalloz périodique 1960, p. 675. Cité par Verdier Pierre, Pour en finir avec l'intérêt de l'enfant, JDJ-RAJS no 280 - décembre 2008.

Despite significant progress in the jurisprudence of the Court of Cassation, controversies have arisen regarding the principle of the best interests of the child.

Professionals such as Pierre Verdier have noted that the interests of the child are essentially invoked and more and more often in laws or codes to justify depriving a child of one of his rights.[45] Others add that the Convention itself does not escape this use of the best interests of the child to dispense with the respect of a right (see articles 9 al1 and 3; 37c, 40b) and point out that it seeks in these cases to resolve a conflict between several of the child's rights and cites, for example, the right not to be separated from his or her parents and the right to be protected against abuse perpetrated by the parents themselves. Furthermore, it is argued that the convention primarily invokes the best interests of the child to guide adults in their responsibilities when reading the provisions of article 18(1) of the convention.

Other jurists denounce this principle, because of the absence of an objective definition of the best interests of the child, a "soft" concept, a "magic formula", "a key notion", but "the key opens on a vague ground", "an elusive notion", and maintain that the risk of arbitrariness is great if the assessment of the best interests of the child is subjective.

[45] Verdier Pierre, Pour en finir avec l'intérêt de l'enfant, JDJ-RAJS no 280 - décembre 2008. Page 38

2. The Conflict of Laws in Matters of Child Abduction

Many agencies, such as UNHCR and its partners, are striving to put the principle of the best interests of the child into practice.[46] This principle was first tested by UNHCR in several countries, including Guinea, Kenya, Malaysia, Tajikistan, Tanzania and Thailand. The conflict-of-laws rule concerns various international situations in which the rights and obligations of those involved must be determined. In other words, there is a conflict of laws when the judge is faced with a situation that can be settled by several laws. Given the lack of consensus on the definition and content of the best interests of the child, each child and each public or private institution tries to determine the elements to be considered when implementing this principle.[47]

According to the CRC (Convention on the Rights of the Child), a child is a person under the age of 18, unless the applicable legislation sets a younger age of the majority. UNHCR considers all children of concern to be children. It is widely accepted that children are vulnerable, and the principle of the best interests of the child, as required by the CRC, is based on this vulnerability. There are no studies questioning the vulnerability of children under its jurisdiction.[48]

This study focuses on cross-border child abductions by foreign abductors whose nationality differs from the abducted children. This case raises several legal issues, including the choice or determination of applicable law. This legal problem has an international aspect, involving different legal orders (2.1.). Judges must consult the connecting rules before choosing the applicable legal instrument. These rules facilitate the determination of the law applicable to the problem. For example, the status and capacity of persons (marriage, filiation, protection of incapacitated persons) are generally governed by the national law of the person or their domicile, while the regime of property is governed by the law of the place where it is located, and so on. This is called qualification. However, consultation of these different norms reveals conflicts between them in the settlement of an international dispute, which raises the problem of conflict of laws (2.2.).

[46] Article 3 al1 de la convention internationale du droit des enfants qui énonce le principe : « dans toutes les Décisions qui concernent des enfants, qu'elles soient le fait des institutions publiques ou privées de protection Sociale, des tribunaux, des autorités administratives ou des organes législatifs, l'intérêt supérieur de l'enfant doit Être une considération primordiale. »

[47] Voir les principes directeurs de du HCR relatifs à la détermination de l'intérêt supérieur de l'enfant, mai 2008.

[48] Voir les principes directeurs du HCR op-cite. Page 8.

2.1. A diversity of legal instruments for the same legal issue.

There are practically two main normative entities stemming from international and national legislation (2.1.2.) opposing two forms of legal order,[49] either stemming from custom (2.1.1.) or from observed throughout the world. This organization, which is perceived at the level of modern and traditional societies, makes it possible to have several legal instruments whose use for the same subject of law makes the judge's work difficult.

2.1.1. International custom

The question may be whether an individual can invoke international custom as a norm and deduce from it the rights that may be recognized by the national court. While it is true that the role of custom cannot be compared with that played by treaty law.[50] Custom in international law is understood as a general practice accepted as law according to the Statute of the I.C.J. It is a legal norm, i.e.: A norm constituting a source of law and obligations. Several times, this norm has been used as a rule of law by the court for the settlement of disputes.[51]

International custom as a rule of law is enforceable against all states that have not formally objected to its creation. It comes just after the treaty; and Chapter 2, Article 38 of the ICJ defines it as "evidence of a general practice accepted as law". Following this definition of custom by the ICJ, it can be said that this norm must be considered as a legal instrument. The judge who is called upon to rule on the problem of child abduction may choose from among the other instruments if the parties invoke it to support their case.

2.1.2. Other standards that may be used by the judge to rule on child abduction.

This part will focus on international instruments (2.1.2.1.) and impacts of child abduction (2.1.2.2.).

[49] Voir JACQUES CHEVALIER, l'Etat post moderne, LGDJ, 2008

[50] Voir DUBOUIS l'application du droit international coutumier par le juge français, 1972, Page75 ;
- le rôle de la Cour de cassation belge à l'égard de la coutume internationale ;
- DOMINCE « le droit international coutumier dans l'ordre juridique suisse, Mémoire de la faculté de droit de Genève n0 27.

[51] Arrêt procureur contre TADIC, arrêt des activités militaires et paramilitaire au Nicaragua ;
- arrêt plateau continental de la mer du Nord, à faire du droit de passage en territoire indien.

2.1.2.1. International legal instruments

Since 1989, several international legal instruments contain a reference to the need to consider the best general interests of the child in decisions concerning him or her, in the case of binding texts:

- The international convention of the United Nations on the rights of the child by application of the following articles:

Article 11, which provides that: "States shall take all necessary measures to combat the illicit transfer and detention of children abroad".

Article 35 all States signatories to this Convention shall: "take all appropriate national, bilateral or multilateral measures to prevent the abduction, sale of or traffic in children for any purpose or in any form".

Article 9 provides that: "the right of children to maintain contact with both parents if separated from one or both.

Article 10 states: "the right of children and their parents to leave any country and enter their own country in order to be reunited or to maintain the parent/child relationship". And finally, we have

Article 18 states that: "Both parents have the primary joint responsibility to raise their children and the state should support them in this task."

- The Hague Convention on the Protection of Children of October 19, 1996: this convention concerns jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children.
- The Charter of Fundamental Rights of the European Union.
- The International Convention on the Rights of the Child (ICRC).
- The Hague Convention of 5 October 1961 on Jurisdiction and Applicable Law in Respect of the Protection of Children (Minors).
- The recommendation of the Council of Europe Parliamentary Assembly No. 1909 (2012).
- The Brussels II bis Regulation.

Several international legal instruments are generally involved in the protection of children. Some of them will be of interest to us because they provide specific solutions to the solutions to the issue of child abduction. At the center core of all these international legal instruments is the CRC which is central to all these international legal instruments. Many of its provisions have also inspired deal with the protection of children, international and national texts to incorporate the notion of the best interests of the child.

Articles 32, 33, 34 and 35 protect the child from all forms of exploitation not covered by these texts. exploitation not covered by these texts; as a result, no child shall be subjected to torture, cruel treatment or punishment treatment, unlawful arrest or detention. However, despite all these national and international and international texts, the jurisdiction responsible for resolving the problem of child abduction has the operational difficulty of choosing the norms or the legal instrument that will enable it to make a legal instrument to enable it to make a fair decision. The lack of consensus on the content of these norms raises the problem of conflict of laws, which does not facilitate the task of the judge the task of the judge in charge of examining the case.

2.1.2.2. Impacts of child abductions

Child abductions usually have certain consequences both for the abducted child (i.) and for the parent whose custody rights have been restricted (ii.).

i. The effects of abduction on children

Very often, abducted children go through very difficult situations because most of the time they are deprived of their usual atmosphere**.**

This may cause psychological disorders in young children, because a sudden and brutal abduction is very often an emotional development.[52]

Abducted children are often sad when they realize that communication with one of their parents is becoming more and more difficult. Abducted children may be very aggressive, withdrawn and depressed.

[52] Greif, G.L, Hegar, R.L, parents who abduct. A qualitative study with implications for practice. Family revelation 1994, page 283

Either they show their sorrow through crying or screaming during the day, on the school level, the grades of these children are very bad because the lack of affection of one of these parents can also play a negative role in his morals. Some abducted

Children may be involved in drugs or alcohol. Some may be rebellious to their parents. while others may be rude. These children appear very lonely with a distorted image of reality.[53]

Thus, the consequences are both emotionally and physically, tend could become children even at the addictive as the abductee grows older.[54]

ii. The effects of the abduction on the parents

It is sometimes difficult for a parent to deal with the abduction of their child. This parent often goes through a period of stress and anguish since he or she cannot get in touch with the child. Because the abducted child is cuts from his or her parent and therefore, the parent whose custody rights have been violated lives moments of lamentation asking himself a series of questions at least finally to know if his child is well.

Most of the time, the most difficult period is when the abduction of the child lasts for a long period of time, the child starts to develop a feeling of abandonment by the other parent because he/she has no news from them. However, it often becomes difficult to re-establish an intimate or trusting relationship with this child because the child creates a negative image of the parent who has remained in his or her usual place**.**

2.2. Conflict of laws in child abduction matters.

Courts face a significant challenge in determining the legal instrument when resolving disputes involving the abduction of children by foreign abductors. The 1996 Hague Convention, in article 16, addresses this issue by specifying that jurisdiction is based on the child's residence. This case study will focus on a young couple going through a divorce that resulted in the abduction of their children (2.2.2.). Additionally, it will examine normative oppositions relating access to justice for children and inconsistencies in intercountry adoption regulations (2.2.1.).

[53] Freeman, R., Freeman, G., Gérer les difficultés de contact : une approche axée sur l'enfant journal du droit des jeunes, 2004, vol.237, p.9

[54] Greif, G., A parental report on the long-term consequences for the children of abduction by the other parents, child, psychiatry and human development 2000, vol. 31(1), page 70.

2.2.1. Normative oppositions regarding the conditions of access to justice for children and normative inconsistencies in the field of intercountry adoption.

2.2.1.1. Inconsistencies in the conditions of access to justice for children.

While the CRC defines the notion of the child, this is not the case for certain organizations such as the UNHCR, which gives an extensive definition of the concept of child. The CRC states that a child is any person under the age of 18 years.[55] Organizations such as the UNHCR, in the context of its activities, give a definition of the term child without regard to age; thus, for this organization, the term child means all children of concern to it, i.e. Asylum-seeking children, refugee children, internally displaced children, children repatriated, assisted and protected by the UNHCR, and stateless persons.

The Hague Convention ignores the principle of the best interests of the child when determining the jurisdiction in which the child abduction case should be heard; this leads to future leads to future debates and criticisms as to whether the Hague Convention violates the best interests of the child. The World Organization for Cross-Border Co-operation in Civil and Social

The 1980 World Organization for Cross-Border Co-operation in Civil and Social Matters notes that the Hague Convention ceases to apply as soon as the child reaches the age of 16, whereas the UNCRC explicitly states that a child means every human being below the age of 18 years.[56]

Thus, to the definition in Article 1 of the CRC. Therefore, it is noted that the two Conventions stipulate different ages for children, this is another point of contention that needs to be resolved, as the age threshold of 16 under the Hague Convention can be used to the detriment of the child, leading to more cases of international child abduction.

Moreover, from a procedural point of view, the judge finds himself in a quandary when he examines the conditions of access to justice, such as those relating to age. This being the case, jurisprudence is not easy regarding the application of the above-mentioned international standards.

2.2.1.2. Case law at odds with international legal instruments

Except for countries like the United States and Somalia, which have not ratified the CRC and rely on their national laws for child abduction and exploitation cases, the French jurisprudence

[55] Article 1er de la convention internationale du droit des enfants
[56] Voire Haut-Commissariat des Nations unies aux droits de l'homme 1989.

stands out in terms of the exploitation of international legal instruments. The French Court of Cassation specifically acknowledged the direct applicability of Article 3 of the CRC.[57]

The implementation of this legal instrument in France was clarified, removing any ambiguity. However, in a decision by the European Court of Human Rights on 04/10/2012, things took a different turn and contradicted Article 3, paragraph 1 of the CRC. The court noted that, considering the margin of appreciation in this matter, the refusal to grant adoption to a child of Algerian nationality, who was placed under "KAFALA" by a French national, based on Article 370-3, paragraph 2 of the Civil Code (which prohibits adoption if the child's personal law prohibits it), did not violate the right to privacy and respect for private and family life. This case law suggests that the court did not incorporate the provisions of the CRC and instead applied the provisions of the French Civil Code.

2.2.2. The difficulty of choosing the applicable law in the Kylie and Julian case.

2.2.2.1. Facts bindings and resolution

Kylie is Maltese and lived in Malta until she was 22 years old before moving to Canada for graduate studies. In Canada, I met Julien, a French student who had gone to Canada for graduate studies the same year as Kylie. Three years later, the couple had a romantic wedding in Malta and a honeymoon in Spain before returning to Canada.

The two boys have dual French and Maltese citizenship. The couple had a crisis: They were stressed by their demanding jobs and had no rest because of their two young sons.

Aware of the couple`s difficulties, Kylie`s mother moved in with her young husband for three months to help care for the boys. While her presence was a huge relief to Kylie, it added tension to the relationship as Julianne felt constantly judged by women she barely knew.

Things got worse after Kylie's mother returned to Malta. Julian felt that Kylie was exaggerating Elias' problems and felt that he should be treated like any other child and not be drugged at a young age.

When Luis was 4 and Elias was 3, Kylie decided she couldn't take it anymore and told Julian that she wanted to go to Malta to find out what to do with the rest of her life. Julian agreed to go to Malta and take the boys with him for six months. As per the agreement, Julian joined Kylie

[57] Voire article 49-c de la convention de 1976 sur la coopération entre le Tchad et la France en matière Judiciaire.

in Malta six months later, and the two had a long conversation. She said that the boys would have been better off staying in Malta for the next five months until the end of the school year. Having already obtained his information, he immediately filed for divorce in France, while still living in Canada. Kylie sought sole custody of the children in a French court, claiming that she was paranoid and therefore not a reliable mother. He wanted to exercise this sole custody right in Canada and therefore demanded the return of the boys.

In her defense, she alleged that Julian had acted abusively. Psychologically, especially for Elias, returning to Canada would pose a risk as Julian refuses the medication and treatment he needs. Meanwhile, Kylie initiated divorce proceedings in Malta, claiming that the French courts did not have jurisdiction. She has also requested an interim measure to allow her children to stay with her until a decision is made on the matter.

She stated that the children were now permanently stationed in Malta, so she was confident that the process would be completed. Parental responsibility cases should be heard in Malta.

In this case, the question was whether the French court had jurisdiction to hear the dispute concerning parental responsibility? If so, which Law Is applicable?

In this case, the Brussels II bis Regulation was used to determine parental responsibility and the habitual residence of the child, following certain principles of the Regulation. If the child is habitually resident in a European Union Member State, Article 8 of the Regulation is applicable. Conversely, if the child is not habitually resident in the EU, Article 16 of the Hague Convention allows the judge to determine the child's habitual residence in a contracting party state.

Additionally, if the child's habitual residence is neither in a contracting party nor an EU Member State, and the child is present in an EU Member State where their habitual residence cannot be established and no choice of court has been made, Article 12 of the Regulation applies (Brussels II bis Regulation, Article 13).

If none of these criteria are met, then the national law of the member states will be applicable under Article 14 of the Regulation.

However, since the child had never resided in France, the French court did not have jurisdiction to resolve the dispute under Article 8 of the Brussels II bis Regulation. Instead, the court had jurisdiction based on either Article 12 or 14 of the Regulation. Regarding the applicable law for this dispute, the Hague Convention on the protection of children would only be applicable if the French court had jurisdiction. This would be the case if, first, the law of the habitual residence

governed the holder of parental responsibility (Article 16); second, if the court applied its own law to determine the future residence of the children (Article 15(1)); or third, if the court applied the law of another state where the children have a close connection (Article 15(2) of the Hague Convention).

Part 2: Determination of Jurisdictional Competence in the Matters of Child Abduction

Child abduction, whether by known or foreign abductors, presents challenges regarding conflicts of laws and jurisdictions in determining court jurisdiction (3.). The existence of multiple laws and difficulties in accessing international jurisdictions complicate judicial decision-making. These criticisms will be discussed further in the subsequent chapters of our work (4.).

3. The problem of determining jurisdiction over child abduction.

In general, the determination court of jurisdiction can be complex,[58] even in straightforward common law or general administrative law cases. Typically, only material and territorial jurisdiction is considered, and in exceptional cases,[59] jurisdiction may be extended in the absence of European regulations or applicable international conventions.[60] It is important to consider the criterion-based approach to jurisdictional competence (3.1.) and the conditions for recognizing and enforcing a judgment in another country (3.2.). In these situations, it is crucial to clarify the criteria for determining court jurisdiction and the conditions for recognizing and enforcing the decision in a third country.

3.1. The criteria for determining jurisdiction in child abduction cases.

The jurisdiction of a court refers to its capacity to hear a case and provide a resolution. Certain criteria must be verified to determine the jurisdiction of the court(s) whenever a dispute needs to be examined before a court.

Firstly, it involves determining in which legal order (administrative or judicial) the case will be examined. (3.1.1.) This is done by analyzing various legal instruments that differentiate between national legislation and international legislation, as discussed in the first part of this study. It is important to note the significance of analyzing criteria derived from international standards when determining court jurisdiction in child abduction cases. (3.1.2.)

[58] Voir conclusions dans l'affaire Association El. Hamida, CE, 5février, 1954, Rec. P77
[59] Arrêt Pelasse : civ, 19octobre 1959 et Scheffel : civ, 30 octobre 1962
[60] Civ 1ere, 30 octobre, 1962

To fully understand the criteria for determining jurisdictional competence in child abduction cases, it is essential to outline both the conditions for bringing a case before a court in all instances of child abduction and the factors involved in determining the court's jurisdiction.

3.1.1. The determination of the legal order in the matter of child abduction:

the omission of explicit provisions regarding the determination of legal orders in the content of the 1980 Hague Convention and many other international legal instruments implies that the international legislator has intentionally streamlined the administration of justice by omitting this preliminary procedural stage. This omission is likely aimed at avoiding the complexity of the texts and administrative delays.

This does not diminish its scientific nature, which has captured the interest of this work. The unlawful abduction of a child, regardless of whether it occurs across borders or not, and whether it is carried out by a parent or a foreign abductor, is a criminal offense like any other. However, it is important to note that it presents several unique aspects, foremost among them being the need to first present the national judicial order. (3.1.1.1.)

The examination of disputes involving child abduction is unique due to the vulnerable nature of the child and the presence of multiple legal norms and institutions. Administrative aspects are rarely involved, and initiating proceedings before an administrative judge is uncommon. Alternatively, if the abduction involves individuals of different nationalities, the dispute may fall under the jurisdiction of the international judicial order, although this is not frequently invoked due to its nuanced nature (3.1.1.2.). It is important to note that constitutional order does not typically intervene in such disputes as they are reserved for political matters.

To clarify, the concept of legal order is complex and requires further explanation. It refers to the legal system or framework that encompasses all the rules defining the status of public and private individuals and the legal relationships between them within a specific state and at a particular time.

It also exists at the level of entities larger than the state, such as the European Union, the CEMAC (the Economic and Monetary Community of Central Africa), the ECOWAS (the Economic Community of West African States), etc., which are considered legal entities with their own organization. This explains why some authors have a broader, more global understanding of

this notion.[61] A distinction is drawn between the internal or national legal order, where its norms can be invoked before a national court, and the international legal order, where its norms can be invoked before either an international or national court, subject to certain conditions.

3.1.1.1. The national judiciary

Considering the developments, the judicial order can be understood as the judicial organization within a country or sub-regional entity, responsible for resolving disputes between individuals through criminal and civil courts, as a general principle.

However, there are exceptions where the courts of the judicial order will have jurisdiction. This occurs when the administration commits an assault by carrying out an act that cannot be attributed to its administrative authority, or when the conflict involves an administrative organization that has acted beyond its public service duties.[62] This point of view is shared by several authors.[63] In matters of child abduction, the judge must be able to determine which category (criminal or civil) of the judicial order of a State will have jurisdiction to hear the dispute.

i. The national criminal order in matters of child abduction.

Instead of conducting an analysis or presentation of the various criminal jurisdictions involved in cases of child abduction, it is crucial to provide a brief discussion on the different national and international organizations that have addressed this issue. This task appears to be immense as each country or State Party has its own internal judicial organization. Furthermore, at the international level, there are still many aspects that need to be determined in order to address the issue of child abduction and other cross-border offenses.

At the national level, the judicial order can be understood based on the jurisdiction's affiliation or the initial classification of the act of abduction as a misdemeanor or felony. This determines whether the case should be directed towards a civil jurisdiction seeking compensation for the harm suffered or towards a criminal jurisdiction to impose a penalty of deprivation of freedom on the perpetrator.

---

[61] Voir, Jacques Chevalier in l'Etat post moderne, LGDJ 2008 : l'ordre juridique symbolise l'ordre social indiquant à tous les membres de la société qu'ils font partie d'un ensemble cohérent, rationnel dans lequel chacun a sa place, dispose d'un statut

[62] Voir chambre sociale, 10 juillet 2013, pourvoi N° 12-17196 ;
civ. 1ère, 10 juillet 2013, pourvoi N° 12- 23109

[63] Cadict (L), droit judiciaire privé, 2ème édition, Paris, Litec 1998.
Larguier, (J), Procédure civile ; droit judiciaire privé, 16ème éd, Dalloz, 1998.

In France, the courts of law have the competence to resolve disputes between private individuals and to punish those guilty of criminal offenses. Civil jurisdictions handle matters such as rent, divorce, inheritance, and more. It is stated in the code of judicial organization N°78-329 and 78-330 dated March 16, 1978, that French justice is organized into two distinct orders: judicial justice and administrative justice.

The distinction between these two orders is established in the law of 16 and 24 August 1790, which prohibits judicial judges from handling disputes related to administration or the work of civil servants. The judicial court is the primary jurisdiction, the court of appeal is the second-level jurisdiction, and the Court of Cassation serves as the final arbiter of law.

ii. The civil order

Subject to the general principles of law, there is no longer any uncertainty regarding the boundary between criminal and civil orders. While the civil judge has the authority to settle disputes resulting in damages and handle urgent cases through summary proceedings, the criminal judge is more focused on imposing penalties on offenders.

The actions available to the victim can be either civil or criminal in nature. It is evident that each country has its own judicial organization, and the various judicial institutions within them have jurisdiction over cases of child abduction, even though their scope may be supplemented by international legal frameworks. The Hague Convention on the Civil Aspects of International Child Abduction, along with the Brussels II bis Regulation, already establishes the structure of the international civil order.

3.1.1.2. The international legal order

If it is clearly understood in all states worldwide, as indicated in the case of the two countries (one in Central Africa and the other in Europe), the international legal order regarding child abduction appears to be quite abstract. The organization of different legal orders does not adequately demonstrate the physical location of competent international judicial jurisdictions responsible for resolving disputes related to cross-border child abduction, which any litigant, regardless of their country, can easily approach.

Therefore, it is necessary to examine the contents of various international legal instruments to understand how the prosecution of this offense is organized and, more importantly, to understand

the shortcomings of the international system implemented by each State Party in combatting child abduction.

If we consider the international legal order as a coordinated system of international norms, it is reasonable to expect the existence of international legal institutions with well-established locations. These institutions should have the capacity to handle international disputes and be accessible to all litigants who seek their assistance. Furthermore, the decisions made by these institutions should not encounter any challenges when it comes to implementation in all states.

3.1.2. Criteria derived from international legal standards: The Brussels II bis Regulation and the Hague Convention of 19 October 1996.

In a case presented before the Court of Justice of the European Union, the Court expressed that the interpretation of the term "**habitual residence**" under Article 8(1) of Regulation No 2201/2003 entails the notion of the place where a child is socially and family-wise integrated. Several factors need to be considered, including the duration, regularity, conditions, and reasons for the child's stay in a particular Member State, as well as the family's relocation to that State, the child's nationality, the location and conditions of schooling, language proficiency, and the child's family and social relationships within that State. The determination of the child's habitual residence based on the factual circumstances of each individual case is the responsibility of the national court.[64]

The concept of "habitual residence" has long been in competition with that of "nationality" and serves as the primary connecting factor in most international and European legal instruments concerning jurisdiction and applicable law in family matters. The complexities associated with defining this concept of "habitual residence" have prompted the Court of Justice of the European Union to take a keen interest in it. It was only in 2021 that the Court of Justice of the European Union provided a clear interpretation of the concept of habitual residence. In a judgment dated November 25, 2021, in response to a preliminary ruling, the court elucidated the meaning of "habitual residence" as defined in Article 3(1)(a) of the Council regulation of November 27, 2003, on jurisdiction.

[64] Voir affaire C- 523/07, A, ECLI ; EU : C : 2009 : 225 dans son arrêt du 22 décembre 2010 ; affaire C- 497/IO PPU, ECLI- EU : C 2014 :2268
- Arrêt du 9octobre 2014, C- 376/14 PPU, Cc, M ECLI : ECLI :EU : C : 2014 : 2268

The court acknowledges that the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility are contingent upon the concept of habitual residence. The court further asserts that habitual residence entails a consistent presence in a particular territory, coupled with the intention to establish the habitual or permanent center of one's interests in that location.[65]

Therefore, the concept of "habitual residence" is understood to be defined by two elements. Firstly, it involves the intention of the individual in question to establish their habitual center of interests in a specific place. Secondly, it requires a sufficiently stable presence within the territory of the relevant Member State. A comprehensive interpretation of both the Brussels II bis Regulation and the Hague Convention of 19 October 1996 allows for a better understanding of the primary criterion for determining jurisdiction in cases of child abduction. It is important to note that the concept of habitual residence, as outlined in these two legal frameworks, should not be applied in isolation.

It is still necessary to consider other equally important criteria that effectively utilize this concept. These additional criteria include the scope of application of these standards and the legal status of a State in relation to the European Union, particularly considering that certain countries have not ratified the Hague Convention.[66]

The personal scope of application pertains to identifying the individuals covered by the regulation. In the case of parental responsibility, it is determined by the habitual residence of the child. However, it is necessary to analyze the jurisdictional competence based on the following scenarios:

- If the child is habitually resident in an EU Member State (except Denmark), the Brussels II bis Regulation applies (Article 8).
- If the child is not habitually resident in the EU, the judge must ascertain whether the child is habitually resident in a State that is a contracting party to the Hague Convention on the Protection of Children (Article 61(a) of the Brussels II bis Regulation and Article 52 of the Hague Convention on the Protection of Children).

[65] Voir cass ; civ 1ère 14 décembre 2005, Bull ; 2005, pp 425-426
[66] La liste des Etats qui ont ratifié la convention de la Haye se trouve dans le site www.hcch.net

- If the child is habitually resident in a State that is neither an EU Member State nor a Contracting Party to the Hague Convention on the Protection of Children, the Brussels II bis Regulation applies in two scenarios. Firstly, if the parents have accepted the jurisdiction of a court of a Member State in compliance with the requirements outlined in Article 12 of the Brussels II bis Regulation. Secondly, if the child is present in that Member State, and establishing their habitual residence is not possible, and no choice of court has been made (Article 13 of the Brussels II bis Regulation).
- If none of these criteria are met, Member States will apply their national law (Article 14 of the Brussels II bis Regulation).

3.2. A variety of conditions to be met regarding child abduction:

The general conditions of access to justice (3.2.1.) and specific conditions (3.2.2.) for children will be presented in this section. However, it is important to note that there are certain conditions that govern the recognition and enforcement of judgments in member states.

3.2.1. General conditions.

i. Conditions related to the person of the applicant:

According to Article 31 of the CPC, the right to initiate a legal action is available to anyone with a legitimate interest in the outcome of a claim, except in cases where the law restricts this right to specific individuals who are qualified to raise or combat a claim or protect a particular interest. This provision outlines the two essential conditions for the admissibility of a legal claim: the presence of an interest and the capacity to act in court. It is mandatory for all plaintiffs to meet these requirements before considering or filing a legal claim.

This requirement is consistently examined by the judge whenever a request is submitted to the court, regardless of the chosen judicial order. Both the presence of an interest and the legal capacity of the plaintiff are prerequisites for the admissibility of a legal action.

ii. Interest to act :

According to Professor Guinchard's lexicon of legal terms, the interest to act is a condition for the admissibility of an action. It refers to the advantage that the plaintiff would gain from the judge recognizing the merits of their claim. This interest must be direct, genuine, and existent.

The requirement of interest being "current" means that it must be present precisely now when the action is initiated, specifically when the request is presented to the judge. It cannot be a potential or hypothetical interest; rather, it must already exist before the proceedings are initiated.

The interest must be legitimate: it is the responsibility of the judge to examine the existing positive law to determine whether the interest claimed by the plaintiff is legally protected or not. In order to fulfill this task, the judge possesses extensive powers to assess the conformity of the interest invoked.

The interest must be personal or direct, with the exception being cases where the public prosecutor has the right to act within the context of a criminal lawsuit, as well as situations involving groups and associations where a collective interest is formed by a combination of individual interests.

The interest should generally be personal or direct, except in cases where the public prosecutor is authorized to intervene in criminal proceedings, or in situations involving groups and associations where a collective interest is formed by the combination of individual interests.

iii. The quality of acting

To initiate legal action, it is necessary to have a specific title or right. Failure to meet this qualification often leads to dismissal, as it is closely connected to the interest in question. Therefore, this condition typically does not present significant difficulties. However, if the qualification is lacking, the judge is compelled to deem the claim inadmissible.[67]

In this context, the issue does not concern physical capability but rather pertains to an individual's attainment of a specific age or their status as an emancipated minor. These factors determine their legal capacity to initiate legal proceedings. Generally, adulthood is widely recognized to start at the age of 21, as stated in diverse national legislations. An emancipated minor

[67] civ. 1ère, 18 septembre 2008, la qualité à agir, Fiche d'arrêt.
- CE, 17 mars 2014, association des consommateurs la Fon taulière.
- CE, 1058, « Abisset » et 2009 « Canavy »

refers to someone who has taken actions to liberate themselves from parental authority and acquire legal capabilities akin to those of an adult.

Regarding children, international legislation significantly influences the national legislation of the States Parties, especially when it comes to defining the boundary between majority and minority. The Convention on the Rights of the Child (CRC) and other international norms define minority as encompassing children up to the age of 16, without specifying their legal capacity at that age. These texts simply indicate the age that international legal instruments have adopted to define minority.

3.2.2. Specific conditions for children:

The concept of the child, as outlined in the Convention on the Rights of the Child (CRC), disrupts both the international and national legal systems. Many national legal frameworks, including those of states that have ratified this Convention, struggle to incorporate the definition of a child as stated in Article 1 of this document.

By referring to the stipulations of Article 14.1 of the International Covenant on Civil and Political Rights, dated December 16, 1966, it can be asserted that every individual has the right to a fair and public hearing by a competent and impartial tribunal established in accordance with the law.

Furthermore, it is evident from this text that the significance of ensuring effective access to justice is emphasized. Similarly, Article 47 of the Charter of Fundamental Rights of the European Union guarantees the right to an effective remedy and the opportunity to approach a competent and impartial tribunal. It specifically states that any individual whose rights and freedoms, protected by Union law, have been violated, has the right to seek an effective remedy before a court, in accordance with the conditions laid out in this article.[68]

The case of children presents certain complexities due to their age and vulnerability. The legal limitations imposed on children, based on their minority, are a matter that legislation strives to tackle. This issue becomes even more significant in cases of child abduction.

Considering this perspective, the abducted child is a victim and should ideally receive legal protection on par with adults. However, a question arises regarding whether the child possesses the ability to initiate legal proceedings themselves.

[68] Voir ; arrêt du 15mai 1986 ; affaire Johnston ; rec ; 1986, p 1651 ; Aff. 222/86, Heylsen, rec,1987, p 4097.

Efforts to address this issue have considered advancements in children's rights, particularly at the international and European levels. There is a growing emphasis on the principle that children should have a say in decisions that directly concern them, regardless of whether it involves their parents or a judge. Various contemporary sources of children's rights explicitly recognize their right to participate in impactful decisions. For example, Article 12 of the CRC acknowledges their right to be involved in such decisions. Paragraph 2 of this article highlights the importance of allowing children to express their views in relevant judicial or administrative proceedings, either through direct participation or representation by a suitable organization, in accordance with procedural rules.

Considering subsection (1), this text does not limit the matters on which children should be consulted, although it only guarantees the right to be consulted for children capable of understanding. The determination of discernment capacity is not specified by any regulation; instead, it is left to the judge's discretion. However, it can be understood that this text aligns with Article 3 of the CRC, which prioritizes the best interests of the child.

Furthermore, the incapacity presumption for minors, aimed at protecting them from themselves and potential exploitation, is logically set aside when the need for such protection no longer exists, either because their fundamental rights have been terminated. In such cases, the child can bring the matter before the European Court of Human Rights. Alternatively, when faced with danger, the child can actively participate in their own protection by involving the judge or exercising their fundamental rights through the educational assistance procedure if they are capable of understanding.[69]

[69] A. Gouttenoire, Rep. Poc. Civ, V° Mineurs, N°18859

4. Critique of an International Justice on Child Abduction

Child abduction remains a concern for all states. To address this issue, common legislation has been established, such as the Hague Conventions of 1980 and 1996, as well as the Brussels II bis and Ter regulations. However, despite these efforts, the objective of achieving a consistent solution to the problem of child abduction has not been fully realized, as evidenced by the increasing number of abducted children worldwide. This suggests that there are existing gaps in the various international legal instruments designed to combat illicit child removal, indicating that a global solution to the issue of child abduction (4.1.) is yet to be found (4.2.).

4.1. The impossible global solution.

Given the significant cross-border displacement of children, courts may be overwhelmed with requests for immediate child return. Quantifying global lawsuits in this regard is comparable to navigating an endless ocean, and statistical data only offers a glimpse into reported cases of abducted or declared children, excluding unreported instances. This situation is worsened by the impracticality of seeking international jurisdiction (4.1.1.), compounded by the lack of consistency in international justice regarding illicit cross-border abductions (4.1.3.), and the inability of states to promptly facilitate the return of abducted children (4.1.2.).

4.1.1. The unrealism of recourse to an international jurisdiction in matters of child abduction:

The unrealistic nature of seeking resolution through an international court in cases of child abduction arises from two factors: (4.1.1.1.) the courts' ability to oppose the immediate return of the child, hindering the applicant's objective, and (4.1.1.2.) legal restrictions preventing authorities of the host State from ruling on custody rights.

4.1.1.1. The possibility given to the courts to oppose the immediate return of the child.

The main objective of the 1980 Hague Convention is to safeguard the well-being of children. When a child is wrongfully removed across borders, a concerned parent can request the prompt return of the child. However, the law empowers the courts handling the case to potentially contest the immediate return of the child, contradicting the guidelines outlined in Article 13(b) of

the Convention. This article asserts that a court must not deny the child's return if it is determined that the custody conditions do not pose any harm to the child**.**

4.1.1.2. Legal prohibitions on the authorities of the State of refuge to rule on the merits of custody rights.

Article 16 of the 1980 Hague Convention restricts the jurisdiction of judicial authorities in the State where the wrongfully removed child is located. According to this article: “after having been informed of the wrongful removal of a child or of his or her non-return under Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or retained shall not decide on the merits of the custody claim until it is established that the requirements of the present Convention for the return of the child have not been met, or until a reasonable period of time has elapsed without a request under the Convention having been made.”

In accordance with this normative provision, the authorities in the Contracting State where the abducted child is located have their substantive jurisdiction curtailed, confining their role exclusively to determining the child's immediate return. This provision is not only consistent with the Hague Convention but is also reflected in numerous other international legal instruments**.**[70]

However, there are some mitigations to these legal provisions that grant the authorities seized the power to rule on the merits of the case. This means the article does not prohibit the authorities of the child's State of origin from deciding on the merits of custody rights, as evidenced by abundant case law**.**[71]

4.1.1.3. Prohibition to consider a decision rendered after the illicit removal of the child:

Frequently, when a parent's child has been abducted and they seek immediate return, they file a legal action in the court of the child's habitual residence to pursue sole custody. The response to this request can be found in Article 17 of the Convention, provides that:

"The mere fact that a decision relating to custody has been rendered or is likely to be recognized in the requested State shall not justify a refusal to return the child under this Convention,

[70] Voir Art 10 du règlement de Bruxelles II bis ; dans le même sens Art 9 du règlement de Bruxelles II ter et Art 7 de la convention de la Haye de 1996.
[71] Cass. Civ 1ere, 9 Juill. 2008, n° 06-22.090 et 06-22-091 : juris Data n° 2008-044758 ; D. 2008, p 1998, note V : Ergéa ; Dr, famille 2008. Comm. 134, note L. Galichet ; D 2009, p 1564, P Courbe et F. Jault ; Gaz. Pal 10 juin 2009, p. 24 ;

but the judicial or administrative authorities of the requested State may take into consideration the reasons for such a decision which would fall within the scope of the application of the Convention."

The purpose of this prohibition is to prevent the immediate return of the child from being frustrated by a decision rendered in disregard of the provisions of Article 16 of the Convention.

4.1.2. Inability of States to organize the return of abducted children.

4.1.2.1. The principle of immediate return of the abducted child

i. The legal basis of the principle

This principle has been stated in the provisions of Articles 12, 13 and 18 of the Hague Convention as follows:

- Article 12 provides that: "Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment. Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child."

Subsequently, article 13 of the same agreement states that: "Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that:

- The person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

- There is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall consider the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

- Article 18 remind us that: "The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time." expressly stating that exceptions to the return of a minor do not prevail in the convention system.

ii. Meaning and scope of the principle.

The principle of the immediate return of the child lacks a precise definition, requiring an examination of various actions, deeds, and gestures of the involved parties to fully comprehend it. In fact, a descriptive definition is necessary to accurately identify and explain it. Therefore, the principle of the immediate return of the child entails an obligation placed on the parent who abducted the child, through an administrative or judicial decision, to return the unlawfully relocated child to their habitual residence. This allows the child to continue benefiting from custody alongside the requesting parent**.**

Once the child returns to their habitual residence, the custodial parent's rights are restored, while the abducting parent retains visitation rights. From a moral perspective, it is crucial to recognize the emotional well-being of both the parent and the unlawfully displaced child. This recognition guarantees that the child receives the essential care for their health, education, and nutrition, which is afforded through custodial rights**.**

4.1.2.2. Exceptions to the principle of immediate return

The collaboration between the Brussels II bis Regulation (b) and the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (a) facilitates the immediate return of an abducted child in cases of illegal child abduction.

i. The Hague Convention exceptions to immediate return.

In addition to what has been mentioned previously, the convention stipulates in its principle of immediate return that abducted minors should be returned to the place where they had their habitual residence before the unlawful abduction took place. However, the same convention also includes provisions for certain exceptions to this principle. According to the provisions of the Hague Convention. A total of six exceptions are recognized.[72]

A study of foreign case law has revealed its absurdity. Fortunately, pay close attention to the following exceptions. These exceptions are often triggered by the abducting parent and are very common. Refused by the seizing authorities.[73]

- The first exception applies when more than one year has passed since the child was integrated into the new environment following the offense.

Article 12 provides that where the application is made more than one year after the removal, the return of the child may not be ordered if the child has settled into the new environment.

The aim here is to find the best solution after an abduction, at least in the absence of any danger, to consider the circumstances in which the child adapts in a new environment over time.[74]

According to the Court of Appeal of Liège, the date of filing must be considered to calculate the one-year time limit, in other words, it would be the date of filing of the application for the opening of proceedings at the court registry.[75]

- The second exception is the non-exercise of custody rights at the time of the removal or non-return of the child article 13 paragraph 1-a

[72] Voy. Les articles 12, 13 et 20 de la Convention
[73] S. DEMARS, art. cit., p. 375 et M. FALLON et O. LHOEST, art. cit., p. 33.
[74] N. RUSCA-CLERC, « La Convention de La Haye sur l'enlèvement international dans l'intérêt des enfants », Fam. Pra., 2004 (1-26), p. 10
[75] Liège, 13 mai 2003, Rev. trim. dr. fam., 2004, p. 392 et Rev. Rég. dr., 2003, p. 186.

- The third exception is the acquisition of

Article 13 of the Convention provides an exception to the return of a child if it is later found that the victim's parent consented or agreed to the removal or retention. In other words, parents cannot claim the benefits of the Convention unless they object to the removal but must still prove their consent.[76]

In a complaint filed with the President of the Court of First Instance of Brussels, the father, who was the perpetrator of the kidnapping, claimed that the mother of the children had consented not to return the children.[77]

However, the court determined that the negotiations between the parents regarding the transfer of habitual residence could not be considered as acquiescence by the non-returning parent.

- The fourth exception is whether there is a serious risk that the return of the child will expose him or her to physical or psychological danger or otherwise place him or her in an intolerable situation (article 13, paragraph 1, b).

It is very often raised by the abducting parent. As an illustration, we can cite the Robertson case.[78]

In this case, the abducting mother claimed that her child had been groped by the father. The order to return to the country of habitual residence puts the child at serious risk of further abuse.

However, the Court noted this argument while noting that: "If the documents filed do not show that the reality of the facts presented has been thoroughly verified by the Texas authorities, this concern would certainly support the allegations." Nevertheless, an expert report prepared in Texas revealed. Colette shows no symptoms of child abuse. Her father does not exhibit the characteristics of a suspected or incestuous pedophile." Represented as a woman, she shows an inability to recognize and appreciate the value of her relationship with her child's father. In this example, the allegations must be followed by evidence for this exception to be considered.

[76] La preuve de l'acquiescement se fera par toutes voies de droit. En général, voy. R. BAILEYHARRIS, « Acquiescence under the Hague Convention on International Child Abduction », Law Quarterly Review, 1997, p. 529 e.s.
[77] Civ. Bruxelles (réf.), 17 avril 2003, J.T., 2003, p. 516 ; Rev. trim. dr. fam., 2003, p. 568 et Divorce, 2004, p. 135, note B. JACOBS.
[78] Liège, 13 mai 2003, Rev. trim. dr. fam., 2004, p. 392 et Rev. Rég. dr., 2003, p. 186.

- Fifth exception: the child objects to his or her return and has reached an age and maturity where it is appropriate to take this opinion into account (article 13, paragraph2).

This is an exception based on non-return decisions often followed by a denial or dismissal by the court. On this basis, the President of the Brussels Court ordered a hearing of the child in order to determine whether the child who opposed the return was mature enough to express his or her opinion.[79]

In this case, the child categorically refused to return to Italy. He enjoyed being in Belgium and did not want to be separated from his father. In Italy, he had no friends and felt abandoned by his mother. This reluctance was not only an expression of a preference for his father over his mother but also a detailed longing related to his past experiences in Italy and two years earlier in Belgium. The 13-year-old also provided precise and differentiated answers to the questions, demonstrating a certain level of maturity. Consequently, the judge agreed to consider his opinion and decided that the child should remain with the Belgian father.

In contrast, in the Robertson case, the little Collette was only 4 years old and unfortunately did not have the maturity, let alone the discernment, of the case in question. For this reason, the mother's request that her daughter Collette also be heard on the opposition to her return was irrational and was rejected by the court.[80]

in view of the behavior of the mother of little Colette, the court was shocked by the fact that a mother could ask that a 4-year-old child having neither the maturity, nor the knowledge of the case, nor even less a spirit of discernment could be heard before the court.

- Sixth exception: the return of the child is not permitted by the fundamental principles of the requested State on the protection of human rights and fundamental freedoms.

[79] Civ. Bruxelles, 6 mars 2003 (ordonne l'audition) et 27 mai 2003 (suites de l'audition), Rev. trim. dr. fam., 2003, p. 559.
[80] Liège, 13 mai 2003, Rev. trim. dr. fam., 2004, p. 392 et Rev. Rég. dr., 2003, p. 186.

According to certain authors, the exception outlined in Article 20 of the Convention is deemed unnecessary due to the existing safeguards regarding the risk children face. In the case of the child's expulsion from the State of Israel, the abducting father specifically cited this provision.[81]

ii. The provisions of the Brussels II bis Regulation concerning the exceptions to the principle of immediate return of abducted children.

It has been shown above that the Hague Convention of 1980 provides for immediate return based on article 13. Moreover, the Brussels II bis Regulation. has taken up this principle in a stricter way.[82]

In fact, when the request for return is based on the provisions of article 13 paragraph 1 b) of the 1980 Hague Convention, article 11 paragraph 4 of the Brussels II bis Regulation rejects it as a ground for non-return. However, the interpretation of this article shows us that it must be based on a principle of mutual trust. Indeed, all the member states of the European Union can guarantee the protection of children.[83]

Article 11.2 of the Regulation provides for the hearing of the child. It also appears in other parts of the regulation and is analyzed in a separate section. And secondly, the abducting parent must have the opportunity to be heard under Article 11.5 of the Brussels II bis Regulation.[84]

4.1.2.3. manifestations of the inability of states to organize the return of abducted children.

According to article 8 of the Hague Convention, the return of the abducted child must be established by the central authority or institutions in charge of the case when all the important elements are provided by the applicant. However, we can see that some of them are still unable to organize the return of the abducted minors. As we can see: In the case of Maire. C. Portugal.[85]

It was a child who was living in France with his father, who had temporary custody. Despite both parents being in the process of divorce, the mother seized the opportunity to take the child to Portugal. A few days later, the child's father contacted the French central authority to initiate an

[81] Civ. Bruxelles (réf.), 17 avril 2003, J.T., 2003, p. 516 ; Rev. trim. dr. fam., 2003, p. 568 et Divorce, 2004, p. 135, note B. JACOBS.
[82] H. FULCHIRON, op. Cit., p. 232 à 234.
[83] Guide pratique pour l'application du règlement Bruxelles II bis, Union européenne, 2015, p. 55 ; H. FULCHIRON, ibidem, p. 232 à 234 ; G. HIERNAUX et al., op. Cit., p. 798 et 799 ; F. COLLIENNE et S. PFEIFF, op. Cit., p. 370 ; P. MCELEAVY, op. Cit., p. 26
[84] H. FULCHIRON, ibidem., p. 235 et 236.
[85] (2003), VII Cour Eur. D.H. 315 [Maire].

immediate return procedure for the child, citing both the Hague Convention and the Franco-Portuguese Convention.[86]

The request for restitution of the child being introduced in Portugal before the court where the mother and the child resided, despite all the information provided by the father of the child, none of the judgments instituting the mother to return the child to the Portuguese central authority had been executed.

However, referring to the terms of article 11 of the 1980 Hague Convention, the court held that if the difficulties are due to the behavior of the parent with whom the minor is living, then the competent authorities should take significant measures to sanction the lack of cooperation of the latter. In the same logic, the court extends on the fact that the national legal orders do not allow the imposition of effective sanctions, and that each state party must exercise appropriate means and are obliged to respect the provisions of article 8 (ECHR) as well as the other instruments they have ratified.[87]

The European Court of Human Rights has also recently sanctioned states under the ECHR for, among other things, misinterpreting key provisions of the 1980 Hague Convention.[88]

Therefore, the failure to comply with the illustrious provisions of this article led the European Court to sanction the inability of states to establish the return of abducted minors at the end of this case.

4.1.3. Non-uniform justice in child abduction:

International child abduction can take many forms; its major consequence is the unilateral alteration of the relationship between the child and the parent who had custody rights. To remedy this situation, it would nevertheless be possible to entrust an international court with the responsibility of examining the dispute with a view to ordering the immediate return of the child, to rule on the merits of the dispute by considering, for example, the question of custody rights, and to take a decision applicable in all States without any limitation.

The lack of conceptual clarity or opacity further complicates the judge's task. In order to interpret and attribute meaning to these concepts, it is always necessary to refer the matter to the Court of Justice through a preliminary reference. Additionally, the freedom of states to choose

[86] Supra note 76. Voir la partie I.B.1, ci-dessus, pour un aperçu de la Convention.
[87] Maire, supra note 222 au para. 76.
[88] Monory v. Romania and Hungary (2005), 41 E.H.R.R. 771.

whether to ratify international conventions limits the geographic scope of application for these legal instruments and exempts non-ratifying states from international constraints.

Furthermore, the exclusive presence of certain institutions, such as the Court of Justice of the European Union, within Europe creates significant implications and obstacles for countries in the South, even if they are parties to the convention, when seeking to refer questions on international law to this jurisdiction for preliminary rulings. Upon closer examination, it becomes apparent that there is a notable scarcity of preliminary rulings sought from the courts of Southern states that have ratified the Hague Convention. These challenges also contribute to the reliance on criminal law in these states whenever there is a case of international child abduction.

The impossibility of a global solution is not the only critical observation to be made regarding the illicit cross-border movement of children. It is also essential to highlight the significant shortcomings present in the international legal instruments established to safeguard these children.

4.2. The shortcomings of international legal instruments

To effectively address international issues like child abduction or illicit cross-border movement, it is important to establish a common system of justice supported by strong international laws that all countries follow. Additionally, specialized international judicial institutions should be created to handle cases related to private international family law.

After reading various international legal instruments, it becomes apparent that the Hague Convention has certain shortcomings that should be acknowledged (4.2.1.). Furthermore, it is important to recognize that there are also tensions between the Brussels II Regulation and the Hague Convention (4.2.2.).

4.2.1. The shortcomings of the Hague convention.

The Hague Convention brings to light numerous shortcomings that warrant attention. First, it can be noted that the convention does not address a new type of dispute.[89]

Consequently, it is widely believed that this text was primarily drafted to deal with cases where non-custodial fathers take children from custodial mothers. Nowadays, 70% of abductors

[89] Norikura, op. Cit. (Note 45), p. 2.

who cross borders with children are mothers. This percentage is enough to show that there has been a change in the proportion of disputes, which can lead to significant inconvenience for the system.

The structure of the Hague Convention is criticized for not considering or mentioning the best interests of the child.

In addition, the right of custody in the convention is interpreted too broadly.[90] Afterward, it is emphasized that the return is ordered to the State in which the child was habitually resident at the time of removal or retention. However, the child's habitual residence should refer to the habitual residence of the parent on whom the child is most dependent, given the importance of that parent to the child's development.

Furthermore, the Convention does not restrict the state to which return is ordered and provides for the possibility of return to a state other than that in which the minor was habitually resident. For example, the state in which the requesting parent currently resides, although there is no interest of the child in such a return.

It is also crucial that the exceptions to the obligation of prompt or immediate return of the child are extremely limited.

A restrictive interpretation of Article 13 and a review of these exceptions based solely on documents and physical evidence used by States Parties presents a serious risk and would undermine the guarantee and protection of the rights of victims of domestic violence and their families.[91]

Finally, the effectiveness of the Hague Convention system is questioned, with concerns raised about the uncertain custody status of the child upon their return.[92]It is not clear that the number of child abduction cases in the parties has decreased. In addition, the different application of Article 13 by States Parties undermines the stability and effectiveness of the Hague Convention as an international system.[93] These criticisms are not the only ones leveled against the Hague Convention; the same applies to the incompatibilities between this norm and certain national instruments.

[90] « Le droit de garde comprend le droit portant sur les soins de la personne de l'enfant, et en particulier celui de décider de son lieu de résidence » (art. 5)
[91] Yoshida, op. cit. (note 46), p. 6; Hagu Shincho no Kai, op. cit. (note 46), p. 3; Norikura, op. cit. (note 45), p. 2.
[92] Yoshida, op. cit. (note 46), p. 6; Hagu Shincho no Kai, op. cit. (note 46), p. 6.
[93] Watanabe, op. Cit. (Note 27), 78.

4.2.1.1. The incompatibility between the Hague Convention and certain national legal instruments: the case of Japan.[94]

Opponents of the ratification of the Convention in Japan argued that the Hague Convention system is incompatible with the Japanese legal system. In domestic judicial practice, Japanese courts focus on the welfare of the child on a case-by-case basis. However, under the Hague Convention system, the best interests of the child could only be assessed exceptionally when interpreting Article 13.

This normative influence of international law has led to the argument that the ratification of the Hague Convention would seriously affect the law and judicial practice in Japan. From a judicial policy perspective, opponents argue that ratifying the Hague Convention would not benefit Japan due to the significant disparity between the number of child abductions from Japan and those to Japan. They also point out that most cases involving child abductions from Japan involve non-contracting States, while most cases involving abductions to Japan involve contracting States. Additionally, there are shortcomings between international legal instruments, particularly between the Brussels II bis Regulation and the Hague Convention regarding child protection.

4.2.2. Tensions between Brussels II bis and the Hague convention

The progress of the Brussels II bis Regulation and the Hague Convention, especially in terms of child protection, should not present significant difficulties when examining the content of these legal instruments. However, in current practice, the use of these norms can be disheartening as it becomes evident that the interaction between the Brussels II bis Regulation and the Hague Convention, regarding jurisdiction on child protection, is not well-organized. Despite situations where both instruments appear applicable, the lack of coordination is apparent.

However, this would create a conflict between EU law and international law if the child is habitually resident in an EU Member State, but the parents agree that their dispute regarding parental responsibility should be resolved in conjunction with the divorce proceedings in a non-EU State that is a party to the Hague Convention on the Protection of Children. Examples of such non-EU States include Albania, Montenegro, Russia, Serbia, Switzerland, or Turkey.

[94] YOKOMIZO Dai, « La Convention de La Haye sur les aspects civils de l'enlèvement d'enfants et le Japon », Revue critique de droit international privé, 2012/4 (N° 4), p. 799-813. DOI : 10.3917/rcdip.124.0799. URL : https://www.cairn.info/revue-critique-de-droit-international-prive-2012-4-page-799.htm.

Article 10 of the Hague Convention on the Protection of Children allows the extension of jurisdiction in certain circumstances. However, according to Article 8 of the Brussels II bis Regulation, the Member State where the child habitually resides has jurisdiction, and Article 61 states that this Regulation takes precedence in such cases. Consequently, the difficulty arises when the judge is compelled to decide between their obligation under EU law and international law.

Conclusion:

This work on the conflict of laws and the determination of jurisdictional competence in cases of child abductions illustrates the challenge of studying the phenomenon of child abduction in private international law. However, the difficulty of this subject is primarily due to limited access to specialized resources and inconsistent jurisprudence regarding the same legal issues. Additionally, the rarity of specialized institutions responsible for the jurisdictional framework of child abduction and the existence of multiple legal systems further contribute to the complexity.

The development of this work has highlighted two main areas for consideration: the ambiguity of determining the applicable law, and the complexity of determining jurisdictional competence, which courts are always faced with when dealing with child abduction cases.

As a result, Article 10 of the Hague Convention allows for a prorogation of jurisdiction in specific circumstances, while the Brussels II bis Regulation gives jurisdiction to the State of the child's habitual residence.

The criticisms formulated at the end of this work have enabled me to make a few recommendations to the international legislator, such as:

- The creation, in all member states of the International Convention on the Rights of the Child, of specialized courts to deal with cases of child abduction.
- The creation of specialized police bodies and the introduction of an obligation for member states to declare the number of children abducted over a given period.
- Reinforcing and monitoring measures put in place to combat child abduction.
- Punishing non-compliant individuals and member states who fail to ratify international conventions under the pretext of the principle of freedom they uphold.

Bibliography

Tables of authorities

Articles:

- DOMINCE " le droit international coutumier dans l'ordre juridique suisse, Mémoire de la faculté de droit de Genève n0 27.
- Doyen JEAN Carbonnier - Dalloz périodique 1960, p. 675. Cité par Verdier Pierre, Pour en finir avec l'intérêt de l'enfant, JDJ-RAJS no 280 - décembre 2008.
- DUBOUIS l'application du droit international coutumier par le juge français, 1972, Page75 ;
- FINKELHOR, David, Heather Hammer et Andrea J. Sedlak. "Enfants enlevés hors de la famille : National estimates and characteristics (NCJ196467)". Washington, DC : Office of Juvenile Justice & Delinquency (2002). P2
- Freeman, R., Freeman, G., Gérer les difficultés de contact : une approche axée sur l'enfant journal du droit des jeunes, 2004, vol.237, p.9
- Greif, G., A parental report on the long-term consequences for the children of abduction by the other parents, child, psychiatry, and human development 2000, vol. 31(1), page 70.
- Greif, G.L, Hegar, R.L, parents qui enlèvent. A qualitative study with implications for practice. Révélation familiale 1994, page 283.
- Goldstein, Freud, Solnit, " Dans l'intérêt de l'enfant et Avant d'invoquer l'intérêt de l'enfant ", traduit et présenté par Laurent Séailles, édition ESF 1983.
- JACQUES Chevalier dans l'Etat post moderne, LGDJ 2008 : l'ordre juridique symbolise l'ordre social indiquant à tous les membres de la société qu'ils font partie d'un ensemble cohérent, rationnel dans lequel chacun a sa place, dispose d'un statut
- LEQUETTE, Y., 1991. Définition de l'enlèvement international d'enfant et du risque grave couru par l'enfant. Revue Critique de Droit International Privé, (02), p.407
- La preuve de l'acquiescement se fera par toutes voies de droit. En général, voy. R. BAILEYHARRIS, " Acquiescence under the Hague Convention on International Child Abduction " Law Quarterly Review, 1997, p. 529 e.s.

- PATOUT, Etienne. ROSTOVTSEVA, Natalia, vladimirona. L'enlèvement d'enfants : perspectives européenne et russe. Revue internationale de droit compare / année 2015/67-2/pp.499-519 accessible à l'adresse suivante. Perse.fr/docridc-0035-3337-2015-num-67-2-20513.
- PICHONNAZ P., article cité, p.163 (2.1)
- Maire, supra note 222 au para. 76.
- N. RUSCA-CLERC, " La Convention de La Haye sur l'enlèvement international dans l'intérêt des enfants ", Fam. Pra., 2004 (1-26), p. 10.
- S. DEMARS, art. cité, p. 375 et M. FALLON et O. LHOEST, art. cité, p. 33.
- THOMAS Dumourtie, revue du droit de l'homme dans le site https://DOI.Org-10.4000 revue dh 10189.
- VERDIER Pierre, Pour en finir avec l'intérêt de l'enfant, JDJ-RAJS no 280 - décembre 2008. Page 38

Case Law :

- Affaire C- 523/07, A, ECLI ; EU : C : 2009 : 225 dans son arrêt du 22 décembre 2010 ; affaire C- 497/IO PPU, ECLI- EU : C 2014 :2268
- Arrêt du 9octobre 2014, C- 376/14 PPU, Cc, M ECLI : ECLI :EU : C : 2014 : 2268
- Conclusions dans l'affaire Association El. Hamida, CE, 5février, 1954, Rec. P77.
- Liège, 13 mai 2003, Rev. trim. dr. fam., 2004, p. 392 et Rev. Rég. dr., 2003, p. 186.
- Liège, 13 mai 2003, Rev. trim. dr. fam., 2004, p. 392 et Rev. Rég. dr., 2003, p. 186.
- Monory c. Roumanie et Hongrie (2005), 41 E.H.R.R. 771
- (2003), VII Cour EUR. D.H. 315 [Maire].

Civil Code :

- Art .371-1 French CC. PICAL,9/2014 N 322,29-32

Conventions :

- Article 1er de la convention internationale du droit des enfants.
- Article 3 al1 de la convention internationale du droit des enfants qui énonce le principe : " dans toutes les Décisions qui concernent des enfants, qu'elles soient le

fait des institutions publiques ou privées de protection Sociale, des tribunaux, des autorités administratives ou des organes législatifs, l'intérêt supérieur de l'enfant doit Être une considération primordiale. "

- Art 7 de la convention de la Haye de 1996.
- Articles 12, 13 et 20 de la Convention.
- Article 49-c de la convention de 1976 sur la coopération entre le Tchad et la France en matière judiciaire.
- CEDH, 5e section, 26 juin 2014, n° 65941/11, Labassee c/ France : https://hudoc.echr.coe.int/eng# {%22itemid%22 : [%22001-145180%22]} ; CEDH, 5e section, 26 juin 2014, n° 65192/11, Mennesson c/ France : https://hudoc.echr.coe.int/eng# {%22itemid%22 : [%22001-145179%22]}.
- CEDH, 28 juin 2007, n° 76240/01, Wagner et J.M.W.L c/ Luxembourg : La Cour a estimé que la décision de refus d'exequatur d'une adoption plénière effectuée à l'étranger par les juridictions nationales se fondant sur les règles de conflit de lois nationales " omet de tenir compte de la réalité sociale de la situation ". En n'admettant pas l'existence juridique des liens familiaux créés par l'adoption, les juridictions nationales ont fait subir à l'adoptant et l'adopté des inconvénients dans leur vie quotidienne. "L'enfant ne se voit pas accorder une protection juridique rendant possible son intégration complète dans la famille adoptive ". Or l'intérêt supérieur de l'enfant doit primer. CEDH, 16 déc. 2011, n° 115297/09, Kanagaratnam c/ Belgique : Compte tenu de " la situation d'extrême vulnérabilité de l'enfant ", la Cour a, par ailleurs, condamné la Belgique s'agissant de la détention d'une mère et de ses enfants dans " un centre fermé pour illégaux " en faisant expressément référence à l'intérêt supérieur de l'enfant " tel qu'il est consacré par l'article 3 de la convention des Nations Unies relative aux droits de l'enfant qui doit prévaloir y compris dans le contexte d'une expulsion ".
- CEDH, série A, 27 oct. 1994, n° 297-C, Mutatis mutandis, Kroon et autres c/ Pays-Bas, § 32 ; CEDH, 1re sect., 3 mai 2011, n° 56753/08, Négrepontis-Giannisis c/ Grèce.
- La convention internationale des droits de l'enfant (CIDE) dite aussi convention de New York, adoptée par l'Organisation des Nations unies le 20 novembre 1989 et

entrée en vigueur, en France, le 2 septembre 1990, dans la laquelle la notion d'intérêt supérieur de l'enfant apparaît sept fois dans six articles différents (les articles 3-1, 9-1, 18, 21, 37 et 40) - l'article 3-1 pose d'ailleurs cette notion comme un des principes fondamentaux sur lesquels s'appuie la convention : " l'intérêt supérieur de l'enfant doit être une considération primordiale " ; la convention de La Haye du 29 mai 1993 sur la protection des enfants et la coopération en matière d'adoption internationale ; la convention européenne sur l'exercice des droits de l'enfant du 25 janvier 1996 (bien qu'elle ait été signée le 4 juin 1996 par la France, cette convention, qui comporte sept références à l'intérêt supérieur de l'enfant, n'a été ratifiée par la France que le 1er août 2007) ; la charte des droits fondamentaux de l'Union européenne du 7 décembre 2000, dont l'article 24, alinéa 2, énonce : " Dans tous les actes relatifs aux enfants, qu'ils soient accomplis par des autorités publiques ou des institutions privées, l'intérêt supérieur de l'enfant doit être une considération primordiale " ; la résolution " Vers une stratégie européenne sur les droits de l'enfant ", adoptée par le Parlement européen le 16 janvier 2008, qui souligne que " toute stratégie sur les droits de l'enfant devrait se fonder sur les valeurs et les quatre principes fondamentaux inscrits dans la Convention des Nations Unies relative aux droits de l'enfant : protection contre toutes les formes de discrimination, intérêt supérieur de l'enfant comme considération primordiale, droit à la vie et au développement et droit d'exprimer une opinion, qui soit prise en considération, sur toute question ou dans toute procédure l'intéressant "

- "Le droit de garde comprend le droit portant sur les soins de la personne de l'enfant, et en particulier celui de décider de son lieu de résidence " (art. 5)
- Qu'elles soient le fait des institutions publiques ou privées de protection sociale, des tribunaux, des autorités administratives ou des organes législatifs ", comme le précise l'article 3 de la CIDE.
- Supra note 76. Voir la partie I.B.1, ci-dessus, pour un aperçu de la Convention.

Legal regulations :

- Décision du Défenseur des droits n° 2019-016, du 22 janvier 2019 : https://juridique.defenseurdesdroits.fr/doc_num.php ?explnum_id=18789

- UNHCR, Directives du HCR sur la Détermination Formelle de l'Intérêt Supérieur de l'Enfant Communiqué Provisoire, mai 2006. Page 8
- Comité des droits de l'enfant des Nations Unies, observation générale n° 10, CRC/C/GC/10, 25 avr. 2007, p. 5.
- Haut-Commissariat des Nations unies au droit de l'homme 1989.
- Voir le principe directeur du HCR P108.

Sources :

- Agnès Bun, «Fear of terrorist risk, a source of profit for insurers » [archive], on Slate.fr, 15 June 2011.
- BARRETO Juan « Venezuela, Caracas, the most dangerous capital in the world » [archive], on RFI.fr, 28 December 2012.
- (in) BRIGGS, Rachel " The Kidnapping Business " [archive], sur Guild of Security Controllers Newsletter, Novembre 2001
- (in) « Colombia: Kidnap capital of the world » [archive], bbc.co.uk.
- EDEL " intérêt supérieur de l'enfant une nouvelle maxime d'interprétation. "
- FIGARO & AFP, « The murder of a girl for 130 euros scandalizes India» [archive], at the Figaro.fr, 7 June 2019 (accessed 8 June 2019).
- Larguier, (J), Procédure civile ; droit judiciaire privé, 16ème éd, Dalloz, 1998
- PRAKASK, Pierre « India: India: crimes without punishment in Bihar» [archive], on la liberation.fr, 13 February 2004.
- H. FULCHIRON, op. Cit. p. 232 à 234
- H. FULCHIRON, ibidem, p. 235 et 236
- JUAN Martin Soler, "Colombia: kidnappings up 20% since the beginning of the year" [archive], on Amerique24.com, 4 July 2011.
- Norikura, op. cit. (note 45), p. 2.
- The French are the most kidnapped in the world after the Chinese" [archive], on 20 minutes.fr, 20 October 2009.
- VERDIER Pierre, Pour en finir avec l'intérêt de l'enfant, JDJ-RAJS no 280 - décembre 2008.
- Watanabe, op. cit. (note 27), 78.

- YANSANE, Sidy « Nigeria: how kidnapping has become an extremely profitable business for criminals » [archive], on Jeune Afrique.com,19 June 2017.
- Yoshida, op. cit. (note 46), p. 6; Hagu Shincho no Kai, op. cit. (note 46), p. 3; Norikura, op. cit. (note 45), p. 2.
- Yoshida, op. cit. (note 46), p. 6; Hagu Shincho no Kai, op. cit. (note 46), p. 6.

Regulations :

- Art 10 du règlement de Bruxelles II bis ; dans le même sens Art 9 du règlement de Bruxelles IIter
- Brussels regulation II Bis: Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000
- Brussels regulation II Ter: Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast).
- (2003), VII Cour Eur. D.H. 315 [Maire].

Jurispredence :

- Arrêt Pelassa : civ, 19octobre 1959 et Scheffel : civ, 30 octobre 1962.
- Ibid. (1959-1962)
- Arrêt procureur contre TADIC, arrêt des activités militaires et paramilitaire au Nicaragua ; - arrêt plateau continental de la mer du Nord, à faire du droit de passage en territoire indien
- Civ. Bruxelles, 6 mars 2003 (ordonne l'audition) et 27 mai 2003 (suites de l'audition), Rev. trim. dr. fam., 2003, p. 559.
- Cass. 1re civ., 6 avr. 2011, n° 10-19053 et Cass. 1re civ., 6 avr. 2011, n° 09-17130 : D. 2011, p. 1064, obs. Labbée X.
- Civ. Bruxelles (réf.), 17 avril 2003, J.T., 2003, p. 516 ; Rev. trim. dr. fam., 2003, p. 568 et Divorce, 2004, p. 135, note B. JACOBS.

- Cass. Civ 1ere, 9 Juill. 2008, n° 06-22.090 et 06-22-091 : juris Data n° 2008-044758 ; D. 2008, p 1998, note V : Ergéa ; Dr, famille 2008. Comm. 134, note L. Galichet ; D 2009, p 1564, P Courbe et F. Jault ; Gaz. Pal 10 juin 2009, p. 24 ;
- Chambre sociale, 10 juillet 2013, pourvoi N° 12-17196 ; civ. 1ère, 10 juillet 2013, pourvoi N° 12- 23109.
- Cass. 1re civ., 13 sept. 2013, n° 12-30138 ; Cass. 1re civ., 13 sept. 2013, n° 12-18315 : AJ fam. 2013, p. 579, obs. Chénedé F., Haftel J.et Domingo M.
- Ibid. 579
- Civ 1ere, 30 octobre, 1962.
- Voir cass ; civ 1ère 14 décembre 2005, Bull ; 2005, pp 425-426.
- Gouttenoire, Rep. Poc. Civ, V° Mineurs, N°18859
- Le rôle de la Cour de cassation belge à l'égard de la coutume internationale
- Section 3(1) de la loi sur les enfants de 1989.

Online-sources :

- https://www.demarches.interieur.gouv.fr/particuliers/enlevement-parental-non-representation-enfant.
- https://www.lapresse.ca/international/afrique/2021-07-26/rapt-d-eleves-au-nigeria/le-porteur-d-une-rancon-lui-meme-enleve.php.
- La liste des Etats qui ont ratifié la convention de la Haye se trouve dans le site www.hcch.net.

Website :

- BERTHY-CAILLEUX, Ariane. Le droit de l'enfant d'exprimer librement son opinion sur toute question l'intéressant - article 12 alinéa 1 de la CIDE - va-t-il devenir caduc ? Dans Journal du droit des jeunes 2009/7 (N° 287), pages 22 à 24 DOI : 10.3917/jdj.287.0022. URL: https://www.cairn.info/revue-journal-du-droit-des-jeunes-2009-7-page-22.htm.
- Cadict (L), droit judiciaire privé, 2ème édition, Paris, Litec 1998. Larguier, (J), Procédure civile ; droit judiciaire privé, 16ème éd, Dalloz, 1998.

https://ssl.editionsthemis.com/livres/livre-4858-droit-judiciaire-prive-2e-edition.html.

- Catto M.-X., " La gestation pour autrui : d'un problème d'ordre public au conflit d'intérêts ? ", in séminaire Droit des femmes face à l'essor de l'intérêt de l'enfant, La Revue des Droits de l'Homme, n° 3, juin 2013 : http://revdh.files.wordpress.com/2013/06/7seminairecatto1.pdf.
- CASTELLARIN, Emanuel. Le principe de non-discrimination. 2017.p171-196 accessible à https://www.researchgate.net/publication/340649652.
- Guide pratique pour l'application du règlement Bruxelles II bis, Union européenne, 2015, p. 55 ; H. FULCHIRON, ibidem, p. 232 à 234 ; G. HIERNAUX et al, op. Cit, p. 798 et 799 ; F. COLLIENNE et S. PFEIFF, op. Cit, p. 370 ; P. MCELEAVY, op. Cit, p. 26 https://matheo.uliege.be/bitstream/2268.2/12007/4/TFEKRZANIKSaskiaS161054.pdf
- Hauser J., RTD civ. 2007, p. 557 note sous TGI Lille, 22 mars 2007 - Mirkovic A., D. 2012, p. 878, note sous CA Rennes, 21 févr. 2012, n° 11/02758 : Fabre-Magnan M., La gestation pour autrui. Fictions et réalité, 2013, Fayard, p. 67 https://www.actu-juridique.fr/sante-droit-medical/bioethique/creation-du-statut-de-parent-legal-dans-linteret-superieur-de-lenfant-issu-dune-gpa/.
- JACQUES CHEVALIER, l'Etat post moderne, LGDJ, 2008. https://www.lgdj.fr/l-etat-post-moderne-9782275057637.html.
- YOKOMIZO Dai, " La Convention de La Haye sur les aspects civils de l'enlèvement d'enfants et le Japon ", Revue critique de droit international privé, 2012/4 (N° 4), p. 799-813. DOI: 10.3917/rcdip.124.0799. URL: https://www.cairn.info/revue-critique-de-droit-international-prive-2012-4-page-799.htm.

Newspapers :

- AFP, « The kidnapping business: flourishing and mostly unpunished in Venezuela » [archive], on 20 minutes.fr, 11 November 2011.
- Jean CARBONNIER, droit civil, 21e Edition, Thom2, la famille, l'enfant, le couple. PUF,2002, P 85

- (in) "55,000 children kidnapped in 2016 in India: Report" [archive], at The Times of India.com, 8 July 2018 (accessed 8 June 2019).
- PICAL, 9/2014 N 322,29-32 Rapport national : France, partie B, question 7.

Abstract

In this master's thesis, the conflict of laws and the determination of jurisdictional competence in cases involving the abduction of children of foreign nationality are examined. This work addresses two questions: The determination or choice of the legal instrument to be used by the judge in examining the situation, and the determination of the courts that have jurisdiction in the matter. To address these concerns, the analysis focused on the ambiguity surrounding the determination of the legal instrument for foreign child abduction cases, as well as the complexity of the legal framework in this field. Furthermore, this work presents certain criticisms related to the functioning of international judicial institutions and others related to the inconsistencies of the various applicable standards, which have not been unanimously accepted today despite the existence of ratified international conventions. For this reason, emphasis has been placed on certain principles, such as: The best interests of the child and the principle of immediate return of the child, as well as certain criteria for determining jurisdictional competence in abduction cases. Through this understanding, it became clear that comprehending this subject is challenging and that not all states have ratified the 1996 Hague Convention, leading to various consequences. Based on this realization, I was able to formulate several recommendations: The creation, in all member states of the International Convention on the Rights of the Child, of specialized courts to deal with cases of child abduction, the creation of specialized police bodies and the introduction of an obligation for member states to declare the number of children abducted over a given period; Reinforcing and monitoring measures put in place to combat child abduction and punishing member states who fail to ratify international conventions under the pretext of the principle of freedom they uphold.

Abstract

V magisterské práci se zabívám právem kolizních norem a určení soudní příslušnosti ve věcech únosů dětí cizí státní příslušnosti. Tato práce se zabývá dvěma otázkami: Určení nebo volba právního nástroje, který má soudce použít při posuzování situace, a určení soudů, které jsou v dané věci příslušné. Za účelem řešení těchto otázek se analýza zaměřila na nejednoznačnost týkající se určení právního nástroje pro případy únosů dětí do ciziny, jakož i na složitost právního rámce v této oblasti. Dále tato práce předkládá některé kritické připomínky týkající se fungování mezinárodních soudních institucí a další, které se týkají nejednotnosti různých platných norem, které nejsou dodnes jednomyslně přijímány, a to i přes existenci ratifikovaných mezinárodních úmluv. Z tohoto důvodu byl kladen důraz na určité zásady, jako např.: nejlepší zájem dítěte a zásada okamžitého navrácení dítěte, jakož i určitá kritéria pro určení příslušnosti v případech únosů. Díky tomuto poznání se ukázalo, že pochopení tohoto tématu je náročné a že ne všechny státy ratifikovaly Haagskou úmluvu z roku 1996, což vede k různým důsledkům. Na základě tohoto poznání jsem byla schopna formulovat několik doporučení: ve všech členských státech Mezinárodní úmluvy o právech dítěte zřídit specializované soudy, které by se zabývaly případy únosů dětí, vytvořit specializované policejní orgány a zavést povinnost členských států oznamovat počet unesených dětí za určité období; posílit a monitorovat opatření zavedená za účelem boje proti únosům dětí a trestat členské státy, které neratifikují mezinárodní úmluvy pod záminkou zásady svobody, kterou prosazují.

Keys words

Abduction of child, habitual residence, parental responsibility, conflict of law, jurisdiction competence

Klíčová slova

Únos dítěte, trvalé bydliště, rodičovská zodpovědnost, rozpor s právem, příslušnost soudu