The European Court of Human Rights and the Best Interests of the Child in the Recent Case Law on International Child Abduction

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1 Introduction: The Relevant Conventions

The problem of child custody and of the related question of international child abduction has assumed, in the last few decades, ever increasing proportions, above all due the ever growing formation of multiethnic families and the increase in marriages between people of different nationalities.

Over the years combating international children abduction has been tackled with great efforts and commitment in different fields: national, international and, in the last few years, also European. The results of these efforts have been the adoption of some different legislative instruments, which, although they have a different juridical basis, have the same aim, i.e. preventing and combating the illicit transfer and abduction of children from one country to another, so as to promote cooperation among States and to facilitate that a child wrongfully removed is returned to the State in which he was formerly habitually resident.

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Two specific international conventions[1] have so been concluded: the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children (Luxembourg, 20 May 1980; hereinafter Luxembourg Convention),[2] adopted in the framework of the Council of Europe, and the Convention on the Civil Aspects of International Child Abduction (the Hague, 25 October 1980; hereinafter the Hague Convention),[3] concluded under the auspices of the Hague Conference on Private International Law.[4] The Luxembourg Convention and the Hague Convention have the same purpose: to deter international child abduction and to secure that children wrongfully removed are returned to their home country. Although they are both founded on the well-recognised general principles that decisions about the care and welfare of children are best made in the country with which they have the closest connection, and that orders made in one State should be recognised and enforced in another, the two international instruments have different ways of achieving those goals.[5] While the Luxembourg Convention is rarely used in abduction cases where a child's return is

[1] Other international instruments contain references to the international abduction of children. The United Nations Convention on the Rights of the Child (New York, 20 November 1989; hereinafter UNCRC), entered into force on 2 September 1990 (192 member States), which can be considered the most important instrument in the system for the protection of minors, being a comprehensive binding agreement which incorporates civil and political rights, social, economic and cultural rights and protection rights, has, among others, also the objective of preventing the international abduction of minors. It requires States Parties to "take measures to combat the illicit transfer and non-return of children abroad" (Article 11.1). To this end, it urges States Parties to promote the conclusion of bilateral or multilateral agreements or accession to existing agreements (Article 11.2). Moreover, we have to mention the Council of Europe's European Convention on the Exercise on Children's Rights (Strasbourg, 25 January 1996), entered into force on 1 July 2000. Italy, while ratifying the Convention, did not include proceedings concerning the international abduction of children among those falling within the field of application of the Convention (see Fioravanti 2011, p. 3656 ff.). A reference to the international abduction of children is also made in the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (the Hague, 19 October 1996), entered into force on 1st January 2002, but not yet in force in Italy (see Jametti Greiner 2009, p. 489 ff.).

[2] Entered into force on 1st Sepember 1983. See Distefano 2011c, p. 3625 ff. also for further references.

[3] Entered into force on 1st December 1983. See Distefano 2011a, p. 3633 ff. also for further references.

[4] Both these instruments have been widely ratified, accepted or approved (see the official sites of the Hague Conference, www.hcch.net, and of the Council of Europe, www.coe.int) and are frequently applied in practice, above all the one signed at The Hague, with currently 82 Contracting States.

[5] In particular, the Luxembourg Convention works on the principle of the mutual recognition and enforcement of orders made in Contracting States: accordingly, there must be in existence an order of a court or other authority with the necessary jurisdiction in a Convention Country, which can be recognised and enforced in the receiving State. Operating only where an order already exists, it has a more frequent application in the enforcement of access orders. Actually, after the entry into force of the European Regulation n. 2201/2003 of 27 November 2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility (see infra, n. 9), the Luxembourg Convention mostly only

sought because it only operates where an order already exists, the Hague Convention is in fact the most effective and successful Convention because it has contributed to resolving thousands of abduction cases and has served as a deterrent to many others through the clarity of its message, which is that abduction is harmful to children, who have a right of contact with both parents, and through the simplicity of its central remedy, i.e. the return order.[6] The Hague Convention has the object of securing the prompt return of children wrongfully removed to or retained in any Contracting State (Article 1.a), and therefore obliges Contracting States to take all appropriate measures to use the most expeditious procedures available (Article 2).[7] The Convention is based on a presumption that, save in exceptional circumstances, the wrongful removal or retention of a child across international boundaries is not in the interests of the child, and that the return of the child to the State of his habitual residence will promote his interests by vindicating the right of the child to have contact with both parents, by supporting continuity in the child's life, and by ensuring that any determination of the issue of custody or access is made by the most appropriate court having regard to the likely availability of relevant evidence. The principle of a prompt return also serves as a deterrent to abductions and wrongful removals, and this is seen by the Convention to be in the interests of children generally. The return order is designed to restore, as quickly as possible, the *status quo* which existed before the wrongful removal, and to deprive the wrongful parent of any advantage that might otherwise be gained by the abduction.

Although under the Hague Convention courts are required to order the return of a child wrongfully removed from, or prevented from returning to, his country of habitual residence, there are a number of grounds on which a return order can be refused. The Hague Convention in fact contains some exceptions to the general obligation to return the child, which are limited and based on a strict interpretation, in order not to defeat the objectives of the entire system.

These grounds include the court being satisfied that returning the child would expose him to a grave risk of physical or psychological harm (which is the most commonly invoked exception), or otherwise place the child in an intolerable situation, the child objecting to being returned and being sufficiently old and mature enough to have his views taken into account. The court may also refuse to return a

(Footnote 5 continued)
operates with respect to countries which are not members of the European Union or with respect to certain orders which predate the Regulation.

[6] Significant post-Convention work has also be carried out on the Hague Convention: a special Commission for the Monitoring and Review of the Operation of the 1980 Abduction Convention has been set up and meets every few years to discuss developments. In addition, the Hague Conference has produced several Guides to Good Practice for the implementation and operation of the Convention, and provides other resources such as a database of case law (INCADAT) and of statistics (INCASTAT) relating to international child abduction.

[7] A wrongful removal or retention is defined as being in breach of rights of custody which are actually exercised by a person, an institution or any other body under the law of the State in which the child was habitually resident immediately before the removal or retention (Article 3).

child if the applicant was not actually exercising rights of custody at the time of removal or consented to or subsequently acquiesced in the removal or retention (Article 13). A discretion not to return a child is also provided if the application was made a year after the removal or retention and the child is now settled in his new environment (Article 12). Finally, the return may be refused if this would not to be permitted by the fundamental rules relating to the protection of human rights and fundamental freedoms of the State addressed (Article 20).

In such a way, the Convention recognises the need for certain exceptions to the general obligations assumed by States to secure the prompt return of children who have been unlawfully removed or retained. As Elisa Perez Vera underlined in her Explanatory Report on the drafting of the Convention,[8] "[f]or the most part, these exceptions are only concrete illustrations of the overly vague principle whereby the interests of the child are stated to be the guiding criterion in this area" and "paragraphs 1 b and 2 of the said article 13 contain exceptions which clearly derive from a consideration of the interests of the child".[9]

[8] Perez Vera 1980, paras 25 and 29.

[9] From 1 March 2005 onwards, the Luxembourg Convention and the Hague Convention have been largely superseded by the European Regulation n. 2201/2003 of 27 November 2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility (Brussels II Revised), in Official Journal L 338 (23 December 2003). It has been in force from 1 August 2004 and has been applicable from 1 March 2005 (for further references see Trombetta Panigadi 2011, p. 3487). The Regulation, in the relations between Member States of the European Union, except Denmark, takes precedence over both conventions "in so far as they concern matters governed by this Regulation" under Article 60. As para 17 of the Preamble to the Regulation explains, in cases of wrongful removal or retention of a child, the return of the child should be obtained without delay, and to this end the Hague Convention would continue to apply as complemented by the provisions of the Regulation, in particular Article 11. So, the Regulation, laying down rules on child abduction, reorganizes the impact of the Hague Convention: when applying Articles 12 and 13 of the Hague Convention, it provides greater emphasis than the Hague Convention to hearing the views of the child provided this is appropriate having regard to his age and maturity, so creating an effective presumption in favour of at least ascertaining the views of the child. It also requires that the left behind parent be given an opportunity to be heard before a decision not to return a child is made. Moreover, the Regulation narrows the grounds on which an order refusing to return a child can be made. The courts of the EU country to which the child has been abducted can only refuse to return the child if there is a serious risk that the return would expose the child to physical or psychological harm, under Article 13.b of the Hague Convention. However, the court cannot refuse to return a child on the basis of Article 13.b and, therefore, must order the child's return if it is established that adequate arrangements have been made to ensure the protection of the child after his return. One of the most significant innovations introduced by Article 11.4, with respect to the Hague Convention, is in fact the obligation for judges who refuse to return the child to demonstrate that adequate measures to ensure the protection of the child have been made in his State of origin. Such a norm has been introduced to discourage an improper use of Article 13.b, obliging the court which has to rule on the abduction to further reflect upon the possible existence of measures to consent to the return of the child, although there may be inherent risks involved.

Moreover, where a court refuses to order the return of a child under Article 13, the courts in the country of the child's habitual residence are able to reconsider and, if appropriate, to override that decision: see Article 11.6. A decision to override a 'non-return' order under Article 13 of the

2 The Importance of the Hague Convention in the Case Law of the European Court of Human Rights

The European Court of Human Rights (hereinafter European Court) has increasingly dealt with the right to family life in cases of international child abduction, thereby interpreting Article 8 of the European Convention on Human Rights (hereinafter ECHR)[10] in the light of the international instruments in force, especially the Hague Convention.

In its case law, the European Court has for years dealt with (and taken into consideration) the strict rules established in the Hague Convention, with the purpose of ascertaining whether, in the case of child abduction, the behaviour of a State contrasted with the principle of the prohibition of interference in private and family life as contained in Article 8 of the ECHR. The European Court has also dealt with cases where national authorities have failed to take all adequate and effective measures to enforce a return order made under the Hague Convention, holding that such a failure is a breach of the right to family life of the applicants.[11]

The European Court has generally stated that once national authorities have verified that a child has been wrongfully removed, national judges are bound to make effective and adequate efforts to enforce the applicant's right to the return of the child and to take necessary and adequate steps to facilitate the execution order. A failure or a delay in enforcing such an order constitutes a breach by the State of the applicant's right to family life and, therefore, a violation of Article 8 of the ECHR: this means that each contracting Party to the Hague Convention (and each EU Member State), "must equip itself with an adequate and sufficient legal arsenal to ensure compliance with the positive obligations imposed on it by Article 8 of the Convention and the other international agreements it has chosen to ratify".[12]

Therefore, in many cases the European Court has decided that a failure to enforce a return under the Hague Convention constitutes a violation of Article 8 of

(Footnote 9 continued)
Convention is enforceable under Article 42 (without any defence being available), provided that (a) the child was given the opportunity to be heard, (b) the parties were given an opportunity to be heard and (c) the court having the final say has taken into account the reasons given by the original court in refusing to order the return of the child under Article 13.

[10] Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950), entered into force on 3 September 1953, as amended by Protocol No. 11 (Strasbourg, 11 May 1994), entered into force on 1 November 1998 and Protocol No. 14 (Strasbourg, 13 May 2004), entered into force on 1 June 2010.

[11] See, among others, ECtHR: Ignaccolo-Zenide v. Romania, 31679/96, Judgment (25 January 2000); Iglesias Gil and A.U.I. v. Spain, 56673/00, Judgment (29 April 2003); Maire v. Portugal, 48206/99, Judgment (26 June 2003); P.P. v. Poland, 8677/03, Judgment (8 January 2008). For an in-depth analysis of some of this case law see Beaumont 2009a, p. 13 ff.; Beaumont 2009b, p. 78 ff.; Di Chio 2009, p. 101 ff.

[12] See Maire, supra n. 11, para 76.

the ECHR.[13] In *P.P.* v. *Poland*, for instance, the European Court effectively summarised and crystallised the general principles that it has developed in applying Article 8 of the ECHR. The Court reiterated that the essential object of Article 8 is to protect the individual against arbitrary action by public authorities. There are, in addition, positive obligations inherent in effective respect for family life. Article 8 contains both negative and positive requirements: in relation to a violation under the Hague Convention, this is usually where the State has failed to take the necessary positive requirements to ensure that the right to family life is protected. In relation to the State's obligation to take positive measures, the Court has repeatedly held that Article 8 includes a parent's right to take measures with a view to his being reunited with his child and an obligation on the part of national authorities to facilitate such a reunion. In cases concerning the enforcement of decisions within the sphere of family law, the Court has repeatedly held that what is decisive is whether the national authorities have taken all necessary steps to facilitate the execution (as can reasonably be demanded in the special circumstances of each case). In cases of this kind, the adequacy of a measure is to be judged by the swiftness of its implementation, as the passage of time can have irremediable consequences for relations between the child and the parent who does not live with him or her. Lastly, the Court underlined that the Hague Convention must be applied in accordance with the principles of international law, in particular with those relating to the international protection of human rights: consequently, the Court considers that the positive obligations that Article 8 places on Contracting States must be interpreted in the light of the Hague Convention, all the more so where the respondent State is also a party to that instrument.

3 The Best Interests of the Child in the Most Recent Case Law of the European Court

As already pointed out, the Hague Convention operates as a jurisdictional mechanism for cooperation between the judicial and administrative branches of the States Parties in order to promote the swift return of a child wrongfully taken from his place of habitual residence. This mechanism is based on the strict application of procedural norms which restore the *status quo ante* the removal through the prompt return of the child to his place of habitual residence, considering as a general presumption that the prompt return of a removed child objectively corresponds to the best interests of the child.[14]

[13] See supra n. 11.

[14] Marchegiani 2011, p. 988; Sthoeger 2011, p. 513 ff. This can be discerned both from the travaux préparatoires and from the Explanatory Report by Perez Vera, 1980, paras 20–26, especially para 24.

In the operative clauses of the Hague Convention, there are no explicit references to the criterion of the best interests of the child. However, the preamble states that it seeks "to protect children internationally from the harmful effects of their wrongful removal or retention" and that the parties are "firmly convinced that the interests of children are of paramount importance in matters relating to their custody". As Elisa Perez Vera concludes in her Explanatory Report on the drafting of the Convention "it is thus legitimate to assert that the two objects of the Convention—the one preventive, the other designed to secure the immediate reintegration of the child into his habitual environment—both correspond to a specific idea of what constitutes the 'best interests of the child".[15]

The principle of protecting the best interests of the child is the cardinal principle that lies at the heart of the UN Convention on the Rights of the Child (UNCRC), the most widely accepted human rights treaty in the world.[16] Article 3 of the UNCRC reads as follows: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".[17] The then President of the European Court of Human Rights, Jean-Paul Costa, in a Franco-British-Irish Colloque on family law held in Dublin on 14 May 2011, accurately underlined that "of course, the United Nations Convention is not directly reviewed by our Court, but it constitutes an important source of inspiration, and a key for adjudicating cases, mainly when they concern

[15] Perez Vera 1980, para 25.

[16] Supra n. 1. See the references in Distefano 2011b, p. 3589 ff.; De Cesari 2008, p. 233 ff. The concept of the child's best interests stems from the second principle of the Declaration on the Rights of the Child of 20 November 1959, which reads as follows: "The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normally manner and in conditions of freedom and dignity. In the enactment of laws, for this purpose, the best interests of the child shall be the paramount consideration". Moreover, the principle is also embodied in the European Union's Charter of Fundamental Rights, which became legally binding with the entry into force of the Lisbon Treaty on 1 December 2009. Article 24 of that Charter, entitled "The rights of the child", states that "In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration" (para 2).

[17] Actually the travaux préparatoires of the UNCRC reveal that an initial drafting containing the phrase "paramount consideration" was rejected, as was a proposal containing the phrase "the primary consideration". Instead, the final wording of the article places the best interests of the child as merely one primary consideration among others in any judicial decision concerning the child himself. See Sthoeger 2011, p. 535. On the differences between the English and the French texts, both of them equally authentic, see Focarelli 2010, p. 987 ff. More recently, with the purpose of solving the problems of ascertaining this pre-eminent and crucial principle for the solution of all the disputes concerning minors in general and the international abduction of children in particular, the Committee of Ministers of the Council of Europe on child-friendly justice has adopted some Guidelines with their explanatory memorandum (Strasbourg, 17 November 2010, version edited 31 May 2011).

See: http://www.coe.int/t/dghl/standardsetting/childjustice/default_en.asp.

Article 8" of the ECHR,[18] and that, in the case law of the European Court, the principle of giving priority to safeguarding the best interests of the child is firmly established and it has been invoked in many different contexts over the years, starting from the reuniting of children taken into social care with their parents.

The case that stands out in this context is the recent Grand Chamber judgment in Neulinger and Shuruk v. Switzerland.[19] Without recalling the facts which are well known, in January 2009 a Chamber of the European Court gave a judgment following the decision of the Swiss Federal Court which was in accordance with the European Court's well established case law, under which from Article 8 of the ECHR derives an obligation for member States to promptly comply with the order to return the child to the State of his former habitual residence: the Chamber of the European Court found that there had not been any violation of Article 8.[20] The mother, on the basis that the child's return to Israel would have constituted unjustified interference, in a democratic society, with the exercise of their rights to respect for their family life, as protected by Article 8 of the ECHR, submitted an application to the Grand Chamber of the Court, obtaining from Swiss judges the suspension of the execution of the decision ordering the child's prompt return. Reversing the decision of the Chamber, the Grand Chamber came to a completely different conclusion, finding the existence of an impediment to the return of the boy to Israel. The Grand Chamber interpreted the Hague Convention bearing in mind the principle of the best interests of the child. In so doing, the Grand Chamber very much insisted on the relevance that the principle of the best interests of the child has achieved in international law, evoking, among other international instruments which provide for this, in particular Article 3 of the UNCRC and Article 24 of the European Union's Charter of Fundamental Rights. The Grand Chamber emphasised that the principle of the child's best interests comprises two limbs: on the one hand, it dictates that the child's ties with his family must be maintained and rebuilt if violated, and, on the other hand, it is in the child's interest to ensure its development in a sound and healthy environment. "The child's best interests, from a personal development perspective, will depend on a variety of individual circumstances, in particular his age and level of maturity, the presence or absence of his parents and his environment and experiences".[21]

For that reason, in the opinion of the Grand Chamber these best interests must be assessed in each individual case. National authorities enjoy a certain margin

[18] Costa 2011, p. 2.

[19] ECtHR: Neulinger and Shuruk v. Switzerland [GC], 41615/07, Judgment (6 July 2010). See, among others, Distefano 2012, p. 229 ff.; Marchegiani 2011, p. 992 ff.; Pitea and Tomasi 2012, p. 338 ff.; Walker 2010, p. 665 ff.

[20] ECtHR: Neulinger and Shuruk v. Switzerland, 41615/07, Judgment (8 January 2009). See Distefano 2009, p. 879 ff.

[21] ECtHR: Neulinger and Shuruk [GC], supra n. 19, para 138.

of appreciation having the benefit of direct contact with the persons involved. The Grand Chamber underlined that it is not the European Court's task to take the place of the competent authorities in examining whether there would be a grave risk that the child would be exposed to psychological harm, within the meaning of Article 13 of the Hague Convention, if the child were returned to Israel. It is the precise task of the European Court, however, to ascertain whether the domestic courts, in applying and interpreting the provisions of the Hague Convention, have secured the guarantees laid down in Article 8 of the ECHR, particularly taking into account the child's best interests. To that end, in the opinion of the Grand Chamber, the European Court must ascertain whether an examination of the entire family situation was conducted in depth by the national courts, taking into account a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and whether the national courts had made a balanced and reasonable assessment of the respective interests of each person, "with a constant concern for determining what the best solution would be for the abducted child in the context of an application for his return to his country of origin".[22]

The general criterion of the best interests of the child, therefore, has now achieved the role of a precise and concrete interpretation and reconstruction of a general principle of international law: it follows that from Article 8 of the ECHR there are no automatic or mechanical obligations to favour or encourage the child's return to the country of his habitual residence when the Hague Convention is applicable. The Grand Chamber pointed out that it is true that the general intent and spirit of the Hague Convention is to cause the return of the child to his habitual residence (where judges are supposed to better protect his interests and welfare), and that the exceptions to this rule (such as, in this case, a grave risk that the child's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation) must be applied restrictively, but the Grand Chamber emphasised that the concept of the child's best interests is also an underlying principle of the Hague Convention. So, the Grand Chamber took the view that the Hague Convention must be interpreted in conformity with the ECHR, making a direct link between the Hague Convention and the best interests of the child. As such, a child's return cannot be ordered automatically or mechanically, as, furthermore, the Hague Convention itself recognises by providing for a number of exceptions to the obligation to return a child. These exceptions (in particular Articles 12, 13 and 20) are in fact based on considerations concerning the actual person of the child and his environment, thus showing that it is for the court hearing the case to adopt an in concreto approach thereto.[23]

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[22] Ibidem, para 139.

[23] ECtHR: Mausmousseau and Washington v. France, 39388/05, Judgment (6 December 2007), para 72.

4 Conclusion

With the best interests of the child being uppermost in its mind, the Grand Chamber in the Neulinger case has for the first time decided in favour of an applicant who was the author of the international abduction, stating that in the event of the enforcement of the federal Swiss Court's judgment there would be a violation of Article 8 of the ECHR. In doing so, the Grand Chamber placed such a great emphasis on the best interests of the child that some authors[24] are now wondering if this is not too damaging for the functioning of the Hague Convention: the statement in para 139 of the judgment (in which the Grand Chamber stated that it "must ascertain whether the domestic courts conducted an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person, with a constant concern for determining what the best solution would be for the abducted child in the context of an application for his return to his country of origin") can be easily interpreted so as to be in line with the earlier case law of the Court, but it can also send out the wrong message. In fact, it could be viewed by national courts as an "invitation" to carry out an investigation on the merits of the case or, at least, as requiring national courts to abandon the swift, summary approach that the Hague Convention envisages, and to move away from a restrictive interpretation of the Article 13 exceptions to a thorough, free-standing assessment of the overall merits of the situation. Of course, this would be very detrimental as it would delay proceedings under the Hague Convention, which are meant to be dealt with expeditiously.[25] Nevertheless, as has already been pointed out, "that is overbroad—the statement is expressly made in the specific context of proceedings for the return of an abducted child. The logic of the Hague Convention is that a child who has been abducted should be returned to the jurisdiction best placed to protect his interests and welfare, and it is only there that his situation should be reviewed in full."[26]

The intention of the Grand Chamber in the Neulinger case was not to create the potential to harm the functioning of the Hague Convention, nor to render the

[24] Walker 2010, p. 668 ff.

[25] Ibidem, p. 668.

[26] In this sense see Costa 2011, p. 4. Walker 2010, p. 668 underlined that para 139 may be a cause for concern if sufficient emphasis is not placed on the last part of the last sentence which refers to the context of an application for a return. Moreover, Walker observed (p. 669) that the "margin of appreciation" for national authorities, to which the Grand Chamber refers, could have the consequence of leaving the Hague Convention open to abuse, because States are effectively free to interpret the Hague Convention as they see fit. "This may in the future have a negative influence on the Hague Convention, which in turn could have a negative impact on the rights of children and their parents".

exceptions largely ineffective in accomplishing its objectives.[27] The prominence of the principle of the best interests of a child, upon which the Grand Chamber based its judgment in the concrete case,[28] must not become an essentially subjective standard that judges can use to facilitate foreign States' manipulation of the Hague Convention and create a pretext for discretionary decisions.[29]

Nevertheless, considering that the result of the Neulinger case has caused a considerable stir amongst practitioners in the field of international family law, for substantive non-compliance with the Hague Convention the feasibility of a protocol to the Hague Convention has been discussed and the idea of continuing the negotiations thereon has already been envisaged and should become a reality.[30] In fact, a Draft Protocol has already been submitted by Switzerland. It contains provisions which would be additional to the Hague Convention and concerns, *inter alia*, protection measures for the child, especially to help ensure the safe return of the child, the provision of information and mutual assistance and the duty to protect and inform after the return of the child.[31]

A protocol to the Hague Convention could probably be beneficial to ensure that the Hague Convention can still continue to function effectively in the future. So, national courts that may have been guilty of interpreting the exceptions too

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[27] Costa 2011, p. 4 underlined that the Neulinger case does not signal "a change of direction in Strasbourg in the area of child abduction. Rather it affirms the consonance of the overarching guarantees of Article 8 with the international text of reference, the Hague Convention".

[28] "Even though he is at an age where he still has a certain capacity for adaptation, the fact of being uprooted again from his habitual environment would probably have serious consequences for him, especially if he returns on his own, as indicated in the medical report. His return to Israel cannot therefore be regarded as beneficial" (Neulinger and Shuruk [GC], supra n. 19, para 147).

[29] In the recent case Sneersone and Kampanella v. Italy, 14737/09, Judgment (12 July 2011), the European Court adopted the same reasoning and based its decision on the relevance of the principle of the best interests of the child who had been wrongfully removed (in the application of Article 11 para 8 of Regulation n. 2201/2003, which recalls Article 13 b of the Hague Convention). See Pitea and Tomasi 2012, p. 338 f.; Nascimbene 2011, p. 109 ff. In the case Raban v. Romania, 25437/08, Judgment (26 October 2010), the European Court recently stated very explicitly that "a child's return cannot be ordered automatically or mechanically when the Hague Convention is applicable" (ibidem, para 28 vi) and that it is a task for the European Court to verify "whether the domestic courts conducted an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person, with a constant concern for determining what the best solution would be for the abducted child in the context of an application for his return to his country of origin" (ibidem, para 28 viii). In the same terms see also ECtHR: Van Den Berg and Sarrì v. The Netherlands, 7239/08, Judgment (2 November 2010).

[30] Even before the Neulinger case, at a meeting of the Council on General Affairs and Policy of the Hague Conference on Private International law (The Hague, 1–3 April 2008), the Council decided in relation to a proposal by Switzerland for a protocol to the Hague Convention "to reserve for future consideration the feasibility of a Protocol to the 1980 Convention containing auxiliary rules designed to improve the operation of the Convention". See Duncan 2009, p. 293; Bucher 2008, p. 143 ff.

[31] Duncan 2009, p. 291 ff.

restrictively may think carefully before in effect automatically ordering a return which is not in the best interests of the child. A protocol could help to regulate the safe return of the child and the abducting parent to the country of the child's habitual residence. This would ensure that any protective orders made are enforceable in the State of habitual residence. A protocol could give legal effect to certain orders in the requesting State: the State would then be legally obliged to comply with these orders on the child's return, thus hopefully ensuring better protection for the child. A protocol could contain procedures for ensuring that protective measures ordered by the court in the State of refuge are enforceable in the State of return. This would help to protect the best interests of the child upon his return. A protocol would also protect the returning parent and should ensure that he can safely enter and remain in the State without the risk of prosecution or deportation, thus removing the fear of the Court in the *Neulinger* case. This would have a positive impact on the rights of both parents, ensuring that they both receive a fair hearing as they will be able to attend the actual custody proceedings, and should protect the right of both parents to family life.[32]

In short, a protocol to the Hague Convention containing auxiliary rules to improve the operation of the Convention would be useful and beneficial as long as it is drafted on the basis of the prominence of the principle of the best interests of the child over all other considerations and of the assessment of such a principle in each individual case.

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