

# VOICE OF THE CHILD IN 1980 HAGUE RETURN CASES

Anca Magda VOICULESCU\*

## Abstract

*The voice of the child is a broad and largely discussed concept relevant for family life, and referred to both in different juridical instruments belonging to national and international areas, and also doctrinal opinions.*

*The purpose of the article is to analyse the voice of the child in the particular situation of international child abduction, in the framework of the ever-increasing number of transnational families on the move, within and outside the EU.*

*As the general principle stipulates that an abducted child shall promptly be returned to the state of habitual residence, children's welfare is to be considered only within the exceptions to the return mechanism.*

*One of these exceptions is represented by the child's objection to being returned, which nevertheless remains highly controversial: if we accept it is generally in children's best interests to be returned, then how can children's rights to express their views be accommodated?*

*Hence, the objectives of the present study are to identify the legal context in which the child's opinion can be expressed and valued in the context of different juridical instruments, with a subsequent focus on the situation of international child abduction (procedural and substantial).*

*Furthermore, the paper will examine the extent to which judicial assessments of child's views in child abduction procedures are conducted in a way that corresponds with a children's rights-based approach, acknowledging their autonomy and right to be heard.*

**Keywords:** *international abduction, prompt return, voice of the child, children's rights, family life.*

## 1. Introduction

There is a general consensus that children should have a voice in all litigations involving measures concerning them (including international abduction disputes, ever more frequent nowadays).

The issue of children objecting to their return to the state of habitual residence in proceedings under 1980 Hague Convention<sup>1</sup> is nevertheless particularly intense and disputed in the area of family justice.

The subject has great importance, as this is an area where „there are as many practices on how to hear the voice of the child as there are legal cultures and traditions”<sup>2</sup> and where the HCCH<sup>3</sup> has not yet published a Guide to Good Practice.

Moreover, an order of return to the state of habitual residence, although applying the prompt return principle, would directly disregard the child's expressed voice.

There is therefore the question of how the prompt return principle and the exception regarding the child's refusal to return can be accommodated in practice, in the wider context of the importance attached to the child's voice outside the framework of the 1980 Hague Convention.

To reach this aim, the study will concentrate in identifying means in which the child's opinion can be expressed and valued in the context of different juridical instruments.

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\* PhD, Judge at Bucharest Tribunal, seconded at the Ministry of Justice, Directorate of International Law and Judicial Cooperation; Trainer in family law at Romanian National Institute of Magistracy; Romanian designated Judge in International Network of Hague Judges for 1980 Hague Convention on the Civil Aspects of International Child Abduction; associate teacher in Family Law at the Faculty of Law within the Academy of Economic Studies (e-mail: ancamagda.voiculescu@gmail.com).

<sup>1</sup> Intergovernmental agreement concluded at The Hague on October 25, 1980, during the 14<sup>th</sup> Session of the Hague Conference on Private International Law, entered into force on December 1, 1983.

<sup>2</sup> Ph. Lortie, Fr. Breger, *Foreword*, in *The Judges' Newsletter on International Child Protection* - vol. XXII / Summer - Fall 2018, available online at the following link: <https://assets.hcch.net/docs/a8621431-c92c-4d01-a73cacdb38a7fde5.pdf>, last accession on 04.02.2023, 12:04, pp. 3-5, p. 3, last accession on 21.03.2023, 18:25.

<sup>3</sup> The Hague Conference on Private International Law (HCCH) is an intergovernmental organisation the mandate of which is „the progressive unification of the rules of private international law” (art. 1 of the Statute). To this end, HCCH elaborated different Guides to Good Practice, Explanatory Reports, Practical Handbooks or Brochures, in order to facilitate the application of different juridical instruments belonging to the area of private international law.

Having established the general outset, the analysis will further focus on particularities of the child's voice in case of international child abductions, given the tension already pointed-out between the principle of prompt return and the exception related to the child's objection.

Doctrinal opinions and case-law will also be identified and presented, with the necessary note that preponderance goes to studies from abroad, as in Romanian juridical literature the subject has scarcely been approached.

## 2. Content

### 2.1. Legal context

Although the subject of the article considers the child's voice in the special situation of international abductions, identifying a wider framework is useful not only for a broader perspective, but also due to the interconnection of different juridical instruments.

These legal instruments may be divided in three main categories, belonging to the area of international private law, EU law, respectively national law (only the most relevant will be mentioned, in a chronological order).

#### 2.1.1. Private international law

The **Hague Convention of October 25, 1980 on the Civil Aspects of International Child Abduction** (to which Romania is a member state<sup>4</sup>) is one of the most important juridical instruments of private international law, which seeks to protect children from the harmful effects of wrongful removal and/or retention across international boundaries by providing a procedure to bring about their prompt return in the state of origin.

The 1980 Hague Convention indirectly empowers the voice of the child by means of art. 13 para. (2), consacrating one of the exceptions to the above-mentioned principle of prompt return, namely the situation when the child objects and has attained the appropriate *age* and *degree of maturity*<sup>5</sup>.

Another significant private international law instrument is the **1989 Convention on the Rights of the Child**<sup>6</sup> (Romania is a member state<sup>7</sup>), which directly underlines the importance of the voice of the child, stating the principle that children have the *right* to express their views in procedures affecting them, either directly or through a representative/an appropriate body, and their opinions are to be given due weight in accordance with the age and maturity<sup>8</sup>.

**Convention of October 19, 1996 on parental responsibility and measures for the protection of children**<sup>9</sup>, adopted later in the framework of HCCH (and to which Romania is also a member state<sup>10</sup>), aimed to establish common provisions taking into account the previous UN Convention on the Rights of the Child.

In particular, this convention values indirectly the voice of the child, providing grounds for non-recognition of judicial or administrative measures taken without the child having been provided the opportunity to be heard.

None of these conventions deals with *substantial and procedural measures related to hearing children*, which were thus left for the contracting states to establish.

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<sup>4</sup> Law no. 100/1992 for Romania's accession to 1980 Hague Convention on the Civil Aspects of International Child Abduction, published in the Official Gazette of Romania no. 243/30.09.1992.

<sup>5</sup> According to art. 13 para. (2): „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”.

<sup>6</sup> Adopted by UN General Assembly, signed in New York on November 20, 1989, entered into force on September 2<sup>nd</sup>, 1990.

<sup>7</sup> Law no. 18/1990 for the ratification of the Convention on the Rights of the Child was published in the Official Gazette of Romania no. 109/28.09.1990 and republished in the Official Gazette of Romania no. 314/13.06.2001.

<sup>8</sup> According to art. 12: „1. States Parties shall assure to the child who is capable of forming 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. 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law”.

<sup>9</sup> Concluded at The Hague, October 19, 1996 and entered into force on January 1<sup>st</sup>, 2002.

<sup>10</sup> Law no. 361/2007 for the ratification of the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, published in the Official Gazette of Romania no. 895/28.12.2007.

### 2.1.2. EU law

**Council Regulation (EC) no. 2201/27.11.2003**<sup>11</sup>, in preamble considerations 19 and 20, respectively art. 11, 23, 41 and 42 considered the voice of the child by incorporating the principle stipulated in art. 12 of the Convention on the Rights of the Child, with a similar reference regarding the age or degree of maturity<sup>12</sup>.

Recognising that hearing of the child plays an important role in the application of the regulation, consideration 19 indicates that this instrument is not intended to modify national procedures applicable to this respect.

The present **Council Regulation (EU) 2019/1111**<sup>13</sup> on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction dedicates art. 21 to the right of the child to express his or her views, with the well-known mention by now related to age and degree of maturity<sup>14</sup>.

Again, it was left to national law and procedure to determine subsequent aspects related to hearing of the child.

### 2.1.3. National law

It results that, in the absence of a uniform relementation in private international law or EU law, domestic legislations play an important role in hearing children, both substantively and procedurally<sup>15</sup>.

In Romanian law, references to the voice of the child appear in the general framework provided by **Romanian Civil Code (CC)**<sup>16</sup>.

Art. 264 CC stipulates: „ (1) In administrative or judicial procedures concerning her/him, the *hearing of the child who has reached the age of 10 is mandatory*. However, *the child who has not reached the age of 10 may also be heard, if the competent authority considers that this is necessary* for the resolution of the case. (2) The right to be heard implies the possibility of the child to ask for and receive any information, according to her/his age, to express her/his opinion and to be informed about the consequences that this may have, if respected, such as and on the consequences of any decision that concerns him. (3) *Any child may ask to be heard*, according to provisions of para. (1) and (2). *The rejection of the application by the competent authority must be motivated*. (4) The opinions of the heard child will be taken into account in relation to his *age and degree of maturity*”<sup>17</sup> (s.n.).

Also, the special provisions of art. 10 from **Law no. 369/2004** on the enforcement of the Hague Convention<sup>18</sup> take over the general arrangements for hearing minors for the special situation of international child abductions.

Romanian legislation therefore complies with the general requirements previously established in the sense of granting the possibility for the minor to express an opinion, which will be evaluated in relation to the age and degree of maturity.

<sup>11</sup> Council Regulation (EC) no. 2201/2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, repealing Regulation (EC) no. 1347/2000, published in the OJ L 338/1/23.12.2003.

<sup>12</sup> Art. 11 para. (2) applicable in abduction cases: „it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regarded his or her age or degree of maturity”.

<sup>13</sup> Council Regulation (EU) 2019/1111 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), published in the OJ L 178/1/02.07.2019.

<sup>14</sup> Art. 21 of Council Regulation (EU) 2019/1111: „1. When exercising their jurisdiction under Section 2 of this Chapter, the courts of the Member States shall, in accordance with national law and procedure, provide the child who is capable of forming his or her own views with a genuine and effective opportunity to express his or her views, either directly, or through a representative or an appropriate body. 2. Where the court, in accordance with national law and procedure, gives a child an opportunity to express his or her views in accordance with this Article, the court shall give due weight to the views of the child in accordance with his or her age and maturity.”

<sup>15</sup> For an extensive presentation of national laws in hearing children in EU and states members to 1980 Hague Convention, see The Judges' Newsletter on International Child Protection, vol. VI, Autumn 2003, available online at the following link: <https://assets.hcch.net/docs/8e10ad94-9f28-41e0-9233-5f79cf99af75.pdf>, last accession on 26.03.2023, 10:57.

<sup>16</sup> Law no. 287/2009 concerning Romanian Civil Code, published in the Official Gazette of Romania no. 511/24.07.2009, subsequently modified and republished, in force from 01.10.2011.

<sup>17</sup> Similar provisions are found in the Civil Code of Quebec (opportunity for the child to be heard if age and power of discernment allow it).

<sup>18</sup> Law no. 369/2004 on the application of 1980 Hague Convention on the Civil Aspects of International Child Abduction, published in the Official Gazette of Romania no. 888/29.09.2004 and republished successively, last time in the Official Gazette of Romania no. 144/21.02.2023.

In addition, the child's age of 10 is indicated as a benchmark for the mandatory hearing, at the same time being left to the judge the possibility to hear children even under this age, if appreciated as necessary.

No other reference is made to practical aspects related to hearing (the place, the time, who takes part, recording etc.), which gives rise to various practices<sup>19</sup>.

## 2.2. Juridical consequences of the child's view depending on legal context

We will further on briefly examine the concrete ways in which disregard of the child's voice operates in the context of the different above-mentioned international instruments.

All the examples to follow represent but concrete manifestations of the principle that enshrines the child's right to be heard, and the sanctions accompanying its breach fully demonstrates the importance attached.

Under art. 23 para. (2) (b) of the 1996 Convention, **recognition of measures of protection for children may be refused** „if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, *without the child having been provided the opportunity to be heard*, in violation of fundamental principles of procedure of the requested State” (s.n.).

There are also **non-recognition grounds in parental responsibility** cases, linked to children's hearings in an unappropriated way, as stipulated in art. 39 para. (2) of Regulation 1111/2019<sup>20</sup>: „The recognition of a decision in matters of parental responsibility may be refused if it was given *without the child who is capable of forming his or her own views having been given an opportunity to express his or her views* in accordance with art. 21.” (s.n.).

Art. 13 para. (2) of the 1980 Hague Convention states that a court hearing an abduction application may **refuse to order return** when abducted children object to being returned and have attained an age and degree of maturity at which it is appropriate to take their views into account.

There is a divergence in the approach of family law professionals towards the way this article should be interpreted, „ranging from a minority who thought the exception was overused and abused, to the majority who felt it was appropriate to listen to the child's views in the context of the exception”<sup>21</sup>.

In the first orientation, the weight attached to the child's views is balanced against the objectives of the Convention.

Indeed, the objection of the child to being returned to the state of origin is in conflict with the principle of prompt return stipulated by art. 1 of the 1980 Hague Convention, and there is a fear that it might indirectly decide on issues foreign to international abductions (parental rights or domicile of the child).

Followers of this orientation give precedence *a priori* to the prompt return principle, arguing that the „return judge has no reason to hear the child. It is only if the judge decides not to order the return of the child, thus becoming competent on the organization of the life of the child (...) proceed with hearing the child”<sup>22</sup>.

In the second orientation, application of the defence provided by art. 13 para. (2) is viewed from a children's rights perspective. According to this opinion, the principle of prompt return may be countered, under certain conditions, by capitalizing on the child's opinion.

Supporters of the second approach also argue this exception was conceived as „an escape route for mature adolescents”, given that there are children below 16 years (age limit for application of the 1980 Hague

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<sup>19</sup> The child is heard either in the courtroom, or in council chambers, or sometimes in specially arranged rooms (if they exist). In addition to the judge, the clerk, the prosecutor, the psychologist may participate in the hearing. Time of hearing may be in court session day or another day (there are different practices, taking into account the timetable of the child and the workload of the court). Related to proceedings stage when the child is heard (at the beginning of the proceedings or after all other evidence has been taken), in practice, hearing is generally at the end, so as to be able to verify the claims of the parties and the information provided by the evidence. Hearing minutes (with or without the hearing recording) are drafted and it is recommended to be attached to the case file only at the end of the proceedings, when the enforceable decision is ruled out (so that the child should be protected from parental pressure during the process).

<sup>20</sup> „The recognition of a decision in matters of parental responsibility may be refused if it was given without the child who is capable of forming his or her own views having been given an opportunity to express his or her views in accordance with art. 21, except where (...)”.

<sup>21</sup> N. Taylor, M. Freeman, *Outcomes for Objecting Children under the 1980 Convention*, in The Judges' Newsletter on International Child Protection, vol. XXII, Summer-Fall 2018, available online at the following link: <https://assets.hcch.net/docs/a8621431-c92c-4d01-a73cacdb38a7fde5.pdf>, last accession 21.03.2023, 18:53, pp. 8-13, p. 11.

<sup>22</sup> M.-C. Celeyron-Bouillot, *The voice of the child in Hague Proceedings: a French perspective*, in The Judges' Newsletter on International Child Protection, vol. VI, Autumn 2003, available online at the following link: <https://assets.hcch.net/docs/8e10ad94-9f28-41e0-9233-5f79cf99af75.pdf>, last accession on 24.03.2023, 17:27, pp. 18-20, p. 19-20.

Convention) who „may attain an age and degree of maturity at which it is appropriate to take account of their opinions“<sup>23</sup>.

Statistics show that, in practice, pleading application of the child's defence has not reached high positive scores and also that results present considerable regional variations<sup>24</sup>.

The low incidence of art. 13 para. (2) should nevertheless be analyzed not only in the context of divergent juridical opinions, but also related to practical aspects.

Research revealed that approximately 78% of international kidnapping cases involve children under 10 years old<sup>25</sup>, whose opinion generally is not taken into account for reasons related to age and degree of maturity (to be discussed later).

### 2.3. Special focus on the 1980 Hague Convention

We make the prior specification that, in our opinion, children should be given the opportunity to be heard in *any* return proceedings under the 1980 Convention, and not only in proceedings limited to a defence under art. 13 para. (2).

1980 Hague Convention indeed makes reference to the opinion of the child only when addressing the exception based on the child's objection.

Nevertheless, art. 26 of Council Regulation (EU) 2019/1111 stipulates that the child has the right to express her/his opinion in return proceedings according to the already mentioned art. 21, without any limitations related to the child's objection defence<sup>26</sup> (argumentation applicable in case of abductions from one MS to another MS).

As for abductions involving non-EU states, we appreciate that the principle enshrined in art. 12 of the Convention on the Rights of the Child applies also in the framework of 1980 Hague Convention, noting the case-law<sup>27</sup> and the Conclusions and Recommendations of the Hague Conference<sup>28</sup>, according to which there is no conflict between these two conventions.

Finally, it would undermine the importance of the voice of the child to restrict the incidence of the child's opinion to particular situations, rather than recognizing a wider right to express his or her views.

#### 2.3.1. Procedural exception or substantive defense

There is no doubt in our appreciation on the substantial nature of the defence related to the child's objection.

If it were to consider the procedural option, it would clearly diminish the importance and even the incidence of this defence, as it would totally depend on procedural national legislations.

#### 2.3.2. Procedural evidence or substantial right of the child

In many countries, there is a discussion related to juridical nature of the voice of the child, starting from the fact that the child in question generally is not made a party to the proceedings<sup>29</sup>.

<sup>23</sup> Ph. Lortie, Fr. Breger, *op. cit.*, p. 4.

<sup>24</sup> N. Taylor, M. Freeman, *op. cit.*, p. 13: „There were some interesting regional differences inasmuch as 31% of all refusals in Latin American and Caribbean States were based upon the child's objections as against 13% in States governed by the revised Brussels II Regulation (...). So far as individual States were concerned, Mexico had the highest proportion (45%, 5 out of 11 refusals) of refusals based solely or in part upon the child's objections ground. Germany had the second highest number (4) but this amounted to 19% of all refusals. Many States had no refusals based either solely or in part on this ground.“

<sup>25</sup> A.O. Bennett, *A better place for the child in return proceedings under the 1980 Convention – A perspective from Australia*, in The Judges' Newsletter on International Child Protection, vol. XXII, Summer-Fall 2018, available online at the following link: <https://assets.hcch.net/docs/a8621431-c92c-4d01-a73c-acdb38a7fde5.pdf>, last accession on 25.03.2023, 15:46, pp. 20-24, p. 20.

<sup>26</sup> Art. 96 of Council Regulation (EU) 2019/1111 regulates the relation with the 1980 Hague Convention as follows: „the provisions of the 1980 Hague Convention shall continue to apply as complemented by the provisions of Chapters III and VI of this Regulation“.

<sup>27</sup> Supreme Court of Canada, case *Balev*, dec. from 20.04.2018, case no. 2018 SCC 16, available online at the following link: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17064/index.do>, last accession on 25.04.2023, 13:08.

<sup>28</sup> See Ph. Lortie, Fr. Breger, *op. cit.*, p. 4.

<sup>29</sup> In exceptional circumstances, children were granted the permission to join the proceedings as a party and separate legal representation. For a presentation of English case-law in this respect, see N. Wall, *The voice of the child in Hague Proceedings: a English perspective*, in The Judges' Newsletter on International Child Protection, vol. VI, Autumn 2003, available online at the following link: <https://assets.hcch.net/docs/8e10ad94-9f28-41e0-9233-5f79cf99af75.pdf>, last accession on 24.03.2023, 17:38, pp. 20-23.

If regarded as procedural evidence, it will be connected to contradictory procedural principles, and this necessarily leads to persons allowed to participate in the hearing<sup>30</sup>. In some states following this orientation, the child is heard as a witness<sup>31</sup>.

If conceived as substantial right of the child, contradictoriness does not apply and judicial proceedings will be aimed at satisfying a child's right.

Along with other opinions expressed in juridical literature, we also appreciate that hearing children is not for gathering evidence in order to reach a decision on the merits, but rather to give effect to their substantial right to be involved in decisions affecting them. Further on, their opinion is to be evaluated in the context of the overall evidence taken in the case.

In this context, we consider important the mention that, even hearings of children are not evidence, matters arising from such hearings cannot simply be banished for procedural reasons, or otherwise there would be no point in hearing children. Therefore, such aspects should subsequently be checked upon in the context of the evidence taken in the case.

### 2.3.3. Judicial or extrajudicial hearing of the child

Practices of states related to hearing of children vary considerably depending on domestic laws and procedures.

Judicial interviews with children should be the first option<sup>32</sup>, as face to face interaction is beneficial both for the judge, and also for the children<sup>33</sup>.

The judge may personally observe the attitude and body language of the child which, beyond words, may often reveal more about genuine wishes, pressures or influences. Direct hearing also forms an impression of the child and allows the judge to verify whether child's opinion consists (or not) to views advanced by the parents.

Although preferable, judicial hearings are not by far the only option, and there are many jurisdictions where hearing children involves independent experts/intermediaries between the child and the court<sup>34</sup>.

In general, this approach is justified arguing that what the child tells the judge in private cannot be tested in court by cross-examination<sup>35</sup> and also that an expert hearing the child has better training and experience and may be called as a witness in court<sup>36</sup>.

A common line is clear: whether a judge, independent expert or any other person, the interviewer the child should have appropriate training.

### 2.3.4. Criteria to be fulfilled

As juridical literature articulated, criteria to be fulfilled for incidence of the child's objection defence present as a "two-stage test"<sup>37</sup>.

<sup>30</sup> E.g., in Spain, in children's hearings in the context of international abductions, the Public Prosecutor should always be present (F.J. Forcada Miranda, *The voice of the child from a continental-Spanish perspective*, in The Judges' Newsletter on International Child Protection, vol. XXIII, Winter 2018-Spring 2019, available online at the following link: <https://assets.hcch.net/docs/dff2cb7c-ed66-4408-a892-2af15c664d58.pdf>, pp. 25-28, p. 27, last accession 21.03.2023, 18:53).

<sup>31</sup> In Quebec, the child may be heard as a witness, and it is up to the judge to decide the way of hearing (with/without presence of the parents and lawyers, in chambers or in the courtroom) – for a detailed presentation, see Marie-Christine Laberge, *The Child's Voice in Quebec*, in The Judges' Newsletter on International Child Protection, vol. VI, Autumn 2003, available online at the following link: <https://assets.hcch.net/docs/8e10ad94-9f28-41e0-9233-5f79cf99af75.pdf>, last accession on 24.03.2023, 18:29, pp. 27-31, p. 28-29.

<sup>32</sup> E.g., such is the case of Romania, Italy, Greece, Spain, Germany, United States.

<sup>33</sup> „The children (...) interviewed were pleased to be able to talk to the judge without interruption and to use their own voices rather than having someone relay what they had said” (N. Taylor, M. Freeman, *Outcomes for Objecting Children under the 1980 Convention*, op. cit., p. 11).

<sup>34</sup> According to F.J. Forcada Miranda, op. cit., p. 25: „17 different types of specialists were identified”. Such is the case in Canada, Japan, United Kingdom.

<sup>35</sup> E.g., in England and Wales, where the child is interviewed by a reporting officer from the Children and Families Court Advisory and Support Service. For more details, see N. Wall, op. cit., p. 20: „After the interview, the CAF/CASS officer reports orally to the court on the views of the child, and gives an assessment of the child's degree of maturity. The officer is then cross-examined by the parties' lawyers”.

<sup>36</sup> R. Moglove Diamond, *The voice of the Child in Hague Proceedings: a Canadian Perspective from Manitoba (a common law province) and from Québec (a civil law province). Ascertaining a Child's Voice in Inter-Jurisdictional Cases of Parental Abduction*, in The Judges' Newsletter on International Child Protection, vol. VI, Autumn 2003, available online at the following link: <https://assets.hcch.net/docs/8e10ad94-9f28-41e0-9233-5f79cf99af75.pdf>, last accession on 24.03.2023, 18:17, pp. 23-26, p. 24.

<sup>37</sup> J. MacDonald, *What is the Evidential Status on the Child's Voice*, in The Judges' Newsletter on International Child Protection, vol. XXIII, Winter 2018-Spring 2019, available online at the following link: <https://assets.hcch.net/docs/dff2cb7c-ed66-4408-a892-2af15c664d58.pdf>, pp. 14-16, p. 14, last accession on 04.02.2023, 13:41.

First, there is a “gateway stage” (an examination of whether, as a matter of fact, the child objects to being returned).

Secondly, there is a “discretion stage”, where the court must consider not only the objection to being returned, but a much wider range of considerations (e.g., whether the objection of the child is authentic - or eventually only the product of influence by the abducting parent; whether the objection coincides with - or is at odds with the child’s genuine welfare).

### A. Objection of the child

Whether a child objects is a question of fact, and it is to be verified *in concreto* in each case; however, this aspect raises some practical problems.

Unless the abducting parent invokes art. 13 para. (2), it is unlikely that the court will find out that the minor actually opposes the return.

The only possible way for the court to be aware of the child's objection in this situation is when the child has reached the age for mandatory hearing (and the court shares the opinion that hearing children is a right of the child in all return cases, and not only when the child's objection defence is raised).

This of course depends on national legislations, and there is still the problem that not all domestic legislations stipulate a minimum age of hearing.<sup>38</sup>

### B. Age and degree of maturity

As already pointed out, art. 13 para. (2) of the 1980 Convention is rather a general provision, as there is no minimum age, nor any guidelines for assessing the child’s maturity indicated.

The Explanatory Report on the 1980 Hague Child Abduction Convention<sup>39</sup> explains in para. 30 that „all efforts to agree on a minimum age at which the views of the child could be taken into account failed, since all the ages suggested seemed artificial, even arbitrary. It seemed best to leave the application of this clause to the discretion of the competent authorities”.

The age and degree of maturity leave therefore a great deal of discretion for many children not to be heard, as it depends not only on domestic legislations, but also on how a particular judge perceives age and maturity.

That should however not result in *a priori* decisions not to hear the child, particularly as children often have a point of view which is quite distinct from their parents' opinions. In addition, they are the first who have to accommodate with the decision of the court, whether they like it or not.

In this context, it is beneficial that a number of legislations provide for specific minimum ages, when the child is *presumed* to have reached sufficient maturity<sup>40</sup>, and from this point further the judge is under the *obligation* to hear the child.

Under these legal limits of age, nevertheless, hearing a child is an option within the *margin of appreciation* of the judge<sup>41</sup>.

As most children are abducted when they are quite young (in Romanian experience, the age is no more than 8-9 years), we consider that in abduction cases children should be heard under the age generally accepted in domestic litigations, or the exception articulated by Article 13 (2) is left without any practical function<sup>42</sup>.

This obviously does not imply that the opinion of the child is necessarily validated in court, unless maturity is proved into the hearing (the child thus is given the possibility to express and argue an opinion).

<sup>38</sup> In the EU, the law of 15 jurisdictions does not provide for a minimum age (see S. Lembrechts, *Hearing abducted children in Court – A comparative point of view from three countries (Belgium, France & the Netherlands)*, in The Judges’ Newsletter on International Child Protection, vol. XXII, Summer-Fall 2018, available online at the following link: <https://assets.hcch.net/docs/8e10ad94-9f28-41e0-9233-5f79cf99af75.pdf>, last accession on 25.03.2023, 18:26, pp. 28-31, p. 29).

<sup>39</sup> Drafted by Eliza Pérez-Vera, Madrid, April 1981, published in 1982 and available online at the following link: <https://www.hcch.net/en/publications-and-studies/publications2/explanatory-reports>, last accession on 24.03.2023, 15:06.

<sup>40</sup> E.g., 12 years in Spain and Italy, 10 years in Romania, 14 years in the Netherlands.

<sup>41</sup> E.g., in abduction cases children may be heard generally starting from 7 years in Romania or 5 years in Canada („The question of maturity thus arises when the child is between the ages of 5 and 14”, according to M.-C. Laberge, *op. cit.*, p. 28). In Netherlands, children from 6 years onwards are given an opportunity to express their views. In Belgium, courts generally allow children 10 years to be heard. In France, children younger than 9 were not heard.

<sup>42</sup> E.g., in the Netherlands, children are in principle heard in legal proceedings from the age of 12, but judges have allowed hearing of children at the age of 6 in abduction cases.

In other words, biological age should not be considered as a criterion to decide whether or not the child should be heard. It is more in accordance with the right of the child to be allowed to express an opinion, which will later be evaluated in terms of maturity.

On the other hand, in absence of legal criteria, an inquiry in the case – law concludes that maturity is generally assessed based on ability speakings, behaviour, consistency of arguments, spontaneity, ability to understand the current situation.

It comes therefore as obvious that determining if a child should be heard (generally related to age) and what weight should be given to the child's views (generally related to maturity) is an extremely difficult and challenging task for judges/others interviewing the children, and therefore specialization is necessary.

### **C. Margin of appreciation**

Although it might appear quite clear, fulfillment of the above-presented criteria does not imply that the child's opinion, once heard, will be validated in court.

This simply creates (again) another stage of discretion for the court determining the matter, related this time to the assessment of the child's objection as well-founded or not.

In other words, even if children are found to object, and also of age and degree of maturity when it is appropriate to take account of their views, they may still be returned to the state of habitual residence against their wishes<sup>43</sup>.

In the absence of (even indicative) criteria provided by the 1980 Hague Convention and, in most cases, also by national legislation<sup>44</sup>, the key to evaluation of the child's opinion is generally established related to common sense standards, as the ability to understand and evaluate consequences, the ability to express opinions in a reasonable and independent manner, consequences for return/non-return specific for each case.

#### **2.3.5. Value of the voice of the child in practice**

When considering the voice of the child in the context of the 1980 Hague Convention and as a matter of accuracy, we consider relevant to make a distinction between art. 13 para. (2) – objection of the child and art. 13 para. (1) (b) – grave risk.

In our opinion, less relevance to children's points of view should be granted when discussing grave risk, due to the fact that other evidences are requested in the vast majority of cases and (as already stated) hearing children is not aimed at gathering evidence.

Therefore, the importance children's voice should be evaluated mainly within the framework of art. 13 para. (2) and the child's objection to being returned.

In practice, nevertheless, the grave risk defence and the child's objection defence often act together, and cases where application of art. 13 alone results in non-return orders are rare.

When evaluating the voice of the child, it needs to be mentioned that there are specific circumstances to be considered for abduction cases.

The court must be aware that manipulation from the abducting parent might appear, as the child is living in unfamiliar surroundings, sometimes does not understand the language, and the only consistent individual in the child's life may be the abducting parent.

Specific safeguards may thus be recommended, such as hearing the child in the presence of an expert, who will then be asked to deliver a report of a possible influence of the abducting parent/specialization of the interviewer in this area.

According to jurisprudence, only firm and consistent objections will be treated as serious grounds for non-return. Children should have a voice in abduction, but this does not mean that they have a choice (to return or not) - their objection has to be seriously motivated, not just simply expressed.

Judicial practice revealed concrete situations when the child's opinion was not taken into account, in cases when, e.g., the child could not give any reasons justifying refusal to return to the state of origin or it was clearly influenced by the kidnapping parent (they were simply too mature for a child, they took over the words and arguments of the abductor, they described the abandoned parent in terms of absolute evil).

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<sup>43</sup> There is a reason for allowing this margin of appreciation, as the judge must strike the right balance between the individual child's rights and the collective interest in preventing/deterring abductions.

<sup>44</sup> In England and Wales, Guidelines for Judges Meeting Children who are subject to Family Proceedings were adopted in 2010.



Also, a sustainable objection under art. 13 para. (2) is clearly to be contrasted with a mere preference or wish, based on factual circumstances such as comfortable surroundings, nice school, etc.

Finally, the child's opinion is to be appreciated without assessing on parental authority or domicile of the child, as abduction litigations do not deal with such aspects, left in the competence of courts of the habitual residence.

Romanian courts generally rejected requests for return as a result of conjunct application of the child's opposition and the grave risk defences, examining the refusal of the child in the context of all the evidences taken, including psychological reports<sup>45</sup>.

### 3. Conclusions

Family law has undergone massive changes related to the importance of the voice of children and there has been a significant movement towards greater recognition of children's right to be involved in decisions affecting their lives.

As juridical literature expressed: „The child, who was previously an object of the law, was becoming a subject of the law”<sup>46</sup> (we should act *with* children, not *upon* them).

For various reasons, the importance of child's voice has nevertheless proved more difficult to be achieved in practice within the framework of the 1980 Hague Convention.

There is in the first place the fear that the child's objection exception would provide an escape mechanism to the obligation to return, and therefore a low incidence of the exception is justified.

Secondly, judges have large discretion to discount children's views, based on very relative standards (minimum age for hearing, where existing, is not uniform and degree of maturity totally depends on the personal appreciation of the judge). Juridical literature pointed that: „Unfortunately, the child objection defence does not appropriately recognise the child's views (...) it gives judges too much discretion to discount children's views”<sup>47</sup>.

Thirdly, there are also the practical aspects related to the fact that the overwhelming majority of kidnapped children are under 10 years old, and therefore they are not generally perceived as sufficiently aged and mature so that their opinion may be even asked for.

Still, „Few children are more vulnerable than those caught up in cross-border, often cross-continent, movement and turmoil”<sup>48</sup>.

These children, more than their parents, will have to live with what the court decides. And this means that their opinion should be asked for and (if not influenced) should not easily be put aside, under the volatile roof of age-related arguments, as long as the maturity and robustness of their motivation was ascertained.

We consider therefore as beneficial first that all national legislations should introduce a minimum age when hearing children is compulsory, and secondly that this age should be reduced in case of international abductions.

Specialized training of all involved (judges, lawyers, mediators, psychologists, etc.) who activate in the specific area of international abductions is also a useful tool, as specialization elevates professional standards and creates the premises of better understanding.

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<sup>45</sup> Bucharest Trib., 4<sup>th</sup> civ. s., dec. no. 530/15.04.2021, case no. 3543/3/2021, definitive, not published. The court argued that the psychological report did not reveal any influence on the part of the mother, and also the minor aged 13years did not outline the relationship with his father in the specific terms of an alienated child, but referred, as a positive element, to the way the father cooks. The child's relationship with the father was conflictual, and the rest of the evidence indicated that the conflicting element of the relationship was the father himself. The child outlined the relationship with his father as being characterized by fear and unconditional compliance with the father's demand, imposed by the latter, if necessary, through verbal violence towards the child.

Similarly, Bucharest Trib., 4<sup>th</sup> civ. s., dec. no. 1145/13.09.2021, case no. 15924/3/2021, definitive, not published, where the court appreciated that a 13 years old boy was mature enough for his objection to be validated. The child explained that he was obliged by his father to perform daily hard work at the animal farm, he had to wake up at 50.30 to travel by car to the farm, he would return home at 9:00 p.m., and he was beaten when he failed to work. The child was also evaluated by a psychologist from DGASPC, who concluded that there were no reasons for his statements to be doubted.

<sup>46</sup> Ph. Lortie, Fr. Breger, *Foreword, op. cit.*, pp. 3-5, p. 3.

<sup>47</sup> M. Henaghan, *The voice of the child in international child abduction cases – Do judges have a hearing problem?* in The Judges' Newsletter on International Child Protection, vol. XXII, Summer-Fall 2018, available online at the following link: <https://assets.hcch.net/docs/a8621431-c92c-4d01-a73cacdb38a7fde5.pdf>, pp. 28-33, p. 29, last accession on 21.03.2023, 20:04.

<sup>48</sup> F.J. Forcada Miranda, *op. cit.*, p. 25.

„The main objective of the Convention is not to return children at any cost, but to return them in situations where, under the Convention, they ought to be returned”<sup>49</sup>.

It results that the prompt return mechanism, although generally appropriate and valuable, is not a solution in itself, not for all cases and not all children<sup>50</sup>.

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<sup>49</sup> M. Fernando, *Children’s Objections in Hague Child Abduction Convention Proceedings in Australia and the “Strength of Feeling” Requirement*, in The International Journal of Children’s Rights, vol. 30, 2022, available online at the following link: [https://brill.com/view/journals/chil/30/3/article-p729\\_006.xml](https://brill.com/view/journals/chil/30/3/article-p729_006.xml), last accession on 25.03.2023, 19:15.

<sup>50</sup> ECtHR, decision adopted on 06.07.2010, Application no. 41615/2007, Case *Neulinger and Shuruk v. Switzerland*, para. 138: „It follows from art. 8 that a child’s return cannot be ordered automatically or mechanically when the Hague Convention is applicable. 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 (...).”

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