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**Judicial cooperation as an instrument
for the protection of the child's best
interests in international child
abductions**

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I. INTRODUCTION

The aim of this paper is to analyze two practical problems that may arise when applying the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (hereinafter the 1980 Convention) and the *Council Regulation 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* (hereinafter Brussels II bis Regulation). These are the following:

- 1) How to achieve an adequate evidence standard in child abduction proceedings, in cases in which the abductor opposes the return of the child on the basis that there is a grave risk that such return would expose the child to physical or psychological harm or otherwise places the child in an intolerable situation; and
- 2) How to reconcile the protection of Human Rights with the prompt return mechanism established by the 1980 Convention and the Brussels II bis Regulation.

II. BACKGROUND

The purpose of the 1980 Convention is to prevent international abduction cases by securing the prompt return of wrongfully removed or retained children (article 1). By ensuring an expeditious return, the 1980 Convention prevents international abduction cases and impedes that the abductor benefits from the abduction by modifying the forum competent to decide on custody matters. In addition, the Convention's return mechanism is considered to be protective of the child's best interests. Although the child's best interests are not mentioned throughout the normative text, they are considered in the Preamble. This is not by chance. As Elisa Pérez Vera's report on the 1980 Convention explains, the legal standard of the "best interest of the child" was understood at the time of drafting the Convention as a vague concept that "*resembles more closely a sociological paradigm than a concrete juridical concept*"¹. It is therefore fair to say that in the context of child abductions the best interests of the child were equated to a prompt return to the State of habitual residence, although the

¹ Elisa Pérez –Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention*, 1982, paragraph 21

Convention secured a balance by establishing several grounds for refusal of return by way of exception to the general return principle. One of these exceptions is contained in art. 13 b) which allows to refuse the return of abducted children if such return creates a grave risk of physical or psychological harm or otherwise places the children in an intolerable situation.

The Brussels II bis Regulation has strengthened the Convention's return policy. A grave risk exception will not lead to a non-return order "*if it is established that adequate arrangements have been made to secure the protection of the child after his or her return*" (article 11.4 of the Regulation). When a non-return order has been issued, the Courts of the State where the child was habitually resident immediately before the abduction retain jurisdiction on custody issues, which means that they can order the child's return despite the existence of a previous non-return order delivered in a child abduction proceeding (article 11.6-8 of the Regulation). Such a return order is enforced without any special procedure being required for recognition and enforcement in the Member State to or in which the child has been removed or retained. Furthermore, the Brussels II bis Regulation has also reinforced the requirement of using the most expeditious procedures² by establishing a time limit for issuing judgments regarding child abduction, which is of six weeks after the application is lodged, unless exceptional circumstances make this impossible (article 10.3).³

The expeditious character of these proceedings could, however, have been misunderstood by the European Court of Human Rights (hereinafter ECHR) in cases such as *Neulinger and Shuruk vs. Switzerland* and *Maumousseau and Washington v. France*, which have come to the conclusion that an *in concreto* approach to the case is vital in order to assess the child's best interests⁴. Such an approach seems incompatible

² See article 2 of the 1980 Convention and article 10.3 of Regulation Brussels II bis

³ The Convention already contained such a time limit, but it was not phrased as an obligation. See Peter Mc Eleavy, *The new child abduction regime in the European Union: Symbiotic relationship or forced partnership*, *Journal of Private International Law*, April 2005, page 21

⁴ *Neulinger and Shuruk v. Switzerland* (App no 41615/07) ECHR 6 July 2010, paragraphs 138 and 139 and *Maumousseau and Washington v. France* (App no 39388/05) ECHR 6 December 2007, paragraph 72

with the return mechanism established in the 1980 Hague Convention and the Regulation.

III. THE SCENARIO

In order to analyse these issues from a practical point of view, we have decided to make up a rather simple case.

Belén, Spaniard, married Hans, who is national of a EU Member state we have named “X”, in Paris in April, 22th 1998. They had two children: Estela and José. The former was born the 30th of June of 1999 and the latter the 4th of January of 2010. In March 2010 Hans was offered a job in State X and the family moved there. The relationship between Belén and Hans deteriorated and they had frequent arguments. One of these arguments was heard by their neighbours, who called the police. Asked by the police, Belén claimed to be a victim of domestic violence; while Hans referred that they simply had had an argument due to the marital crisis they were undergoing. Belén refused to report on the basis of domestic violence. On the 20th of February of 2012 Belén moved with the children to Málaga, where her family lives, without giving any notice to Hans. Hans contacted the State X Central Authority the 27th of February of 2012 and a return proceeding under Brussels II bis Regulation was initiated at the Juzgado de Primera Instancia número 1 de Málaga. Belén opposed the children’s return on the basis of the article 13.b) of the Hague Convention.

In the present case Estela (13 years old) and José (2 years old) were removed from State X to Spain by their mother. As both countries belong to the European Union, Regulation Brussels II bis must be applied in combination with the 1980 Hague Convention, since as stated by Recital 17 of the preamble of the Regulation, “*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 of 25 October 1980 would continue to apply as complemented by the provisions of this Regulation, in particular Article 11*”.

Jurisdiction on the return proceeding belongs to Spain because the children have been removed to that country. The competent court is the *Juzgado de Primera Instancia*

de Málaga according to article 1902 of the *Ley de Enjuiciamiento Civil of 1881*⁵. Despite of this, jurisdiction to decide on the merits of custody rights will still belong to State X, the state of the children's habitual residence, according to article 10 of the Regulation.

IV. HOW TO PROTECT THE CHILD'S BEST INTERESTS BY USING THE MOST EXPEDITIOUS PROCEDURES

In order to protect the child's best interests by referring jurisdiction on the merits to the court of the child's habitual residence, the standard of evidence in return proceedings shall be limited (IV.a). This limited scrutiny of the facts avoids delays and enables to comply with the 1980 Hague Convention's purpose of ensuring the prompt return of abducted children (IV.b).

IV. a) The standard of evidence

According to article 1 of the Hague Convention, one of its objectives is to "*secure the prompt return of children wrongfully removed to or retained in any Contracting State*". The Hague Convention is not concerned with custody proceedings, but with ensuring that children illegally removed to or retained in a Contracting State are returned to the place where they were habitually resident before the removal or retention. This is clearly stated in article 19 of the Convention: "*A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue*". Article 10 of the Regulation reinforces this idea by expressly providing that "*in case of wrongful removal or retention of the child, the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention shall retain their jurisdiction until the child has acquired a habitual residence in another Member State*" and there is either an explicit

⁵ Spanish rules on the procedural implementation of the 1980 Hague Convention are contained in articles 1901 to 1909 of the *Ley de Enjuiciamiento Civil* of 1881, which were introduced on the 15 of January of 1996 by provisions contained in the Final Clause 19.3 of the *Ley Orgánica de Protección Jurídica del Menor*. Although these rules were not incorporated into the new *Ley de Enjuiciamiento Civil* of 2000 (which generally substituted the 1881 statute) they are still in force according to the Final Clause of the 2000 LEC.

acquiescence or an inactivity of the holder of the rights of custody during a one year period.⁶ Thus, a judgment on the merits may be issued in the forum where the child was habitually resident immediately before the wrongful removal or retention, but not in the State of refuge⁷. Both, the Convention and the Regulation are based on the principle that in cases of wrongful removal or retention, children must be returned as quickly as possible to their habitual residence and that the dispute on the merits should be decided there by the competent authorities.⁸

However, articles 13 and 20 of the 1980 Convention contain some exceptions to this general rule of immediate return. One of these exceptions is established in article 13.b) and could be applicable to our case: *“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 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”*. Belén might therefore oppose the return of her children on the basis of Hans’s violent behaviour. However it should be noted that evidence on this regard is rather weak. The police had been alerted by the neighbours on occasion of one argument and although she claimed to have been abused (which was denied by Hans) she refused to report her husband’s abuse upon her when she was visited by the police.

⁶ The European Court of Justice (hereinafter ECJ) in *Mercredi v. Chaffe* (Case C-497/10) PPU and *Case A* (Case C-523/07) PPU has set out some criteria in order to determine when a change of habitual residence has happened by stating that the concept of ‘habitual residence’ corresponds to the place which reflects some degree of integration by the child in a social and family environment. Therefore, the intention of the person with parental responsibility to settle permanently with the child in another Member State, manifested by certain tangible steps such as the purchase or rental of accommodation in the host Member State, may constitute an indicator of the transfer of the habitual residence. To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family’s move to that State, the child’s nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration.

⁷ Elisa Pérez-Vera, Explanatory Report on the 1980 Hague Child Abduction Convention, 1982, paragraph 19.

⁸ Jacques Chamberland, *Whither the “best interests of the child” in the 1980 Child Abduction Convention?*, International Family Law, March 2012, page 30

The evidence standard required to apply article 13 b) is a rather complex matter. In fact, this issue will be thoroughly explored by a working party set up by the Hague Conference on Private International Law according to a decision taken in the last commission on general affairs that took place in April 2012.

In our view, the Convention and the Regulation give the following guidance:

- 1) The burden of the proof is to be borne by the abducting parent. According to article 13 of the 1980 Hague Convention and the Explanatory Report it is clear that the person who opposes the return must prove that the exception applies. This can be seen as a specific consequence of the general principle of the presumption of innocence. Otherwise, the left behind parent would face a *probatio diabolica*.
- 2) The Regulation states that when applying article 13 of the Convention the child shall be given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity (article 11.2 of the Regulation). Although the child's opinion is not binding for the court, it is consistent with the principle of protection of the child's best interests that children are heard before making any decision that affects them⁹.
- 3) The left-behind parent shall be given the opportunity to be heard before issuing a non-return decision by the requested state (article 11.5 of the Regulation), which is a consequence of the fundamental right of defence. No decision for or against a parent should be taken without him or her having had the opportunity of being heard.

On the basis of the above mentioned rules, which could be seen as a minimum standard of proof according to general principles of Procedural Law, the evidentiary standard has varied from court to court. Some jurisdictions consider that the article 13.b) exception shall be established on the basis of a considerable evidence (for instance Canada), some require a clear and compelling evidence (for instance England and Wales)¹⁰.

⁹ Article 12 of the Convention on the Rights of the Child expressly states that: "*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*".

¹⁰ Permanent Bureau of The Hague Conference on Private International Law, *Domestic and family violence and the article 13 "grave risk" exception in the operation of the*

It is clear that striking a balance between ensuring the prompt return within six weeks and gathering some evidence on the facts that would impede a return order is almost a chimera. A too high evidentiary standard causes delays and is clearly excluded by both the Convention and the Regulation, which state that the judicial or administrative authorities shall act expeditiously in proceedings for the return of children (article 11 of the Convention and article 11.3 of the Regulation) and confer jurisdiction to issue a judgment on the merits to the court of the child's habitual residence before the abduction (article 8 of the Regulation).

In our case, it would be impossible for the *Juzgado de Primera Instancia de Málaga* to gather all the relevant evidences to determine if there is a grave risk. The Convention and the Regulation are consistent with the principle of proximity, which suggests that State X Courts are entitled to give a judgement on the merits, since they are better placed to gather evidence and assess it. However, this basic principle has been questioned by the ECHR in *Maumousseau and Washington v. France* and *Neulinger and Shuruk v. Switzerland*. *Maumousseau and Washington v. France* is very similar to our case, since the applicant opposes the return on the basis of the grave risk exception but with a rather weak evidence of domestic violence. The ECHR, although claiming to agree entirely with the philosophy underlying the Convention, stated that “*there is no automatic or mechanical application of a child's return once the Hague Convention has been invoked (...)*” and that the domestic courts shall adopt an *in concreto* approach to each case¹¹, conducting thus 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, as requested of them, what the best solution would be for the child in the context of a request for her return*”¹². The same standard of evidence was required by the ECHR in *Neulinger and Shuruk v. Switzerland*.

Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: A reflection paper, May 2011, page 16

¹¹ *Maumousseau and Washington v. France* (App n° 39388/05) ECHR 6 December 2007, paragraph 72

¹² *Ibid*, paragraph 74

However, there are various risks derived from adopting such an *in concreto* approach. Such an approach could:

- 1) cause delays in proceedings, which may determine a change of circumstances as happened in *Neulinger and Shuruk v. Switzerland* and in *Raban v. Romania*¹³, where delays made the restoration of the *status quo ante* impossible;
- 2) undermine the Hague Convention and the Regulation by assessing the merits in a proceeding not designed to do so;
- 3) allow the abducting parent to benefit from his/her wrongdoing and thus legitimate an illegal situation by the mere passage of time; and
- 4) encourage the adoption of a decision influenced by the social, moral and cultural views of the Court issuing the judgement. Professor Elisa Pérez-Vera showing her concern stated that “*It must not be forgotten that it is by invoking “the best interests of the child” that internal jurisdictions have in the past often finally awarded the custody in question to the person who wrongfully removed or retained the child. It can happen that such a decision is the most just, but we cannot ignore the fact that recourse by internal authorities to such a notion involved the risk of their expressing particular cultural, social, etc attitudes which themselves derive from a given national community from which the child has recently been snatched*”¹⁴.

IV. b) How to avoid delays in proceedings

In our opinion, it is possible to reconcile the child’s best interests with an expeditious procedure based on a minimum standard of evidence but respectful with fundamental rights. This balance can be stricken in our case if the *Juzgado de Primera Instancia de Málaga* applies a minimum standard of evidence pursuant to comply with the Regulation’s requirements:

¹³ In *Raban v. Romania* (App N°25437/08) ECHR 26 October 2010 the ECHR expanded the grave risk of harm exception to include a general “well-settled” exception, concluding that the non-return of the child was justified given that the children wrongfully removed were well integrated and well taken care of by their mother in the State to where they were wrongfully removed.

¹⁴ This last risk was envisaged by Elisa Pérez-Vera in her Explanatory Report on the 1980 Hague Child Abduction Convention, paragraph 22

- 1) Giving the children the opportunity to be heard: Estela, who is thirteen, has to be heard, since she has achieved the required degree of maturity. However, as José is two years old and has not attained a proper degree of maturity, it is better for him to be heard by experts in order to determine what his best interests are¹⁵;
- 2) Hearing Hans or getting his testimony via affidavit otherwise. In order to do so Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters might be useful.
- 3) Initiating direct communication between the courts involved, through the existing judicial networks. In fact, some cases reveal that national authorities do not make an adequate use of the cooperation instruments. That happened in the case *Aguirre Zarraga vs. Pelz* (C-491/10 PPU), where the European Court of Justice expressly stated that “*the court of the Member State of origin must, in so far as possible and always taking into consideration the child’s best interests, use all means available to it under national law as well as the specific instruments of international judicial cooperation, including, when appropriate, those provided for by Regulation No 1206/2001*”¹⁶.

As mentioned above, one of the disadvantages of the *in concreto* approach suggested by the ECHR is that it may cause delays in return proceedings. These delays may hinder the aim of re-establishment of the status-quo ante in order to prevent the legal consolidation of a situation that was illegal ab initio.

The approach of the ECHR seems to go too far into the merits of the case¹⁷. This approach differs not only from that contained in the Convention and the Regulation (since these instruments presume that the child’s best interests are protected by ensuring the prompt return to the country where he/she was habitually resident). The Hague Convention contains exceptions of non-return in articles 13 and 20. The Regulation has

¹⁵This criterion was followed by the ECHR in *Maumousseau and Washington v. France* (App no 39388/05) ECHR 6 December 2007, paragraph 80

¹⁶ *Aguirre Zarraga v. Pelz* (Case 491/10 PPU), 22 December 2010, paragraph 67

¹⁷ *Neulinger and Shuruk v. Switzerland* (App no 41615/07) ECHR 6 July 2010, paragraph 139

reinforced their exceptional nature by limiting the effect of easily exploited exceptions¹⁸.

The risk of harming the child's best interests by a full examination on the merits¹⁹ has been reduced by article 11.4 of the Regulation, which provides that “*a court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return*”. If we hold on the ideas of assessing the domestic violence claims with a minimum standard of evidence and using the EU cooperation instruments, especially regarding direct judicial communications in order to arrange undertakings pursuant to guarantee a safe return, the passage of time will not legalize an illegal abduction, since the restoration of the status quo is ensured despite the fact that the “grave risk” exception has been alleged. Furthermore, this provision may be a good deterrent to false domestic violence statements, which can no longer be used as a strategy to get a non-return order.

In this context, we could question how far judges can assess the interests of the child without taking into account the situation of the abductor if a return order is to be issued. This happened in *Neulinger and Shuruk v. Switzerland*, where it was unknown if criminal proceedings would be initiated against the abducting parent (the mother) and whether that parent, who had always been the primary carer of the child, could be expected to return in such circumstances. Focusing on our case, it is possible that the *Juzgado de Primera Instancia de Málaga*, in spite of being aware of the risk of criminal proceedings against Belén in State X, orders a return. Bearing in mind that José is only two years old and this would mean the loss of his primary carer, the child's best interests could be undermined if such a decision was taken. On the other hand, if arrangements are made under article 11.4 in order to avoid domestic violence upon the

¹⁸ Peter Mc Eleavy , *The new child abduction regime in the European Union: Symbiotic relationship or forced partnership*, *Journal of Private International Law*, April 2005, page 8

¹⁹ Dissenting opinion of Judge Zupancic joined by Judge Gyulumyan in the case *Maumousseau and Washington v. France* sheds light on the importance of taking the passage of time into account. It criticizes the Chamber's approach to these matters, as it simply states that the mere passage of time cannot transform an illegal situation into a legal one, without making any reference to how the passage of time might have an unquestionable influence in short-aged children.

children and those arrangements imply that Estela and José must live apart from their father, they will be separated from their whole family if Belén refuses to return or has to serve a prison sentence after her return. The fear of criminal sanctions may also dissuade Belén from initiating custody proceedings in State X or to take part in them. Although the ECHR missed that point in *Neulinger*, as it ended up assessing not the interest of the child but the fundamental right of the mother to her family life²⁰, eventual criminal proceedings against the abductor have to be taken into account, as one of the circumstances that might be influential. As a *lege ferenda* suggestion, criminal sanctions to child abduction should be suppressed in cases where the abductor is willing to comply with the return order, in order to promote the abductor's return with the children or at least make the abductor's visits possible. Judicial co-operation could be very useful in this connection: the Spanish judge should communicate directly with the competent authority in State X to ensure that Belén will not be prosecuted. Additionally, judicial networks could provide information about criminal proceedings, undertakings, and other provisional measures designed to guarantee a safe return.

It is essential for judges to understand the internal logic of the Brussels II bis instrument and realize that the return procedure has to be followed as immediately as possible by a custody proceeding. The return procedure is not on the merits of the case and, therefore, it is not a custody decision. That is why, if the Spanish judge issues a non return order, under article 11.6 of the Regulation, he/she must immediately, within one month, transmit a copy of the court order on non return and of the relevant documents, in particular a transcript of the hearings before the court, to the court with jurisdiction or the Central Authority in State X. Unless the courts in the Member State where the child was habitually resident immediately before the wrongful removal or retention have already been seised by one of the parties, the court or central authority that receives the information mentioned in paragraph 6 must notify it to the parties and invite them to make submissions to the court, in accordance with national law, within three months of the date of notification so that the court can examine the question of custody of the child (article 11.7 of the Regulation).

In conclusion, if return proceedings are conducted in a most expeditious way by applying a minimum standard of evidence and using cooperation mechanisms, and if

²⁰ Article 8 of the Convention for the Protection of the Human Rights and Fundamental Freedoms

custody proceedings are immediately initiated before the courts of Estela's and José's habitual residence State, the "grave risk" exception will not delay the proceedings if the Regulation is applicable, as article 11 guarantees either a safe return with undertakings or a non-return order followed by an immediate custody proceeding if the parties wish so. In addition to that, cooperation could also take into account and avoid future criminal prosecution if the abductor complies with the return order forthwith.

V. THE PRINCIPLE OF MUTUAL TRUST VS. HUMAN RIGHTS

The Brussels II bis Regulation is based on the principle of mutual trust²¹. The European mechanism in parental responsibility matters and child abduction cases relies on judicial cooperation to the extent that Brussels II bis Regulation cannot be understood if we do not keep in mind that European judges have to work together. A good example of such cooperation is article 15, which provides that the courts of habitual residence can transfer their competence to a better placed court. This article is inspired by the *forum non conveniens* rule, setting out an alternative forum which courts can, even on their own motion, take into account when deciding on the merits of the case, in the light of the best interests of the child²².

The mutual trust principle has as well inspired the enforcement rules contained in the Brussels II bis Regulation. These rules apply only in cases where children have been wrongfully taken from one Member State to another Member State, and operate in the following way. If the *Juzgado de Primera Instancia número 1 de Málaga* decides the return of Estela and José to State X, as both of them are in Málaga at the time of the ruling, this same court is responsible for enforcing the return order, given that in Spain, jurisdiction on enforcement is legally given to the Court of First Instance of the place where the minor has been abducted or illegally retained. Even if this Court dismisses the return petition, and return is later granted on appeal by the *Audiencia Provincial de*

²¹ Article 21 of Regulation Brussels II bis establishes this principle in stating that "*The recognition and enforcement of judgments given in a Member State should be based on the principle of mutual trust and the grounds for non-recognition should be kept to the minimum required.*"

²² The Preamble of the Regulation (paragraph 12) states that the grounds of jurisdiction in matters of parental responsibility established in the present Regulation are shaped in the light of the best interests of the child

Málaga, the Court of First Instance will be empowered to enforce the Provincial Court's decision²³. If the First Instance court of Málaga, on the contrary, decided to deny the return of Estela and José to State X, we would face a completely different scenario. Regulation Brussels II bis establishes that the final custody decision is to be taken by the State of origin's courts. In a way, the courts of State X are empowered to challenge the Spanish First Instance Court's decision, ordering the effective return of Estela and José to the place from which they were wrongfully removed on the basis of a judgment on the merits. A ruling on the merits by the competent Court in State X is to be enforced in Spain without delay; otherwise a change of circumstances may be alleged as a strategy to avoid enforcement. Nevertheless, a change of circumstances will never entitle the Juzgado de Primera Instancia de Málaga to refuse the enforcement, as expressly stated by the ECJ in the case *Doris Povse v. Mauro Alpage*.²⁴

Article 42 of Regulation Brussels II bis, built upon the principle of mutual trust, abolishes the need to apply for "exequatur" in cases where a return order is issued. According to the referred rule, when the judgment given by the empowered State X Court becomes enforceable, it shall be recognized and enforced in Spain and any other country within the Union²⁵. Otherwise, the abductor parent could move to another country with the purpose of initiating a new return procedure. This non-exequatur procedure is based on the certification of the final judgment. According to article 42, the Court shall issue the certificate only if the following procedural guarantees have been respected: the child must be given an opportunity to be heard, unless his or her age or degree of maturity make it inappropriate; the parties must also be given an opportunity to be heard; and the court must have taken into account the reasons for and evidence underlying the non-return order issued pursuant to article 13 b) of the 1980 Hague Convention. As the ECJ has clarified, there is no possibility of challenging the certificate before the requested courts²⁶.

Despite its apparent simplicity, some problems have arisen in practice when

²³ Spanish rules on the procedural implementation of the 1980 Hague Convention are contained in articles 1901 to 1909 of the Ley de Enjuiciamiento Civil of 1881.

²⁴ *Povse v. Alpage*, (Case C-211/10) PPU, 1 July 2010, paragraph 83

²⁵ Practice guide for the application of the new Brussels II bis regulation. Pages 41-42

²⁶ See *Aguirre Zarraga v. Pelz* (Case 491/10 PPU), 22 December 2010

applying these provisions. The abolishment of exequatur can only operate in an optimal way if the mutual trust upon which it is based effectively exists. That trust was proved not to be a strong one in the *Aguirre Zarraga v. Pelz case*²⁷, in which a German Court submitted a preliminary ruling to the European Court of Justice in order to clarify whether the Judge from the State of refuge may exceptionally refuse to enforce a certificate on the grounds that the ruling court had not complied with article 42 obligations. In the *Aguirre Zagarra* case, the obligation to hear the child had not been fulfilled, breaching thus article 24 of the Charter of Fundamental Rights of the European Union.²⁸ The ECJ, relying on the mutual trust principle, replied negatively, stating that “*the Member State of enforcement cannot oppose the enforcement of a certified judgment, ordering the return of a child who has been wrongfully removed, on the ground that the court of the Member State of origin which handed down that judgment may have infringed Article 42 of Regulation Brussels II bis, interpreted in accordance with Article 24 of the Charter of Fundamental Rights of the European Union, since the assessment of whether there is such an infringement falls exclusively within the jurisdiction of the courts of the Member State of origin*”.

However, Member States might be responsible of breaching the Convention for the Protection of Human Rights and Fundamental Freedoms if the Court of a Member State enforces a certified judgment that is not respectful with human rights. The principle of mutual trust is based upon the presumption that in all Member States the recognition and protection of Human Rights is a reality. Following the Regulation, it would not be necessary to verify in each individual case whether a certain standard of protection of human rights has been effectively achieved as a condition for providing cooperation.²⁹ Nevertheless, the presumption settled above has already been brought into question by the European Court of Human Rights in case *M.S.S. v. Belgium and Greece*³⁰. M.S.S entered the EU through Greece, ending up in Belgium where he claimed asylum. Belgium submitted a request for Greece to take charge of his claim

²⁷ Ibid, paragraph 75

²⁸ Article 24.1 protects the right of the child to have an “*opportunity to be heard in any procedure concerning him*”.

²⁹ Camille Dautricourt, *A Strasbourg Perspective on the Autonomous Development of Fundamental Rights in EU Law: Trends and Implications*, Jean Monnet Working Paper 10/10. <http://centers.law.nyu.edu/jeanmonnet/papers/10/101001.pdf>

³⁰ *M.S.S. v. Belgium and Greece* (App no 30696/09) ECHR 21 January 2011.

pursuant to EU Law. Relying on the principle of mutual trust, the Belgian Court thought that there was no reason to question Greece's human rights protection standard. Therefore, Belgium decided to transfer M.S.S. to Greece. However, the ECHR decided that the deplorable asylum conditions in Greece should lead to understand that not only Greece, but also Belgium by transferring an asylum seeker to Greece, had violated the European Convention of Human Rights.

We therefore end up in a scenario in which on the one hand, the ECJ advocates for an automatic cooperation between European judges, but on the other hand, the ECHR rejects automatism, stressing that each case has to be assessed individually. Effective cooperation has to be granted only if Human Rights are actually protected. Thus, as judges, we must be aware that the principle of mutual trust has to be reconciled with respect of fundamental rights.

VI. CONCLUSIONS

The successful operation of both the 1980 Convention and the Brussels II bis Regulation is dependant upon judicial cooperation. In order to guarantee that these instruments operate smoothly judges must be prepared to evolve and to adapt their skills to a globalised world in which mobility is each time more frequent, especially within the European Union. Additionally, we need to become aware of the fact that most of child abduction cases stem from an intricate family conflict, which cannot be solved in a return proceeding. Judges have to focus on a small part of the conflict: the facts that determine a decision of return or non-return.

Domestic courts will be more likely to strike the balance between taking into account the child's best interests and ensuring the prompt return if the following actions are taken:

1. Promoting cooperation: If we look back to the above analyzed ECHR and ECJ decisions, we realize that one of the failures within the handling of procedures was

the incapability of judges to communicate effectively and cooperate towards an effective solution of the case³¹. Cooperation is rendered difficult by:

a) The lack of knowledge of foreign languages: The lack of knowledge of foreign languages is an obstacle to cooperation, since judges from different Member States will find it difficult to communicate. Additionally, some instruments of judicial cooperation are only available in a couple of languages³². This problem could be solved if judges were required to speak English fluently or incentives to the learning of that language were given to them.

b) Training in European law is absolutely essential in order to promote a European legal culture.

c) The special status of Judges, who are independent, often determines that they are not inclined to cooperate. This could be avoided if judicial networks and other cooperation instruments were promoted more actively among judges by organizing seminars and meetings with this purpose.

2. Reconciling the aim of prompt return with the protection of human rights in the light of the child's best interests: As mentioned above, there is a serious risk of undermining human rights if cooperation is provided blindly. If judges become aware of the European dimension of these proceedings and the effect of their rulings on human rights, they will be more likely to provide an adequate protection of human rights. Nevertheless, a balance between automatic enforcement and protection of human rights will never be achieved if the ECJ and the ECHR continue ruling on the basis of different approaches to the child's best interests. This is why some authors have proposed a conference under the auspices of the Permanent Bureau of the Hague Conference on Private international law and the European Commission for both the

³¹ The national courts in Lithuania (Case C-195/2008, Rinau PPU), Slovenia (Case C-403/09 PPU, Deticek), Austria (case C-211/10, PPU, Povse) and Germany [(Case C-491/10) PPU, Aguirre Zarraga] initiated proceedings at the ECJ, to try to avoid the automatic enforcement provided in article 11.8 of the Regulation

³² For instance, the Practice Guide to the Brussels II bis Regulation is only available in French, English and German

Strasbourg and Luxembourg judiciary³³ in order to promote an approach between both Courts that leads to a balance between ensuring the prompt return via cooperation and protecting human rights in the light of the child's best interests. In conclusion, it is important that our highest European Courts begin to work together towards a common approach to the child's best interests in child abduction cases.

³³ Nigel Lowe. *A supra-national approach to interpreting the 1980 Hague Child Abduction Convention – a tale of two European courts: Part 1: setting the scene*, International Family Law, March 2012

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