

Thesis International Children's Rights



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**The child's right to be heard in South Africa and the United States of
America: analysis of the Hague Abduction Convention**

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Abstract

My master thesis deals with the topic of children's international abduction and children's right to be heard. During the lecture on private international law, a lot of case law were analysed, and the feeling came out that children were mostly considered as passive actors of the abduction procedures. As a result, the idea rose to take a closer look at the implementation of the children's right to be heard in abduction procedures. This analysis has been conducted through a comparison between two countries: South-Africa and the United States of America. This choice has been made because of the different international legal background of these two countries regarding children's rights. Indeed, South-Africa did ratify the Convention on the Rights of the Child while the United States of America did not.

In the first part, the framework of the children's right to be heard in abduction procedures is detailed. On the one hand, children's participation has been strengthened by Article 12 of the UNCRC, and this specific provision is closely examined. On the other hand, the Hague Abduction Convention is a key instrument of this thesis, nevertheless, this convention does not consecrate children's right to participation as a general principle, but restrains it to the child's objection clause contained in Article 13(2) of the Hague Abduction Convention.

The next two chapters are dedicated to the analysis of the implementation of the Hague Abduction Convention both in South Africa and in the United States of America, with a specific focus on the children's right to participation. In the U.S., the huge numbers of competent judges, as well as the absence of guiding legislation, decrease the harmonisation of the decisions on Hague Abduction cases. This weakness impacts children mainly regarding their hearing, as some judges are reluctant to hear children while others allow it. Regarding South Africa, the Convention on the Rights of the Child and the African Convention on the Rights and Welfare of the Child have a great impact on its legislation. As a result, children's participation is recognised as a general principle, and children involved in abduction procedures benefit from specific protection such as the child's mandatory separate legal representation from parents. Despite a reform in 2007, judges are still not fully trained to the specificities of the Abduction Convention. However, the divergence is less apparent than the one observed in the U.S.

This thesis shows that the UNCRC has a real impact on the daily life of children compared to countries where this international instrument has not been ratified. Finally, as a result of our analysis, in international abduction procedures between countries parties to the Abduction Convention, it can be said that the child's participation, and thus the child's opportunity to give his/her views, is only possible –regardless of domestic legislation which is influenced by the ratification of international instruments– with Article 13(2) of the Abduction, in respect of which interpretation varies among states-parties.

Keywords: International Abduction – Right to be heard – Article 12 UNCRC – South Africa – United States of America – Hague Abduction Convention – Children's objection – Children's views.

The child's right to be heard in South Africa and the United States of America: analysis of the Hague Abduction Convention

"There is now a growing understanding of the importance of listening to the children involved in children's cases.

It is the child, more than anyone else, who will have to live with what the court decides... they (children) often have a point of view which is quite distinct from that of the person looking after them. They are quite capable of being moral actors in their own rights".¹

1. Introduction

Children's rights are now recognized across the world, as can be shown by the quasi-universal ratification of the 1989 UN Convention on the Rights of the Child.² This particular international instrument identifies several specific rights, within which the UN Committee on the Rights of the Child highlights four core principles. These are the best interests principle,³ the right to life, survival and development,⁴ the right to non-discrimination⁵ and the right to participation. This latter will be the main subject of this thesis and covers two different aspects of child's participation enshrined in Article 12 of the UNCRC i.e. the child's right to express his/her view and the child's right to be heard.

Article 12 of the UNCRC will not be analysed alone, and this thesis will combine two different fields i.e. the right to be heard and international abduction procedures. This private international law theme has been chosen mainly due to an observation made while reading case-law: in abduction cases, the main actors are parents, and little attention seems to be paid to the children, even though they are the main victims of this situation and are more impacted by the devastating effects of international abduction.⁶ This practice is the result of the traditional opinion that children are vulnerable persons in need of protection against harmful behaviour. In abduction procedures, children can also be seen as "objects" of the abducting parent who does not feel comfortable in his/her country of residence and therefore, frequently, goes back home with the child.

As almost all the Member-states to the Hague Conference on Private International Law are parties to the UNCRC; they are therefore under the obligation to hear the child's opinion in all matters related to him/her. Therefore, the child's views should be given due weight in all judicial procedures including international abduction procedures. However, this analysis will show that a systematic child's hearing is not a worldwide practice, especially in international abduction cases, where the major aim, as will be explained later, is to enable the prompt return of the child in his/her country of habitual residence. In fact, some judges are reluctant to hear the child during a Hague procedure, arguing that it will delay the final decision on the return of the child. It is only when this return has taken place that the local competent authorities will hear the child and decide upon the custody issues that are at the centre of the conflict.

¹ USA, *In re D* (2006) UKHL 51.

² U.N. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., U.N. Doc. A/Res/44/25 (1989); Hereinafter UNCRC

³ Article 3 UNCRC.

⁴ Article 6 UNCRC.

⁵ Article 2 UNCRC.

⁶ For a complete study on the effects of international abduction on both parents and children, see *M. Freeman, International Child Abduction – the Effects* (2006).

This thesis will have two main goals: on the one hand, it will be the opportunity to examine whether the right of children to be heard is an effective right in abduction return procedures, and on the other hand, this thesis will examine whether the implementation of this right has been strengthened by the ratification of the UNCRC, more than 25 years after its adoption

To enable a concrete analyse of my subject of interest, two limitations will help to define the framework of the research. The first one will be geographical: two different countries will be analysed regarding the manner in which they deal with the child's right to be heard in abduction return applications. Those two countries will be South Africa and the United States of America. This comparison presents a particular interest for the assessment of the relationship between the UNCRC and The 1980 Hague Convention on International Child Abduction.⁷ In fact, South Africa has ratified both international instruments while the USA has ratified only the Abduction Convention. The second limitation will be temporal: the analysis will start in 1997, date of ratification, by South Africa, of the Abduction Convention.

Several challenges have been encountered during the drafting process of this thesis. First of all, the analysis is limited to published cases. Therefore, if, due to financial and human constraints resources, the database of cases is not updated, interesting cases may not be accessible. Second, the same reasoning applies to cases settled by mediation after which agreements stay private.

More specifically, this thesis has as a basis two very different Conventions: the UNCRC and the Abduction Convention. The UNCRC is the most ratified treaty in the world with 196 States-Parties. Only one country has not ratified this international instrument, despite its involvement in the drafting process: the United States of America. The various reasons of this non-ratification relate mainly to the fear of this Convention impacting parental rights by giving autonomous rights to children.⁸ Besides its ratification status, the content of the Convention is broad and encompasses both general principles and specific situations such as "illicit transfer and non-return of children abroad" in Article 11 UNCRC which is relevant to our subject of interest. The UNCRC can be directly linked with the Abduction Convention: indeed, the combination of Article 11 and Article 35 UNCRC shows that abduction phenomenon and the possibility of non-return of the child in his/her country of habitual residence can negatively affect him/her. Through those two provisions, it can also be argued that States are asked to conclude agreements preventing such situations.⁹

At the date of the 5th July 2016, the Abduction Convention has 94 Member-States. It was established to achieve two goals: one preventive¹⁰ and one responsive. The preventive aspect aims to combat the phenomenon of international child abductions by guaranteeing that any abducted child will be returned to his/her country of habitual residence where the custody issues will be decided.¹¹ This deterrent effect focuses on a trend that had been observed which consists of abductors choosing their destination by looking at the more favourable jurisdiction for their case – also called "forum shopping".¹² This choice of courts put the left-behind parents in a less favourable position, and he/she

⁷ Hereinafter The Abduction Convention.

⁸ These arguments will be detailed in Section 3.1. of this thesis.

⁹ Australia, *In the Marriage of Murray and Tam* (1993) 16 Fam LR 982.

¹⁰ E. Lesh, *Jurisdiction Friction and the Frustration of the Hague Convention: Why International Child Abduction Cases Should be Heard Exclusively by Federal Courts*, 49 Family Court Review 170 at 172 (2011); United Kingdom, *Re E (Children) (Abduction: Custody Appeal)* (2011) UKSC 27.

¹¹ USA, *Barzilay v. Barzilay*, 600 F. 3d 912 (8th Cir. 2010).

¹² C. R. Metz, *Application of the Younger Abstention Doctrine to International Child Abduction Claims*, 69 University of Chicago Law Review 1929 at 1934 (2002) ; USA, *Redmond v. Redmond*, 724 F. 3d (7th Cir. 2013); USA, *Hofmann v. Sender*, 716 F. 3d 282 (2d Cir. 2013); USA, *Selo v. Selo*, 929 F. Supp. 2d 718 (E.D. Mich. 2013).

was likely to lose definitively the custody of his/her child. By stating that the authorities of the country of destination cannot judge upon the child's custody, the Abduction Convention prevents the phenomenon of forum shopping, and as a consequence, child's abduction. The second goal is responsive and is applied when the abduction has already taken place in response to the assumption that the negative effects of these situations can have fewer consequences if the child is promptly returned to his/her country of habitual residence.¹³ In fact, the Abduction Convention has as its purpose:

to return wrongfully retained children to their country of habitual residence to allow that country to make any custody determination on the merits, depriving the abducting parent of any practical or legal advantage from the abduction.¹⁴

The immediate reintegration of the child in his/her habitual environment¹⁵ is guided by several principles including a close cooperation between national authorities¹⁶ and a state's willingness to respect the custody rights in place in the country of habitual residence. Before returning the child, the competent authority must go through a quick analysis of the situation. It will determine the habitual residence of the child to assess the existence or not of a wrongful removal or retention and whether the rights of custody of the left-behind-parent have been violated. Finally, and before ordering the return, the authority must look at the time elapsed since the arrival of the child in the country of destination. If more than one year has elapsed, then the authority has a discretionary power to order the return, which is not the case if the child has arrived less than 12 months before. This process could be easy if the drafters of the Convention had not added some exceptions to this prompt return.¹⁷ These exceptions are mainly contained in Article 13 of the Abduction Convention and are an expression of the importance of the best interests of the child as a "guiding criterion"¹⁸ in the abduction process.¹⁹ Four exceptions can be distinguished, and all of them must be interpreted narrowly²⁰ as to avoid to "drive a coach and four through the Convention".²¹ The first one covers the situation in which the person seeking the return of the child was not exercising the rights of custody. The second situation entails the non-return of the child if such a return would place him/her in an intolerable situation, and the third one allows the judge not to return the child if the latter objects to his/her return in the country of origin. Finally, article 20 of The Hague Abduction Convention allows the non-return of the child if this return "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms". This thesis will focus more on the third exception as it allows the child's views to be taken into account and constitutes an aspect of the child's right to be heard.

¹³ Z. Ponjavic & V. Vlaskovic, *Space for the Child's Best Interests Inside the Hague Convention on the Civil Aspects of International Child Abduction*, 16 *Rev. Eur. L.* 45 at 48 (2014).

¹⁴ L. Elrod, *Please Let Me Stay: Hearing the Voice of the Child in Abduction Cases*, 63 *Oklahoma L. Rev.* 663 at 675 (2010-2011).

¹⁵ *Australia, DP v. Commonwealth Central Authority (2001) HCA 39.*

¹⁶ E. Perez-Véra., *Explanatory Report, in 3 Hague Conference on Private International Law: Actes et documents de la Quatorzième session, 6 au 25 Octobre 1980, Tome III, Enlèvement d'enfants at 434 (1982)* (Hereinafter *Rapport Perez-Véra*).; See Z. Ponjavic & V. Vlaskovic, *supra* note 13 at 46.

¹⁷ D. R. Rivers, "The Hague International Child Abduction Convention and the International Child Abduction Remedies Act: Closing Doors to the Parent Abductor", 2 *Transnat'l Law.* 589 at 620 (1989)

¹⁸ See Z. Ponjavic & V. Vlaskovic, *supra* note 13 at 60.

¹⁹ See *Rapport Perez-Véra, supra* note 16 at 432.

²⁰ R. Nanos, "The Views of a Child: Emerging Interpretation and Significance of the Child's Objection Defense Under the Hague Child Abduction Convention", 22 *Brook. J. Int'l L.* 437 at 446 (1996-1997); A. M. Greene, « *Seen and Not Heard? Children's Objection Under the Hague Convention on International Child Abduction* », 13 *U. Miami Int'l & Comp. L. Rev.* 105 at 139-141 (2005-2006).

²¹ *USA, C v. C (Abduction: Rights of Custody) 1989 1 WLR 654.*

Regarding the work done in the precise field of this study, whereas academics have written on the right to be heard, only a few have combined the right to be heard and abduction procedures, and such a combination has, as far as the author knows, never been examined in these two countries, one of which has ratified the UNCRC and the other not. A lot of articles concentrate on the child's objection clause contained in Article 13 (2) of the Abduction Convention as the way for children to be heard in abduction procedures such as Anastacia Greene²² or Rania Nanos.²³ By doing this, they omit the general principle of children's right to participate. However, this omission can be justified by the fact that most of these academics are American citizens, and as the USA did not as yet ratify the UNCRC, the general principle of children's right to be heard does not apply to their jurisdiction. The closest study to this thesis has been conducted by Linda D. Elrod in an article called "Please Let Me Stay: Hearing the Voice of the Child in Hague Abduction Cases".²⁴ Despite the focus on USA, she gives an overview of the use, by the relevant stakeholders, of the child's views in abduction procedures. Her final argument is to claim for the recognition of the need of the child's voice to be taken into account "whenever the child's interests and the parent's interests are not aligned",²⁵ incorporating thus the UNCRC in American practice despite its non-ratification. This opinion joins some American academics that consider the UNCRC as international customary law.²⁶

This thesis will be divided into four main parts. The first one will be dedicated to the analysis of the right to participation and its relevance in abduction cases. Both the UNCRC and the Abduction Convention will be detailed, as well as their most relevant provisions i.e. Article 12 of the UNCRC and Article 13 (2) of the Abduction Convention. Regarding the latter, a brief explanation of the use of this child's objection clause will be offered to the readers. Chapter three and four will apply this legal framework to the practice of the United States and South Africa. The case law of these two countries will be analysed, as well as the impact of the ratification, or not, of the UNCRC in their application of the right to participation. A brief overview of the reasons for the non-ratification of the UNCRC by the USA will also be given to enable a more concrete contextualisation of the American implementation of the Abduction Convention. While assessing South-Africa, the African Charter on the Rights and Welfare of the Child will also be looked at, as this regional convention also entitles States to hear children. The last substantive chapter of this study will merge the findings of the different previous chapters, and will try to answer the research question: is the children's right to be heard effective in abduction procedures, and has the UNCRC had an impact on this effectiveness?

²² See Greene, *supra* note 20.

²³ See Nanos, *supra* note 20.

²⁴ See Elrod, *supra* note 14.

²⁵ *Ibidem* at 689.

²⁶ *Ibidem* at 672; B. Dohrn & C. G. Kanelos, "Human Rights for Children: New Tools and Strategies", 20 *Child. Legal Rts. J.* 20 at 22 (2000).

2. The framework of the right to be heard in international abduction procedures

« Being heard and having one's views taken into account ... is one of the main determinants of the perception that the decision making process is fair, even if the outcome is not the one that is wanted »²⁷

In this chapter, the readers will be offered a precise and complete analysis of the child's right to participation in international abduction procedures. In the first part of this chapter the children's right to participation, and more especially their right to be heard, will be analysed. In the second part, the phenomenon of international child abduction and its worldwide occurrence will be assessed, while the third part of this chapter will be dedicated to the presence – or absence - of the children's right to be heard in the specific context of international abduction.

While the focus will be put on the UNCRC and the Abduction Convention in this thesis, several other international and regional instruments also enshrine the children's right to be heard and must be mentioned. Those are mainly Article 13 of the Inter-American Convention on Conflicts of Laws Concerning the Adoption of Minors,²⁸ Rule 14.2 of the UN Standard Minimum Rules for the Administration of Juvenile Justice, Article 7 of the African Charter on the Rights and Welfare of the Child, Article 3 of the European Convention on the Exercise of Children's Rights and Article 11 §2 of the Brussel Ila Regulation which is specific to international abduction cases.

2.1. Child Participation

2.1.1 History

Traditionally, children were faced with the view that they were not rights bearers,²⁹ and had, as a consequence, no opportunity to be involved in the divorce of their parents and the subsequent issue of custody.³⁰ This "incapacity" was based on several grounds linked to the doctrine of *patria potesta*,³¹ which considered that children are lacking physical and intellectual maturity, are dependent on adults and are especially vulnerable and thus in need of special protection measures. The ancestral reliance on the concept of vulnerability was led by the opinion that children could not protect themselves against harm. It is interesting to note that these latter arguments are still used by the United States of America to justify its non-ratification of the UNCRC, as it will be shown in the next chapter. However, and despite this national exception, at the end of the 1970s, a shift occurred from a vulnerability/protectionist approach stance towards a rights-based approach. This can be proven in the Recommendation 874(1979) of the Parliamentary Assembly of the Council of Europe, which declared that "children must no longer be regarded as parents' property but must be recognized as individuals with their own rights and needs".³² Thereafter, children were recognized subjects of rights in the same

²⁷ P. Parkinson & J. Cashmore, *The Voice of a Child in Family Law Disputes at 20* (2009).

²⁸ Here the child's consent is required only when the child is more than 14 years old.

²⁹ For a deeper analysis of the evolution of children's rights see M. Freeman, *The Value and Values of Children's Rights*, in A. Invernizzi & J. Williams (Ed.), *The Human Rights Of Children – From Visions to Implementation 21* (2011).

³⁰ See Elrod, *supra* note 14 at 664; See Rivers, *supra* note 17 at 592.

³¹ K. Hanson, *Schools of Thought in Children's Rights*, *Children's Rights Unit, University Institute Kurt Bosch 5 at 12-13* (2008).

³² Parliamentary Assembly of the Council of Europe, 31st Ordinary Session, *Recommendation on a European Charter on the Rights of the Child*, 4 October 1979.

way as adults are, and their recognized lack of autonomy³³ should not be understood as precluding their ability to be entitled to human rights as human rights applies to every human being.³⁴

Regarding the right to participation, this shift meant that instead of being a passive, or even a silent actor, the child becomes an active participant who can influence the outcome of procedures affecting him/her by being seen, heard and listened to.³⁵ This progressive approach is, unfortunately, not yet well implemented and an interesting study carried out in 2013 in Australia showed that children's legal representatives did not consider child's interview as a needed step to the process of representation.³⁶ This lack of enforcement is the subject of this thesis, and, as explained earlier, the focus will be put on children's participation in abduction procedures.

2.1.2 The UNCRC and child's right to participation

The right to participation has been designated as one of the four core principles of the CRC, with the best interests principle, the right to life, survival and development and the right to non-discrimination. Article 12 of the UNCRC which is dedicated to the right of children to be heard gives the opportunity for the child to express his/her views on subjects affecting him/her. Hearing children in all matters concerning them is important, as it empowers them, adds value to the outcome and gives credibility to the process.³⁷ Furthermore, researchers have shown that children want to participate.³⁸ For these reasons, and also to enable a better implementation of the right expressed in the UNCRC, the Committee on the Rights of the Child, in 2009, issued a General Comment on this specific provision. It described it as an:

ongoing process which includes information-sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes.³⁹

It is important to note that no minimum age at which a child can be heard has been defined either by the CRC or the Committee in its General Comment No.12. This absence is deliberate, as children evolve differently and have a different level of maturity at the same age.⁴⁰ Moreover, adding an age limitation to this right would restrain its scope of application.

³³ CRC Committee, General Comment No. 12 (2009) on the Right of the child to be heard, UN. DOC CRC/C/GC/12 at 1. Hereinafter "General Comment No. 12".

³⁴ J. Tobin, *Understanding Children's Rights: A Vision Beyond Vulnerability*, 84 *Nordic Journal of International Law* 155 at 160 (2015).

³⁵ *Ibidem* at 176.

³⁶ R. Kaspiew, *Report on Independent Children's Lawyers: Final Report (2013)* at 41. <https://www.ag.gov.au/Publications/Documents/IndependentChildrensLawyersStudy/IndependentChildrensLawyersStudyReport-Publication.pdf> (last accessed 30th may 2016)

³⁷ See Elrod, *supra* note 14 at 666; J. B. Kelly, *Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice*, 10 *Va. J. Soc. Pol'y & L.* 129 (2002).

³⁸ L. Krappman, *The weight of the child's view (Article 12 of the Convention on the Rights of the Child)*, 18 *Int'l J. Child. Rts.* 501 at 513 (2010); P. Parkinson, J. Cashmore & J. Single, *Adolescents' Views on the Fairness of Parenting and Financial Arrangements After Separation*, 43 *Fam. Ct. Rev.* 429 (2000); *Canadian Special Joint Committee on Child and Access For the Sake of the Children Report 1998*.

³⁹ See General Comment No. 12 ; M. Potter, "The Voice of the Child: Children's Rights' in Family Proceedings", *IFL* 140 at 147 (2008) http://www.reunite.org/edit/files/Library%20-%20Journal%20Articles/IFL_Sept_2008_Childrens_Rights.pdf (last accessed 31st May 2016).

⁴⁰ See General Comment 12 at 6-7 para. 21.

Several comments on Article 12 UNCRC and its implementation must be done for the purposes of this thesis. For a better understanding, the two paragraphs which constitute Article 12 will be analysed separately: the first paragraph calls for the right for children to express their views while the second part of the provision enshrines the right for the child's views to be heard.

2.1.2.1 Article 12 (1) of the UNCRC

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.

The use of the words “capable of forming his or her own views” calls for a specific interpretation: States cannot begin with the assumption that a child is incapable of forming his/her own views and they should, *a contrario*, presume that each child has such a capability.⁴¹ This particular emphasis requires the competent authority to assess on a case-by-case basis the child's capacity to build his/her own opinion, and to correctly express it. As a prerequisite of this examination, all the adequate information must be given in a child-friendly manner⁴² to the child to enable him/her to form his/her view. Indeed, a correct understanding of the procedure will truly be of benefit to the child and aid his/her acceptance of the final decision.⁴³

The provision also specifies an important aspect of the right for children to express their views: only listening to the child is insufficient, the opinion must be given “due weight”.⁴⁴ In fact, the provision requires that the child's opinion is given due weight depending on both a subjective and an objective element: the age being the objective one while maturity being the subjective one. This combination allows for the child not to have already reached a full stage of development and enables a wider coverage of children. Indeed, the adding of the “maturity of the child”⁴⁵ enables the authority not to stick only to the age of the child and strengthens the necessity of a case-by-case analysis which complies with the best interests principle. This obligation entitles that the competent authority must explain to the child how his/her opinion has been treated in the process, and if needed, why the opinion has not been followed by the decision-maker.

An important component of the authority's analysis is to decide which weight to give to the child's view. This process is linked with the requirement laid down in the provision that the child's opinion should be given “freely” i.e. without having been influenced by one the parents⁴⁶, under pressure or while being subjected to uncomfortable conditions such as stress and fear.⁴⁷ If such a situation is found, the child's voice will be given little or no weight.⁴⁸ Furthermore, this condition reinforces that a child must not be forced to give his/her views. Otherwise, the opinion will not be expressed freely.

The child should be able to express his/her views in all matters affecting him/her. This requirement that the issue affect the child should however not be interpreted broadly, and children should only be

⁴¹ See General Comment No. 12 at 6 para. 20; See Krappman, *supra* note 38, at 507.

⁴² See General Comment 12 at 9 para. 34.

⁴³ See General Comment 12 at 8 para. 25, 10 paras. 41 and 27 para. 134 a).

⁴⁴ See Krappman, *supra* note 38, at 502.

⁴⁵ This last concept is defined by the Committee as “the capacity of a child to express his or her views on issues in a reasonable and independent manner” see General Comment 12 at 8 para. 30.

⁴⁶ See Quebec, *Droit de la famille – 1763*, (1993) R.D.F. 111 (S.C.), *appel dismissed* (1993) R.J.Q. 2976 (C.A.) for an example of parental alienation syndrome.

⁴⁷ See Potter, *supra* note 39, at 142.

⁴⁸ The issue of influence, also called the parental alienation syndrome, will be touch upon in the point 2.3.2.2 “use of exception” of this thesis.

heard in matters affecting them directly, and not, *a contrario*, be considered as a systematic step in all possible matters such as the construction of a roadway or the drafting of a bill in competition law. However, it is important to strengthen the fact that Article 12 (1) applies both to public but also private matters, and thus includes family issues.⁴⁹ In other words, the children's right to be heard must be applied in all matters affecting the daily life of children.⁵⁰ This narrower interpretation is strengthened by Article 3 of the UNCRC and the application of the best interests principle in all matters concerning children. Therefore, Article 12(1) calls upon States to give a space in their decision-making process to children in fields affecting their daily life.

Finally, the use of the specific verb "assure" is important, as it emphasizes that children should not be forced to express their views, but should be given the opportunity to do so. This can be done through several and diverse mechanisms such as special councils at school, direct consultations, legal representation during judicial procedures and the establishment of Youth Parliaments.⁵¹

2.1.2.2 Article 12 (2) of the UNCRC

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.

This second paragraph expresses the child's right to be heard in judicial and administrative procedures when the latter affects the child. The reference to "this purpose" entails that the child must be capable of forming his/her views and that the opinion should be given due weight in accordance with the age and maturity of the child, as stated in the first paragraph of the provision. The particular use of the word "opportunity" strengthens the idea that the child should be offered the possibility to be heard in the procedure, but that the children's right to be heard encompassed in Article 12(2) is a right and not an obligation. Therefore, a child cannot be forced to give his/her opinion and can choose whether or not to exercise his/her right.⁵²

In this particular context of Article 12(2), it is of tremendous importance to bear in mind that children can express their views in various ways. The provision allows for various forms of participation such as the representation of the child or, if the child wishes so, by a direct hearing in front of the relevant court or body. Regarding the choice of a representative, the provision does not require this spokesperson to be a legal representative, and he/she could be a psychologist or another professional such as a *curator ad litem* or a social worker. It can be argued that this indirect form of participation is often more suitable for children, as the representative will, generally, have experience in the field and will be more able to express the child's views and ensure that they are heard.⁵³ However, the spokesperson should be aware that his/her role is to express the child's views, and not to defend what is in the best interests of the child. Those two different functions can sometimes be in competition and it is important to distinguish them. For example, in the specific context of custody, the child's interests

⁴⁹ D. G. Kassan, *How Can the Voice of the Child be Adequately Heard in Family Law Proceedings?* LLM University of Western Cape, at 9 (2004).

⁵⁰ F. Lücker-Bail, *The right of the child to express views and to be heard: An attempt to interpret Article 12 of the UN Convention on the Rights of the Child*, 3 *Int'l J. Child. Rts.* 391 at 396 (1993).

⁵¹ Several initiatives of youth parliaments have been launched both at the regional and national level. See <http://www.parlementjeunesse.be> (last accessed 30 May 2016) to have an example of a national youth Parliament here within Belgium and <http://eyp.org> (last accessed 30 May 2016) to learn more about the European Youth Parliament. For example of children's public participation in South Africa see S. Moses, *Children and Participation in South Africa: An Overview*, 16 *Int'l J. Child. Rts.* 327 at 333-336 (2008).

⁵² See General Comment 12 at 27 para. 134 b).

⁵³ See Kassan, *supra* note 49 at 12-13.

can compete with the parental interests, and the child's views could be in contradiction with the child's interests. The protection of the child's interests can be safeguarded through the appointment of a representative⁵⁴ who will represent the child during the procedure and who will defend his/her best interest,⁵⁵ but this role is different from the function stated in Article 12(2) where the focus is on the necessity for the child's views to be brought in front of the decision-makers and not on the child's interests. In fact, where those two roles are exercised by the same person, the child's views could be drowned by the representative's own opinion on what should be in the child's best interests.⁵⁶

Finally, the decision-makers should also not limit themselves to "hearing" *stricto sensu* the child. For example, younger children can show their feelings through drawings, paintings, body language and facial expressions and those ways of expressing views cannot be ignored.⁵⁷

2.2 International Abduction – The Abduction Convention

International abduction is not a new phenomenon,⁵⁸ and has been occurring for centuries. However, some events had a certain impact on the frequency of international abduction and provoked a marked increase⁵⁹ in this phenomenon. Those factors are, for example, the creation of the European Union and its free movement of person's principle,⁶⁰ the ease of international travel, the sharing of linguistic or historical ties between countries,⁶¹ the multiplication of bi-national marriages and the specific vulnerability of children with dual nationality.⁶² It is interesting to note that, while the drafters of the Abduction Convention had in mind a father abducting his children, a global trend shows that the majority of abductors are mothers⁶³ with a percentage of 69% in 2008. Fathers, grand-parents and other relatives follow with respectively 28% and 3%. To conclude on those statistics, Nigel Lowe, in his report of 2008, showed that judges are increasingly ordering the non-return of the child to his/her country of habitual residence.⁶⁴ This last data is surprising, as the objective of the Abduction Convention is to guarantee the prompt return of the child in his/her country of habitual residence. In

⁵⁴ See General Comment 12 at 9-10 para. 35-37.

⁵⁵ See UK, *In re L (A Minor) (Abduction: Jurisdiction)* (2002) 1 WLR 3206 and UK, *Re S (Abduction: Children: Separate Representation)* (1997) 1 FLR 486 for illustration of the issue of separate representation for children.

⁵⁶ See Potter, *supra* note 39, at 143.

⁵⁷ Younger children are not the only group who encounter difficulties to express their views, and specific attention should also be given to disabled children regardless of their age ; See Krappman, *supra* note 38, at 507.

⁵⁸ The Council of Europe, already in 1972, investigated the issue and open to signature, in 1980, the European Convention on the Recognition and Enforcement of Decisions Concerning Child Custody and on Restoration of Custody of Children, May 20, 1980, 19 I.L.M. 273. For more explanation on this Convention, see Rivers, *supra* note 17, at 611-615.

⁵⁹ Nigel Lowe notes that between 2003 and 2008, there had been an increase of 45% in return applications and a 40% increase in access applications. See N. Lowe, *Analyse Statistique des Demandes Déposées en 2008 en Application de la Convention de la Haye du 25 Octobre 1980 sur les aspects civils de l'enlèvement international d'enfants – Partie 1 rapport global* (2011).

⁶⁰ For more details see R. Lamont, *Linking Child Abduction and the Free Movement of Persons in European Law*, 13 *Journal of Family Law and Practice* 39-44 (2010).

⁶¹ N. G. Lowe & V. Stephens, *Global Trends in the Operation of the 1980 Hague Abduction Convention*, 46 *Fam. L. Q.* 41 at 49 (2012-2013).

⁶² See Lesh, *supra* note 10 at 170.

⁶³ To learn more about the profile of the 'abducting parent' and the shift from father's abduction to mother's abduction, see M. Henaghan & R. Ballantyne, *International child abduction, intercountry adoption and international commercial surrogacy*, in J. Eekelaar & R. George, *Routledge Handbook of Family Law and Policy* 383 at 384-388 (2014) ; L. Silberman, *The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues*, 33 *N.Y.U.J. Int'l. & Pol.* 221 (2000-2001).

⁶⁴ See Lowe & Stephens, *supra* note 61 at 56.

the author's opinion, this raise can be explained by the increased awareness-raising and training surrounding the Abduction Convention.

This section will be divided into two main parts: the first one will focus on the concept of international abduction (2.2.1), and in the second one, the scope of application of the Abduction Convention will be analysed (2.2.2).

2.2.1 Terminology

As seen in the introduction of this thesis, the Abduction Convention has created the establishment of a common international framework aimed at preventing international abduction but also increasing cooperation between countries towards the return of children wrongfully removed or retained from their country of origin.

The terms “wrongfully removed” and “retained” are essential to the application of the Abduction Convention and are briefly explained in its article 3. Those definitions are of particular relevance as the drafters of the Convention did not, except in the title, refer to the terms “international abduction”. In fact, the notion of “international abduction” was essentially retained to refer to situations covered by mass-media but also due to its resonance in public opinion. However, as the intention of the “abductor” in international child abduction is not the same as the intention of common abductors, the terms “wrongful removal or retention” were introduced to replace the loaded terms of “international abduction”.⁶⁵

2.2.2 Scope of application

To fall under the scope of application of the Abduction Convention, the situation must combine three elements:

- The existence of a right of custody
- The exercise of this right of custody prior to the removal.
- A child must be under 16 years old

These factors deserve several comments.

First, the Convention mentions “right of custody” and not “access rights”, which are different. This distinction has been made consciously and is aimed to avoid the substitution of one right by the other one.⁶⁶ Second of all, the place of residence of the child is not determined in an administrative way i.e. by reference to the domicile⁶⁷ but in a question of pure fact: the place of habitual residence. This determination requires a complex⁶⁸ case-by-case analysis which is, unfortunately, not guided by the Abduction Convention and provokes, as a consequence, some difficulties of interpretation and harmonisation among the States-Parties to the Convention.⁶⁹ In an attempt to clarify this concept between the Member-States of the European Union, the European Court of Justice in the case of A stated that habitual residence:

⁶⁵ See Rapport Pérez-Vera, *supra* note 19, at 441 §53.

⁶⁶ *Ibidem* at 445 § 65.

⁶⁷ M. H. Sampson, *Interpretation of the Article 13 exceptions to return under the child abduction Convention: Are the states speaking with one voice ?*, 54 RHDJ 527 at 529 (2001).

⁶⁸ N. Lowe, *Some Moot Points on the 1980 Hague Abduction Convention*, 46 Victoria U. Wellington L. Rev. 683 at 705 (2015).

⁶⁹ See Henaghan & Ballantyne, *supra* note 63 at 389-391.

must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment. 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. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case.⁷⁰

Guidance can also be found in *Friedrich v. Friedrich*, where the United States Supreme Court emphasised the need for judges to look at the habitual residence of the child prior to the removal, and not after.⁷¹ For example, the child's habitual residence does not change if he/she is moved from one country to another with the consent of the left behind parent, as judged by an Italian Court.⁷²

Finally, the parent seeking the return of the child must prove that he/she exercised, at the time of the wrongful removal/retention, the right of custody. Because this concept is not defined in the Abduction Convention, the United States Sixth Circuit considered that right of custody is to be found "whenever (a parent) had been keeping or seeking to keep any sort of regular contact with the child",⁷³ without having to examine the quality of the exercise of this right.

2.3. The Right to be heard in The Hague Abduction Convention

This section will be divided into two parts: the right to be heard in the Abduction Convention (2.3.1) and Article 13 (2) of the Abduction Convention (2.3.2). In the first part, I will look at the way that drafters took children's rights, and more specifically children's right to be heard, into account during the drafting of the Abduction Convention. In the second part, Article 13 (2) of the Abduction Convention will be analysed. This provision is very interesting as it is the only one that refers to the child's opinion, and provides the possibility for a judge to refuse the return of the child based on his/her objection.

2.3.1 Absence of guidance on children's right to be heard in The Hague Abduction Convention

Because the Abduction Convention predates the UNCRC, no reference to this latter instrument can be found in it.⁷⁴ This chronological fact has had, in the author's opinion, an important impact on children's rights in abduction return processes. Indeed, the lack of international guidance on children's rights to be heard⁷⁵ at the time of the drafting of the Abduction Convention is a justification for the absence of a solid reference to the need to take children's opinion into account in the abduction process.⁷⁶ Despite its narrower application, the addition of the child's objection clause contained in Article 13 (2) of the Convention is nonetheless a great step towards the recognition of the child's right to be heard and was probably ahead of its time.

⁷⁰ CJUE, Case C-523/07, A (2 April 2009) at para. 44.

⁷¹ USA, *Friedrich v. Friedrich* (6th Cir. 1993) 983 F.2d 1396 at 1401.

⁷² Italy, *Austin v. Sorrentino*, Venice, Juvenile Court, 27 June 1996.

⁷³ See Sampson, *supra* note 67 at 534.

⁷⁴ See Ponjavic & Vlaskovic, *supra* note 13, at 59.

⁷⁵ At the time, the 1924 Declaration of the Child had been adopted, but it did not refer to a right to participate or to be heard; See Krappman, *supra* note 38, at 502.

⁷⁶ Even if, at the time of the drafting of the Hague Abduction Convention, the Declaration on the Rights of the Child of 1959 was in place, this instrument had only a declaratory nature and did not refer to any participation rights or right to be heard for children; Hague Conference on Private International Law, *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Part IV Enforcement* at 28 §98 (2010)

Discussions about the participation of children did nonetheless take place, as can be shown in the Pérez-Vera report. The drafters rejected the requirement of the child's consent to the outcome of the decision based on the fact that custodial issues cannot be decided under the Abduction Convention.⁷⁷ Indeed, making the decision dependent on the child's choice would have had the result that the child chooses his/her residence, a situation which is not allowed by the spirit of the Abduction Convention itself.⁷⁸ A proposal was also drafted to render the hearing of children over 12 compulsory, however, it was also dismissed⁷⁹ considering that the best solution was to leave the decision to hear the child or not to the discretion of the competent authorities.

2.3.2 Article 13 (2) of The Hague Abduction Convention

Despite these attempts, the drafters of The Abduction Convention referred to the child's opinion in one of the provisions - Article 13 (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.

This provision gives the possibility to refuse the return of the child in his/her country of habitual residence if he/she objects to the return. Through this exception, the drafters considered that "the Convention gives children the possibility of interpreting their own interests".⁸⁰ This conclusion is, in my opinion, not well founded, as the possibility for any child to be heard is only offered when he/she refuses categorically to return to his/her country of habitual residence. By doing so, the drafters created for the child at stake a situation in which he/she must choose between his/her relatives and puts him/her in a dramatic dilemma. This dangerous aspect of the exception had been highlighted in the Perez-Véra report in which the author pointed out the risk for the child to "suffer serious psychological harm if they think they are being forced to choose between two parents".⁸¹

This section will be dedicated to a brief history of the provision (2.3.2.1.), followed by a detailed explanation of the functioning of the child's objection clause (2.3.2.2.).

2.3.2.1 History

This controversial provision⁸² has a history: the inclusion of the child's objection clause as an exception to the prompt return is a compromise between two different goals.⁸³ The first one is the desire to expand the scope and application of the Abduction Convention to as many situations as possible. This extension can only be done by limiting the numbers of restrictions to its application. One of these limitations is the age of the child who has been abducted by one of his/her relatives. During the drafting process, the age limitation had been put at fourteen years old, but in order to cover a

⁷⁷ Article 1er of the Abduction Convention and 16 ; See Rapport Perez-Véra, *supra* note 16, at 430 and 463-464.

⁷⁸ See Lesh, *supra* note 10, at 177. The child custody proceeding begins when the child is returned to his or her country of habitual residence.

⁷⁹ See Rapport Pérez-Véra, *supra* note 19, at 433. The main difficulty was to agree on a minimum age as every proposal seemed arbitrary and artificial.

⁸⁰ *Ibidem* at 433.

⁸¹ *Ibidem*.

⁸² See arguments against this clause in Greene, *supra* note 20, at 122.

⁸³ See Nanos, *supra* note 20, at 443.

larger range of situations, this age was raised from 14 to 16 years old with the presumption that sixteen-year-old children are mature enough to decide where and with whom to live.⁸⁴

The second goal is the willingness to enable children under 16-years to also have the right to choose their own place of residence⁸⁵ as it must be acknowledged that forcing a teenager to return to his/her country of habitual residence against his/her will would be very difficult.⁸⁶ Statistically, 18% of refusals were based on the child's objections in 1999, 13% in 2003 and 17% in 2008.⁸⁷ As it can be noted, there is a global trend towards the reliance on the child's objection. It is also interesting to note that the average age of the child objecting to his/her return was 11.3 years in 2003, but has decreased to 10.7 years in 2008.⁸⁸ Finally, for children under seven-year-old, the objection is hardly ever the sole reason to refuse the return.⁸⁹

Despite this increased use of Article 13(2), the exemption contained in Article 13 (1) (b) remains the most used and accepted exception to the prompt return of the child at 27% of cases.⁹⁰ This clause allows the judge to order the non-return of the child in case where "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".⁹¹

2.3.2.2. Use of the exception

It is firstly important to specify that this child's objection clause is not a veto: the judge has a discretionary power to take the refusal of the child into account or not.⁹² For example, the European Court of Human Rights⁹³ declared a Finnish ruling to be in contradiction with the European Convention on Human Rights because it had considered the child's objection to return as a veto.⁹⁴

Four stages can be distinguished in the application of the exception.⁹⁵

1/ does the child object to his/her return in the country of origin?

The judge must be sure that the child objects to the return, and not only that he/she has a "desire to remain with the abducting parent",⁹⁶ or that the objection is only a matter of preference rather than a strong objection. For example, a Scottish court ordered the return of siblings to the United States of

⁸⁴ See Rapport Perez-Véra, *supra* note 16, at 450.

⁸⁵ See Greene, *supra* note 20, at 121.

⁸⁶ See Rapport Pérez-Vera, *supra* note 19, at 433.

⁸⁷ See Lowe, *supra* note 59, at para. 17.

⁸⁸ See Lowe & Stephens, *supra* note 64, at 60-61.

⁸⁹ See Elrod, *supra* note 14 at 680.

⁹⁰ See Lowe & Stephens, *supra* note 64 at 61.

⁹¹ Article 13 (1) (b) Abduction Convention.

⁹² « The judicial or administrative authority **may** also refuse...»

⁹³ On the relation between the Hague Convention and the European Convention on Human Rights, See V. Stephens & N. Lowe, *Children's Welfare and Human Rights under the 1980 Hague Abduction Convention – the Ruling in Re E*, 34 *Journal of Social Welfare and Family Law* at 125 (2012) ; P. Mc Eleavy, "The European Court of Human Rights and the Hague Child Abduction Convention: Prioritising Return or Reflection?", 62 *Neth. Int'l. L. Rev.*, 365 (2015) ; L. Walker, *The Impact of the Hague Abduction Convention on the Rights of the Family in the Case-Law of the European Court of Human Rights Committee: the Danger of Neulinger*, 6 *J. Priv. Int'l L.* 649 (2010).

⁹⁴ European Court of Human Rights, *C v. Finland*, 9 May 2006, No. 18249/02, especially paras. 57-58.

⁹⁵ New Zealand, *White v. Northumberland* (2006) NZFLR 105 (CA).

⁹⁶ See Sampson, *supra* note 67, at 539.

America because it realised that the children's objections were based on the fear of leaving their mother alone in Scotland.⁹⁷

2/ is the child of sufficient age and maturity to enable the court to take account of those objections?

This exception is stated in very brief terms and does not fix a minimum age for the child's objection clause to be raised. There is also no specific age at which a child should automatically be considered as mature enough for his/her views to be taken into account. This absence of guidance is in compliance with the opinion of the Committee on the Rights of the Child, as mentioned earlier: the maturity of the child must be assessed on a case-by-case basis.

The reference to "maturity" is crucial, as an objection to return can be refused if the judge considers that the child is not mature enough to have an overall understanding of the situation. It is, therefore, surprising that no guidance can be found on this concept in the text of the Abduction Convention itself. The drafters could have included several indicators such as the "child's ability to articulate a preference with cogent reasons" as well as the "child's emotional, cognitive, and developmental level".⁹⁸ The child's maturity can also be assessed through his/her overall understanding of the situation at stake, even though the child should not be asked to understand the whole process, but at least the point on which her/his opinion is asked. The assessment of the maturity can also be done by a professional such as a social worker or a psychologist who will advise the judge on this particular point. However, there is a risk of arbitrary and inconsistent assessment of maturity as a judge can consider that a specific child is not mature enough, while another would have considered the contrary.

3/ what weight should be given to the child's views?

After having heard the child's opinion, and before relying on it, the competent authority must combine the child's views with other factors and this balancing act will help to determine the strength of the child's voice. One very important factor in this step is the impact of influence: if the judge feels that the child has been unduly influenced, he/she will give no weight or little weight to the child's views.⁹⁹ This so-called "parental alienation syndrome"¹⁰⁰ has been explicitly expressed in the early case-law regarding international abduction by an English Court which stated that:

if the court should come to the conclusion that the child's views have been influenced by some other person, e.g. the abducting parent, or that the objection to return is because of a wish to remain with the abducting parent, then it is probable that little or no weight will be given to those views. Any other approach would be to drive a coach and horses through the primary scheme of The Hague Convention.¹⁰¹

⁹⁷ Scotland, *In re Matznick*, 1995 Sess. Cas. (Outer House Nov. 9, 1994) (LEXIS, Intlaw Library, Scocas File) (Cameron, Lord Ordinary); See Nanos, *supra* note 20, at 456.

⁹⁸ See Elrod, *supra* note 14, at 680.

⁹⁹ See Greene, *supra* note 20, at 124 and 138.

¹⁰⁰ Described as an "unjustified denigration against a parent" by H. Smith, *Parental Alienation Syndrome: Facts or Fiction – The Problem with Its Use in Child Custody Cases*, 11 *U. Mass. L. Rev.* 64 at 64 (2016). To learn more about this syndrome, see R. Warshak, *Parental Alienation: Overview, Management, Intervention, and Practice Tips*, 28 *J. Am. Acad. Matrimonial Law.* 181 (2015-2016).

¹⁰¹ England, *S v. S (Child Abduction)* (1992) 2 *FLR* 492 at 501D; J. Reddaway & H. Keating, *Child abduction: Would protecting vulnerable children drive a coach and four through the principles of the Hague Convention?* 5 *Int'l J. Child. Rts.* 77 (1997).

In international abduction cases, influence can hardly be avoided,¹⁰² and can sometimes be detected by the language used by the child. In fact, by paying attention to the words used, the judge might be able to detect a manipulation of the child due to the use of words that a child of a particular age and maturity would not use. For example, a judge has considered that a ten-year-old boy had been unduly influenced because he had used the word “settled in” in a letter he had written to the judge.¹⁰³ For the Court, this wording is not part of the language of a child, and the use of this particular verb shows that the child was victim of undue influence by his parent and the counsellor. As a consequence, the child’s views were given no weight.¹⁰⁴

4/ Is the judge going to use his/her discretion in favour of allowing the child to remain or return in spite of the mature child’s objections?

This last step is due to the non-mandatory nature of the exception. This discretionary power is important especially to counter the possible influence of the abductor on the child’s objection to return to her/his country of habitual residence. In this last step, the judge will analyse the reasons for the child’s objection and assess their validity and how strongly they are weighed against the aims of the Abduction Convention.

To conclude, Article 13 (2) is, on the one hand, a clause enabling courts to consider the views of the child but unfortunately, its use can lead to potentially subjective and arbitrary decision-making.

2.4 Link with article 13 (1) (b) – Grave risk or an intolerable situation?

In the examination of Article 13 (2), it is interesting to point out Article 13 (1) (b) of the Abduction Convention which states that:

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that -

(...)

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

The first paragraph of Article 13 of the Abduction Convention is of certain relevance in the context of the child’s objection to return. Indeed, some authors argue that, if the child’s objection to be returned is not taken into account, or if taken into account and then not respected, the child will be placed in the “intolerable situation” described in Article 13 (1) (b).¹⁰⁵ This reasoning links the two different exceptions to the prompt return of the child and has been used in Canada and USA for example.¹⁰⁶ In *Blondin v. Dubois*¹⁰⁷, the Court associated both exceptions, and considered that the non-respect of the wishes of the eight-year-old girl forms a part of the “grave risk” of Article 13 (1) (b). However, this strategic litigation is not unanimously accepted,¹⁰⁸ as it is common knowledge that any exception to a general rule must be interpreted narrowly. By creating this chain reaction between the two paragraphs

¹⁰² See Rivers, *supra* note 17 at 595.

¹⁰³ USA, *Robinson v Robinson*, 983 F. Supp. 1339 (D. Colo. 1997).

¹⁰⁴ See Nanos, *supra* note 20, at 452.

¹⁰⁵ See Greene *supra* note 20 at 117.

¹⁰⁶ Canada, *The Ontario Court v. M. and M. (Abduction: Children’s Objections)* (1997) 1 FLR 475; UK, *Re T (Abduction: Child’s Objections to Return)* (2000) 2 FCR 159.

¹⁰⁷ USA, *Blondin v. Dubois*, 238 F.3d 153 (2d Cir. 2001).

¹⁰⁸ C. Woodrow & C. Du Toit, *Chapter 17 – Child Abduction* at 19 (2010).

of Article 13, lawyers are interpreting the child's objection clause broadly, which is against the primary aim of the Abduction Convention i.e. the prompt return of the child.

2.5 Final observations on the right to be heard in abduction procedures

The child's right to be heard in abduction procedures has evolved significantly since the drafting of the Abduction Convention. This is mainly due to the multiplication of international and regional instruments enshrining this right, but also to the change of opinion towards hearing children's views, as seen earlier. Before, judges were reluctant to hear children in international abduction cases, arguing that it "comes down to inviting him or her to answer, directly or indirectly, for conduct which to start with is considered to be inappropriate by the international authorities".¹⁰⁹ Children were only heard when there was a possibility of non-return, or when the child's objection clause was raised.¹¹⁰ It was also argued that judge did not have appropriate training to hear children¹¹¹ and that the reliance on the social worker reports was more than adequate. Even though the situation is slowly changing, the recognition of the necessity to hear children in abduction procedures is increasing, and this trend is more than welcome as abduction situations concern the child directly and impact his/her life in the short term, medium term but also long term. The child should not be a passive actor and should be given the opportunity to give his/her feelings about the difficult situation in which he/she is finds himself/herself.

According to data of 2011, in at least 10 states which have ratified the Abduction Convention, the child is always heard, with only a few countries limiting the hearing to when article 13 (2) is raised and 24 States are making the child's hearing dependent on the circumstances.¹¹² Updated statistics are not yet available, but they could be very interesting examine. Regarding European countries, it is important to note that due to the Brussel Ila Regulation, States members of the European Union are now obliged to give an opportunity to the child to express his/her views in every abduction situation. This legislation has enabled a more widespread acceptance of the need to hear children in abduction procedures.

¹⁰⁹ Hague Conference on Private International Law, 6 Judges' Newsletter at 19 (Autumn 2003).

¹¹⁰ *Ibidem* at 19 and 27.

¹¹¹ *Ibidem* at 24.

¹¹² Hague Conference on Private International Law, Conclusions and Recommendations of the Sixth Meeting of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention at 42 (1-10 June 2011).

3. The United States of America and the children's right to be heard

*"Individually and collectively all children have the right to express themselves as independent social beings, to have their own laughter as well as sorrow, to play, imagine and explore in their own way, to themselves get to understand their bodies, minds and emotions, and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood"*¹¹³

In the United States of America, an average of 11 000 American children are living abroad as victims of international abduction.¹¹⁴ As said before, the USA did not ratify the UNCRC despite having played a pivotal role in the drafting process.¹¹⁵ The various reasons for this will be analysed in the first part of this section (3.1.). Regarding regional instruments, the U.S. did not ratify the American Convention on Human Rights, and even if this Convention is not children's specific, it contains some references which justify a rapid comment (3.2.). The third section of this chapter will analyse American provisions related to children with a special focus on legal representation and participation (3.3.), and this analysis will be followed by a detailed study of the right to be heard in international abduction cases (3.4.1.) with a special focus on Article 13(2) and its use by American judges (3.4.2).

3.1. The US and the UNCRC

The Clinton Administration signed the UNCRC in 1995 on the occasion of the death of James Grant, the director of UNICEF,¹¹⁶ but did not submit it for ratification.¹¹⁷ This non-ratification has been described by President Barack Obama as embarrassing.¹¹⁸ However, due to Article 18 of the Vienna Convention on Law and Treaties, the country, by signing the UNCRC, engaged itself to respect the spirit and the soul of the Convention. This negative obligation is part of the customary law and is referred to as the "interim obligation" between the signature of a treaty and its ratification by the State.¹¹⁹

Even though the next logical step would be the ratification of the UNCRC, it is, for the moment, unlikely to occur due to significant opposition of the American public opinion arguing that the Convention is a "legal equivalent of a fundamental right to rebel against their parents".¹²⁰ Several reasons¹²¹ support this hostility, and it could be argued that they reflect a problematic misunderstanding of the UNCRC. The main argument against ratification is the opinion that the UNCRC grants

¹¹³ South Africa, *S v. M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC).

¹¹⁴ See Lesh, *supra* note 10 at 170.

¹¹⁵ R. G. Wilkins, A. Becker, J. Harris & D. Thayer, *Why the United States Should not Ratify the Convention on the Rights of the Child*, 22 *St. Louis U. Pub. L. Rev.* 411 at 425 (2003); S. Kilbourne, *U.S. Failure to Ratify the U.N. Convention on the Rights of the Child: Playing Politics with Children's Rights*, 6 *Transnat'l L. & Contemp. Probs* 437 at 438-440 and 456-457 (1996).

¹¹⁶ B. Dohrn, "United States – The Surprising Role of the CRC in a Non-State-Party", in T. Liefaard & J. E. Doek (Ed.), *Litigating the Rights of the Child – The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* 71 at 73 (2015).

¹¹⁷ However, the US did ratify the Optional Protocol on the involvement of Children in Armed Conflict and the Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography in 2002

¹¹⁸ P. Geary, "United States: Is Obama's Win also a Victory for Children's Rights ?" *Children's Rights Information Network* (Nov 7, 2008), <http://www.crin.org/violence/search/closeup.asp?infoID=18874> (last accessed 4th July 2016).

¹¹⁹ J. Klabbers, *International Law* at 47 (2013).

¹²⁰ S. Kilbourne, *Placing the Convention on the Rights of the Child in an American Context*, 26 *Hum. Rts.* 27 at 28 (1999) citing D. PHILIPS, *The Legal Impact of the (sic) United Nations Convention on the Rights of the Child*, (Nat'l Ass'n for Home Educ. Paeonian Springs, Va.).

¹²¹ See Dohrn, *supra* note 116, at 74-75. See Kilbourne, *supra* note 115 at 441.

excessive powers to States to interfere in families in the name of protecting children.¹²² This state's intervention in the private family's sphere is considered as a threat to parental authority,¹²³ and also as an opportunity to shift parental authority for children from the family to the social worker, and finally to the State itself.¹²⁴ Along the same line of thinking, opponents argue that parents are in a "better position than the state, or even an agent appointed for the child, to determine when a particular child is ready to assume new rights and corresponding responsibilities".¹²⁵ Moreover, it is claimed that the UNCRC considers children as equal to their parents by suppressing the latter's authoritative role¹²⁶ and replacing it with a guiding role.¹²⁷

Several examples can be found on the "a priori" tremendous impact of the possible ratification of the UNCRC on American children. With regards to the right to privacy,¹²⁸ it is mainly argued that children would be able to take important medical decisions or to undergo abortion without parental consent. Moreover, the freedom of expression, thought, conscience and religion expressed in the UNCRC would enable, for example, children to change religion despite the education given by their parents.¹²⁹ Another important argument relates to the right to access information. Indeed, this right is misinterpreted as to allow children to access pornographic materials, and would be incompatible with American Case law. In fact, the USA Supreme Court ruled in *Ginsberg v. New York*¹³⁰ that a child could not access harmful materials including materials which depict nudity. This argument can be rejected by the UNCRC itself which gives rights to children unless the situation in which they are exercised are harmful and/or not in the best interests of the child.¹³¹ It should also be mentioned here that some argue that children have the right to experiment with their sexuality.¹³² The right to freedom of association also creates some fears, and more particularly, parents are afraid of seeing their children joining gangs or illegal activities and them not being able to react because their children have a right to freedom of association. Another issue is related to the prohibition laid down in the UNCRC of any form of corporal punishment, and this interdict has been reinforced by the General Comment n°13 on the right of the child to freedom from all forms of violence.¹³³ This prohibition includes spanking, a punishment which is common in the USA. Therefore, the protection from corporal punishment enshrined in the UNCRC is argued to go against the values of American parents and to step into the family's sphere¹³⁴ by deciding how families may punish children, precluding, therefore, parents from choosing their own way of raising their children.¹³⁵ Finally, Article 12 UNCRC is seen as a tool which would empower children to exercise determinative power through their views, such a capacity being in

¹²² See Tobin, *supra* note 34 at 93.

¹²³ See Dohrn & Kanelos, *supra* note 26 at 21.

¹²⁴ See Kilbourne, *supra* note 115, at 441.

¹²⁵ B. Nauck, *Implications of the United States Ratification of the United Nations Convention on the Rights of the Child: Civil Rights, the Constitution and the Family*, 42 *Clev. St. L. Rev.* 675 at 688 (1994).

¹²⁶ D. Weissbrodt, *Prospects for Ratification of the Convention on the Rights of the Child*, 20 *EMORY INT'L L. REV.* 209 at 211, n.21, (2006).

¹²⁷ See Wilkins, Becker, Harris & Thayer, *supra* note 115, at 414.

¹²⁸ *Ibidem* at 423.

¹²⁹ *Ibidem* at 422.

¹³⁰ USA, *Ginsberg v. New York*, 390 *U.S.* 629, 637-638 (1968); See Wilkins, Becker, Harris & Thayer, *supra* note 115, at 420.

¹³¹ See combination of article 13 and 19 UNCRC.

¹³² K. Walsh, *The Sexual Rights of Children and the Age of Consent*, 2nd *Global Conference on Good Sex, Bad Sex: Sex Law and Ethics* (2010).

¹³³ U.N. Doc., General Comment No. 13 on the right of the child to freedom of all forms of violence, CRC/C/GC/13 (2011).

¹³⁴ See Kilbourne, *supra* note 115 at 450-451.

¹³⁵ *Ibidem* at 449-450.

contradiction with the US Constitution.¹³⁶ Furthermore, it is argued that the best interests of the child will no longer be determined by American citizens but rather by the United Nations, and this will undermine U.S. sovereignty.¹³⁷ In other words, there is a threat of the superiority of the UNCRC for the US Government and American citizens since the USA Constitution states that “all treaties (...) shall be the supreme Law of the Land”.¹³⁸

Those conceptions result from an incorrect reading of the UNCRC and undermine the power and recognition given by the drafters to the parents, especially through article 5 UNCRC where the parental role of guidance and direction is asserted in addition to the need to respect their duties, responsibilities and rights. All those supposed conflicts idealise adult-child relations¹³⁹ and consider that parents always take into account the best interests of their child in the decision-making process and know best what is in the best interests of their child. However, as it will be shown in this thesis, some conflicts such as typical custodial conflicts can put the child's interests in opposition to the parent's interests. In these situations, it is likely that parents will not be able to differentiate the two interests and their interest will override their child's one. The reliance on specific rights is not the only opposition faced, indeed, opponents argue that children do not have the capacity and the experience in life that adults have to adequately determinate the best way to make a choice.¹⁴⁰ Therefore, to:

short-circuit this process by legally granting – rather than actually teaching – autonomous capacity to children ignores the realities of education and child development to the point of abandoning children to a mere illusion of real autonomy.¹⁴¹

Again, this argument fails to take into consideration article 5 UNCRC: children are rights bearers on their own, but parents play a role in their capacity building. Other arguments are more orientated towards the practical implementation of the UNCRC. Two forms of legislation are drafted in the USA: State law and Federal law, each of them having their specific competence. The ratification of the UNCRC would have, as a consequence, that Federal law should have to cover issues normally at the disposal of state and local jurisdictions.¹⁴² Furthermore, the UNCRC is not superior to federal law, but in case of a conflict with a state law, the Convention would prevail,¹⁴³ which is hard to accept for USA sovereignty. In a last attempt to justify their reluctance, American's opponents rely on the fact that the USA already has some laws protecting children, and that a specific convention on children's rights would be useless. It was also argued, in the first decade of the UNCRC, that it had failed to make some changes.¹⁴⁴

To conclude on this part, as said by M. Freeman, “many of today's critics of children's rights are passionate defenders of the rights of others, notably of the rights of parents”,¹⁴⁵ and even without

¹³⁶ J. Eekelaar & R. George, *Children's Rights: the wider context*, in J. Eekelaar & R. George, *Routledge Handbook of Family Law and Policy* 288 at 290 (2014).

¹³⁷ S. C. Baxter, *The Suggestions on the Rights of the Child: Why the United Nations' Convention on the Rights of the Child is a Twenty-Five Year Failure*, 2 *J. Glob. Just. & Pub. Pol'y* 89 at 117 (2015).

¹³⁸ U.S. Const. Art. VI.

¹³⁹ M. Freeman, *Why It Remains Important to Take Children's Rights Seriously*, 15 *International Journal of Children's Rights* 5 at 11 (2007).

¹⁴⁰ K. M. Smith, *The United Nations Convention on the Rights of the Child: The Sacrifice of American Children on the Altar of Third World Activism*, 38 *WASHBURN L.J.* 111 (1998).

¹⁴¹ B. C. Hafen & J. O. Hafen, *Abandoning Children to their Autonomy: The United Nations Convention on the Rights of the Child*, 37 *HARV. Int'L L.J.* 449 at 491 (1996).

¹⁴² See Baxter, *supra* note 137, at 118.

¹⁴³ See Kilbourne, *supra* note 115 at 444.

¹⁴⁴ See Baxter, *supra* note 137.

¹⁴⁵ See Freeman, *supra* note 139, at 6.

ratification, the language, standards and concepts of the UNCRC are used strategically by lawyers,¹⁴⁶ even though it is still hard to found claims for children's rights in the USA.¹⁴⁷

3.2. The U.S. and the American Convention on Human Rights

President Carter signed the American Convention on Human Rights¹⁴⁸ in 1977, and since then, no ratification has taken place.¹⁴⁹ Three reasons are given to advocate against this ratification: federalization¹⁵⁰, sovereignty¹⁵¹ and the right to life.¹⁵² Regarding the last one, it is argued that the right to life as enshrined in the American Convention is not compatible with the death penalty which is allowed in 31 American states¹⁵³ and abortion. The examination of these various reasons is not necessitated by the aims of this study. However, the American Convention should be mentioned due to its Article 19 of this Convention which is dedicated to children's rights and states that "Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state". Moreover, Article 17 draws attention to the need for a provision which protects children when they are confronted with the separation of their parents. Even though these provisions are phrased in a simple and brief way, they could increase children's rights protection in the U.S.

3.3. Specific children's rights provisions

3.3.1 The 1791 Bill of Rights

The US Constitution, namely the 1791 Bill of Rights, does not contain any reference to children as right-bearers. This absence reflects the public opinion of that time considering children as vulnerable and as dependent on adults. However, in an important case, *Planned Parenthood of Central Missouri v. Danforth*,¹⁵⁴ the U.S. Supreme Court stated that "constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority".¹⁵⁵ This statement illustrates well the fact that constitutional rights apply equally to children and adults, and that the absence of reference to children's rights in the Bill of Rights does not mean that children are not rights bearer under the Bill of Rights. Nevertheless, this big step was to an extent negated 10 years later in *Shall v. Martin* where the U.S. Supreme Court stated that children "are assumed to be subject to the control of their parents".¹⁵⁶ Thus, even though children have been recognised as rights bearers, they cannot exercise their rights due to their dependency on adults. This ruling also emphasised the fact that parents are the primary caregivers of the child, and it is only in case of parental failure to do so that the State will intervene, playing, therefore, its role of *parens patriae*. This reminder of the primordial role of parents deserves two comments. On the one hand, in this short sentence of the US Supreme

¹⁴⁶ See Dorhn & Kanelos, *supra* note 26, at 23.

¹⁴⁷ See Tobin, *supra* note 34 at 104.

¹⁴⁸ Hereinafter the American Convention.

¹⁴⁹ Nevertheless, like for the UNCRC, the signature of the American Convention entails the U.S. to not take actions which will contravene to the aims of the American Convention.

¹⁵⁰ To learn more about the federalist concerns see J. Diab, *United States Ratification of the American Convention on Human Rights*, 2 *Duke Journal Of Comparative & International Law* 323 at 328-334 (1992).

¹⁵¹ To learn more about the sovereignty concerns see Diab, *supra* note 150 at 334-337.

¹⁵² F. J. Rivera Juaristi, *U.S. Exceptionalism and the Strengthening Process of the Inter-American Human Rights System*, 20 *Human Rights Brief* 19-25 (2013); To learn more about the abortion and death penalty issues see Diab, *supra* note 150 at 337-340.

¹⁵³ Updated up to the 22nd of June 2016.

¹⁵⁴ USA, *Planned Parenthood of Central Missouri v. Danforth* 428 US 52 (1976).

¹⁵⁵ *Ibidem* at 74.

¹⁵⁶ USA, *Schall v. Martin* 467 US 253 at 265 (1984).

Court, all the arguments against the ratification by the USA of the UNCRC are summarized. On the other hand, this statement is also along in the same line of thinking as article 5 UNCRC as explained before. This contradiction is interesting to highlight, as it shows that the main fear of Americans is addressed and protected in the UNCRC.

3.3.2 Statutory Law

3.3.2.1. Implementation of the Abduction Convention

The U.S. joined the Abduction Convention within a short period of time, and the ratification took place on 31 December 1981 with the aim to combat “the detrimental emotional effects associated with transnational parental kidnapping”.¹⁵⁷ This was strengthened by the drafting of the International Child Abduction Remedies Act 1988¹⁵⁸ which creates a procedural framework for the Abduction Convention in the particular context of the U.S. It does not differ from the Abduction Convention, and the two instruments require a combined reading. The American Central Authority is the Office of Citizens Consular Services in the State Department, Bureau of Consular Affairs, and had to deal, in 2008, with the highest amount of abduction cases across the world, with 598 incoming and outgoing return and access applications.¹⁵⁹ In 2014, this number had increased and 781 abduction and access cases were resolved in the USA.¹⁶⁰

Section 11603 a) of the ICARA grants concurrent federal and state court jurisdiction over incoming cases of abduction¹⁶¹ to facilitate the access to judicial remedies and to strengthen the protection of rights under the ICARA and thus the Abduction Convention.¹⁶² However, this concurrent jurisdiction between courts has negative consequences that have been pointed out by several academics.¹⁶³ Indeed, as both judges of federal courts and state courts can deal with abduction cases, the probability for each of them of having an Abduction Convention case is low. Therefore, judges are not specialized in this field and do not know the particularity of the Abduction Convention, as well as the prevalent interpretation and development of its concepts.¹⁶⁴ This lack of knowledge is recognized by the U.S. Department of State – Bureau of Consular Affairs, which sends, whenever a judge is hearing a Hague Abduction cases, a letter emphasizing important articles of the Abduction Convention, domestic law applicable to international abduction and reminding the judge that he/she must not take a decision about custody.¹⁶⁵ Due to this recognized lack of experience, decisions are not harmonised, and some divergent outcomes can be observed in the interpretation of the Abduction Convention. An example of such a divergence will be shown in the next section, as one Federal Court has excluded

¹⁵⁷ Letter of Submittal from Secretary of State George P. Schultz to President Ronald Reagan (Oct. 4, 1985), reprinted in 51 Fed. Ref. 10,495 (1986).

¹⁵⁸ International Child Abduction Remedies Act, Pub. L. No 100-300, 102 Stat. 437 (1988) (codified at 42. U.S.C. §§ 11601-11610 (1988)) Hereinafter ICARA; See K. A. McKee, *A Primer on International Parental Abduction* 6 Regent J. Int'l L. 37 (2008) at 47-49 for a commentary of this domestic act and especially on its complementarity with the Abduction Convention.

¹⁵⁹ See Lowe, *supra* note 59.

¹⁶⁰ U.S. Department of State – Bureau of Consular Affairs, *Annual Report on International Parental Child Abduction (IPCA)* at 2 (2015).

¹⁶¹ See Lesh, *supra* note 10, at 170.

¹⁶² I. Hazzikostas, *Federal Court Abstention and the Hague Child Abduction Convention*, 79 N.Y.U. Law Review 421 at 444 (2004).

¹⁶³ See Lesh, *supra* note 10, at 174.

¹⁶⁴ A. Zashin, C.G. Heckman, A. M. Keating, *The United States as a Refuge State for Child Abductors: Why the United States Fails to Meet Its Own Expectations Relative to the Hague Convention*, 28 J. Am. Acad. Matrim. Law 1 at 19 (2015).

¹⁶⁵ See *Annual Report on International Parental Child Abduction (IPCA)* *supra* note 160 at 13.

children below the age of nine from raising the objections clause arguing that any child of nine or below could not have sufficient maturity to object, while the other Courts did not follow this interpretation. This concurrent jurisdiction creates cases of parallel litigation, for example when the left-behind parent files a complaint before the federal court while the abducting parent filed a custody case in the state family court. In these situations, several federal courts have made the choice to apply the doctrine of abstention¹⁶⁶ as encouraged in *Younger v. Harris*¹⁶⁷ or *Colorado River Water Conservation District v. United States*.¹⁶⁸ However, this abstention only relies on case law, and courts have a discretionary power to abstain which results in inconsistency of application.¹⁶⁹

These consequences have led some academics to advocate for the exclusion of state courts' jurisdiction,¹⁷⁰ a centralisation that is also asked by The Hague Conference which states that countries must keep in mind that a concentration of jurisdiction within a country is preferable due to its considerable advantages such as experienced judges, mutual confidence between judges and authorities, harmonisation of interpretation and mitigation of delay.¹⁷¹ Centralisation has been the option chosen by more than forty countries¹⁷² such as Belgium, where a reform took place in 2007 to decrease the number of competent judges for Hague Abduction cases from 27 to 6.¹⁷³ In South Africa, section 45 (3) of the Children's Act of 2005 gives exclusive jurisdiction of the High Courts in Hague Abduction matters, therefore excluding lower courts. However, it must be emphasized that even within centralised courts, some issues of specialization can be raised where High Courts have a broad mandate of civil and criminal competencies without having one chamber specialised in family and child law. This specific issue has been overcome in 2007 in South-Africa by nominating specific judges to Abduction cases and training them especially relating to international situations.¹⁷⁴

Besides the ICARA, the U.S President signed, in 2014, the International Child Abduction Prevention and Return Act¹⁷⁵ which aims "to return abducted children as expeditiously as possible, to prevent new abductions, and to strengthen and expand the Hague Abduction Convention worldwide".¹⁷⁶ In addition to those two federal implementing Acts, the U.S. adopted two uniform State Laws. Firstly in 1997, the Uniform Child Custody Jurisdiction and Enforcement Act¹⁷⁷ was passed to enable the enforcement of

¹⁶⁶ See Lesh, *supra* note 10.

¹⁶⁷ USA, *Younger v. Harris* 401 U.S. 37 (1971). For a better apprehension of the Younger abstention see Metz, *supra* note 12 and Hazzikostas, *supra* note 162 at 427-429.

¹⁶⁸ USA, *Colorado River Water Conservation District v. United States* 424 U.S. 800 (1976). For a better apprehension of the Colorado River Abstention see Hazzikostas, *supra* note 162 at 430-432.

¹⁶⁹ See Hazzikostas, *supra* note 162, at 451. See USA, *Tsai-Yi Yang v. Fu-Chiang Tsui* (3d Cir. 2004) (accessible on <http://caselaw.lp.findlaw.com/data2/circs/3rd/034714p.pdf> last accessed 7th June 2016) for a concrete application of the Younger abstention to a Hague Abduction case in which the Federal Court refused to abstain in favor of a state court; See McKee, *supra* note 158 at 61.

¹⁷⁰ See Zashin, Heckman, Keating, *supra* note 162, at 35.

¹⁷¹ Hague Conference, Conclusion and Recommendations of the fourth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (March 22-28, 2001) at para 3.1 i; P. Lortie, *Overview, The Judges' Newsletter on International Protection – Vol. XX/Summer-Autumn 2013 at 1.*

¹⁷² See Lortie, *supra* note 171 at 1.

¹⁷³ See article 1322bis of the Belgian Judiciary Code ; M. De Hemptinne, *Concentration of Jurisdiction under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Belgium, The Judges' Newsletter on International Protection – Vol. XX/Summer-Autumn 2013 at 5-6.*

¹⁷⁴ B. Van Heerden, *Concentration of Jurisdiction under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: South-Africa, The Judges' Newsletter on International Protection – Vol. XX/Summer-Autumn 2013 at 23-24.*

¹⁷⁵ Hereinafter ICAPRA.

¹⁷⁶ <https://travel.state.gov/content/childabduction/en/legal/law-and-regulations.html> (last accessed 6th June 2016).

¹⁷⁷ Hereinafter UCCJEA

child custody and visitation determinations made in a foreign country. Secondly, in 2006, the Uniform Child Abduction Prevention Act¹⁷⁸ was passed to increase the prevention of child's abduction by identifying risk factors such as the request for a passport or buying a ticket abroad.¹⁷⁹ This instrument must not be seen as "trumping existing legislation",¹⁸⁰ but more as a complement to them, addressing a field which was not yet covered.

3.3.2.2. Children's Participation in the US

The U.S Law offers little guidance on children's participation. Nevertheless, in 2006, the Congress passed the Child and Family Services Improvement Act which asks for:

procedural safeguards to be put in place to assure that in any permanency hearing held with respect to the child, including any hearing regarding the transition of the child from foster care to independent living, the court or administrative body conducting the hearing consults, in an age-appropriate manner, with the child regarding the proposed permanency or transition plan for the child.¹⁸¹

This requirement is also strengthened by the American Bar Association Custody Standards,¹⁸² in which the necessity to give children an opportunity to be heard in custody proceedings is highlighted.¹⁸³ Every decision to organize a meeting between the judge and the child should be adequately thought through, and the possible harmful consequences of this direct hearing or testimony should be balanced¹⁸⁴ with the benefits of such a discussion.¹⁸⁵ In these cases where the child will attend and participate in Court, the attorney is asked to adequately prepare the child for his/her hearing or testimony with the judge.¹⁸⁶ This function includes:

to prepare the child, familiarizing the child with the places, people, procedures, and questioning that the child will be exposed to; and seek to minimize any harm to the child from the process.¹⁸⁷

This particular reliance on the attorney is risky, as the child's preparation is dependent on the quality of training offered to the attorney. Therefore, if the lawyers did not receive adequate training on the information to give to the child before the hearing, the child will not be well-prepared and could be negatively impacted by his/her experience in Court.

The National Council of Juvenile and Family Court Judges highlights six different ways of enabling a child to participate and there is no guidance on when to use which possibility, and judges have a discretionary power in this choice:¹⁸⁸

¹⁷⁸ Hereinafter UCAPA

¹⁷⁹ B. Sherer, *Comment, The Maturation of International Child Abduction Law: From the Hague Convention to the Uniform Child Abduction Prevention Act*, 26 *J. Am. Acad. Matrimonial Law*. 137 at 157 (2013-2014).

¹⁸⁰ *Ibidem* at 151.

¹⁸¹ §675 (5) (C)

¹⁸² *American Bar Association, Standards of Practice for Lawyers Representing Children in Custody Cases (2003)* Hereinafter the ABA Custody Standards.

¹⁸³ ABA Custody Standards at 20.

¹⁸⁴ See USA, *Kufner v. Kufner*, 519 F.3d 33 (1st Cir. 2008) where an expert stated that the child's hearing would be too harmful.

¹⁸⁵ ABA Custody Standards at 14.

¹⁸⁶ Some guidances on how to prepare can be found on the website of the Children's Bureau express with short articles on "Interviewing the Child and Preparing for Court" <https://cbexpress.acf.hhs.gov/index.cfm?event=website.viewArticles&issueid=54&articleid=830> and "Preparing Kids for Court" <https://cbexpress.acf.hhs.gov/index.cfm?event=website.viewArticles&issueid=21&articleid=322> (last accessed 7th June 2016)

¹⁸⁷ ABA Custody Standards at 6.

- the child's complete participation to the procedure;
- the child's participation when the parent/guardian is temporarily excluded;
- the child's attendance of a portion of the hearing;
- the child's hearing in chambers;
- the child's hearing through the use of video technology or letters and hearsay statements.

Specific state legislation can be found, and different criteria are used to determine the child's opportunity to participate. States such as Kansas, New Mexico or Virginia use the age of the child as criteria, whereas Minnesota, Florida, California and Pennsylvania use various criteria such as the best interests of the child. In Florida for example, the child can be present unless the judge considers that his/her attendance is against his/her best interest¹⁸⁹ whereas in Kansas,¹⁹⁰ children of fourteen years old and above can participate if they ask to and in Minnesota, all children have the right to participate in all proceedings without any age limit. However, most states do not have legislation on children's participation in court and leave this issue to the judge.¹⁹¹ This discretion is problematic as it results giving huge powers to the judge on the children's participation rights. Indeed, allowing a child to be heard entails a subjective and personal judgment by the judge, and results in a non-harmonised right across the U.S.: a child could be allowed to be heard by one judge but the same child, in front of another judge in a different state, could be denied this right.

3.3.2.4. Children's Legal representation in the U.S.

There is, in the U.S., a growing consensus that children must be represented in high conflict cases, and an international abduction is obviously such a case.¹⁹² To enable this representation to be done, the ABA drafted several standards for lawyers who will have to represent children. These guidelines are field specific and cover representation of children in custody cases¹⁹³ and representation of children in abuse and neglect cases.¹⁹⁴

Before analysing these guidelines, it should be mentioned that the ABA Custody Standards makes a distinction between two types of lawyers: the child's attorney and the best interests attorney. While the first one "provides independent legal counsel for a child", the second one is entitled to provide "independent legal services for the purpose of protecting a child's best interests, without being bound by the child's directives or objectives",¹⁹⁵ a lawyer being one of them and not both of them. This separation of the roles is interesting as it reflects the assumption that a lawyer cannot defend at the same time the child's views and the child's best interests. For some lawyers, it can be argued that those two points of views are not so divergent, and can be merged in cases of very young children. This last perception wrongfully departs from the opinion that even younger children can express their views not in a verbal way but through paintings, body movements and facial expressions. This opinion cannot be found in the ABA Custody Standards in which the importance of taking non-verbal behaviour into account is born in mind especially for young children.¹⁹⁶

¹⁸⁸ National Council of Juvenile and Family Court, *Seen, Heard and Engaged: Children in Dependency Court Hearings* (2012) at 13-14.

¹⁸⁹ Fla. R. Juv. Pro. 8.255(b) (2005).

¹⁹⁰ Kan. Stat. Ann. §38-2247(a) (2006).

¹⁹¹ See *Seen, Heard and Engaged: Children in Dependency Court Hearings*, *supra* note 188 at 5.

¹⁹² See Elrod, *supra* note 14 at 670-671.

¹⁹³ ABA Custody Standards.

¹⁹⁴ *American Bar Association, Standards of Practice for Lawyers Representing Children in Abuse and Neglect Cases* (1996).

¹⁹⁵ ABA Custody Standards at 2.

¹⁹⁶ ABA Custody Standards at 4.

The ABA Custody Standards deal with several relevant factors for our study including the lawyer's duty in the exercise of their representation role. The guidelines also recall that the main reasons for the appointment of a lawyer are to ensure the child's views are given a proper weight, but also to protect the child against collateral damage. Firstly, the importance for the child to understand the proceedings, the court system but also the lawyer's responsibilities, is highlighted. Indeed, this requirement is in line with children's right to participation, as a child cannot give his/her opinion without being well-informed. While types of lawyers need to hear the child on his/her views on the ongoing proceedings, the difference lies in the use of these views. On the one hand, the child's attorney will need to defend the child's opinion, as a lawyer defends his/her client. On the other hand, the best interests attorney will add this child's views to other elements to determine the best interests of the child. In other words, while in the first situation, the child's views will be determinative, in the second situation, it will be balanced against other considerations and the lawyer will decide which weight to give to the expressed views.¹⁹⁷ Lawyers are asked to meet the child, to establish and maintain a relationship between themselves and the child, as it is recognised as the foundation of representation. Only through this meeting they will be able to correctly understand the child's circumstances.

Secondly, the collaboration between lawyers and other professionals such as social workers and psychologists is seen as fruitful by helping to ascertain the child's developmental abilities, the child's wishes and to facilitate communication. It is important to keep in mind here that the reliance on other professionals in helping to determine the child's views could negatively impact these views by diluting their content.¹⁹⁸ Thirdly, the lawyer must also prepare the child for the eventuality that his/her views will not be followed by the judge.¹⁹⁹ This duty is very important and relevant in international abduction cases as judges can easily consider that the child's views can be overlooked because the child has not reached a sufficient level of maturity to have an overall understanding of the conflict situation and its related procedure. Fourthly, regarding the best interests attorney, the determination of the child's best interests must be done by the gathering and weighing of evidence, and some determinative factors should be, in principle, specified in a state's statutes.²⁰⁰ The American Bar Association does not mention any specific component of the child's best interests, and leaves discretion to states to do their own appreciation and list of elements. For young children between 0-5, the attorney usually meets the child in his/her family context and plays the role of an observer. Indeed, looking at the manner in which the relationship between the parents and the child works can be very instructive.²⁰¹ Little details such as the fact that the child wears adequate clothes for the weather situation, or if the parents bring food or books for the child at the court are good elements to see how the family members respond to each other and what the place of the child in the family is. This observation will enable the attorney to see how the child reacts to his/her family, and this behaviour can be considered as the infant's voice.

Fifth, the attorney's appointment should occur as soon as practicable, and the ABA Custody Standards distinguish mandatory appointment from discretionary appointment. A lawyer must be appointed when it is mandated by state law and in accordance with the ABA Standards of Practice for Representing a Child in Abuse and Neglect Cases. *A contrario*, the Court has a discretionary power to appoint a lawyer to represent the child but the ABA Custody Standards listed a variety of situations in which such an appointment is desirable. Among others, reference can be found to "past or present

¹⁹⁷ *Ibidem* at 16.

¹⁹⁸ M. Henaghan, *What Does a Child's Right to be Heard in Legal Proceedings Really Mean? ABA Custody Standards Do not Go Far Enough*, 42 FAM. L. Q. 117 at 119 (2008).

¹⁹⁹ ABA Custody Standards at 7 ; See *Seen, Heard and Engaged: Children in Dependency Court Hearings*, *supra* note 188 at 10.

²⁰⁰ ABA Custody Standards at 18.

²⁰¹ See *Seen, Heard and Engaged: Children in Dependency Court Hearings*, *supra* note 188 at 8.

child abduction or risk of future abduction".²⁰² Therefore, in the US, children facing abduction are more likely to be represented in courts and thus to have their right of participation respected. Finally, the guidelines emphasise that lawyers should be trained in a multidisciplinary way to allow them to have a constructive dialogue with the child.²⁰³

Regarding specific state practices, two states will be briefly touched upon: New York and Kansas.²⁰⁴ Firstly, in the State of New York, children are legally represented in every welfare case. The attorney is appointed the day the petition is filed in court. For children of seven years old and above, the lawyer is supposed to directly advocate the children's views. This age limitation is, however, flexible to allow some younger child's views to be given more weight if they have sufficient maturity. The establishment of this limit aims to prevent the underestimation of children's capacity by lawyers and to increase children's participation. In each case of representation, an independent investigation is carried out to have a better understanding of the child's context, in accordance with the ABA Custody Standards. This is done through a meeting with the child which is considered as really important by lawyers to help formulate their client's needs. Other stakeholders such as school staff, social workers and other service providers are helpful in this process as they have been usually in contact with the family. New York's attorneys receive a lot of training regarding child's representation, are trained in interviewing the child, assessing the development of the child, identifying red flags and asking relevant questions in a child-friendly manner. Secondly, in Kansas, children's legal representation is mandatory only during cases of neglect. The determination of the children's legal interests is based on an analysis of the child's best interest through an independent investigation when the child's can express his/her views. The investigation relies on several sources such as medical records, reports of the foster family, police reports and visitation reports from social workers. Those various documents show what the child is thinking and enables the attorney to build the child's legal interests with the information gathered and the child's needs.

To conclude this part, it is interesting to note that for the ABA Custody Standards, children's views are separated from their needs, as children do not have the capacity to determine their own needs. This perception well reflects the paternalistic approach of Americans; however, the possibility for the child to have his/her own attorney and thus to be able to participate in court should not be underestimated.

3.4. Case Law analysis

This part will be dedicated to the analysis of case law specific to abduction procedures. In the first part, the children's right to be heard will be analysed in a general way, trying to assess when and how children can participate in abduction procedures. In the second part, the analysis will cover the specific situation of Article 13(2) and the child's objection clause, as this provision directly provides a way for the child to influence whether the judge will order the return or not.

3.4.1 Participation for Hague Abduction cases

In the U.S., most abduction cases are heard by federal judges, unless the court decides to abstain in favour of a state court, a possibility that has been described earlier. Due to their range of competencies, federal judges only deal rarely with custody and protection cases, and therefore, are

²⁰² ABA Custody Standards at 20.

²⁰³ *Ibidem* at 23-24.

²⁰⁴ This choice is due to the hearing of a roundtable "Representing Very Young Children: What does Zealours Advocacy Look Like?" accessible on <http://www.americanbar.org/groups/litigation/resources/roundtables.html> (last accessed 6th June 2016).

not used to hearing children,²⁰⁵ this approach being reinforced by the non-ratification of the UNCRC. For these reasons, the best way to ensure that children's voices are heard in abduction procedures is to appoint a lawyer who will represent the child's perspective. Indeed, this method has been argued by several academics due to the particular nature of abduction cases which are recognised as high conflict cases.²⁰⁶ However, as it has been detailed before, it is likely that the lawyer will distinguish the child's voice and the child's needs, arguing mostly what he/she thinks is in the best interest of the child rather than the child's wishes. In these cases, the best interests attorney should request the appointment of a child's attorney. This scenario is allowed by the ABA Custody Standards, however, it seems that this duplication of lawyers will rarely be understood by the child as two different persons with whom he/she has met, arguing in two different directions.

In addition to this obstacle, judges are usually reluctant to hear children in Hague Abduction cases as it would, in their opinion, run against the Abduction's Convention aims.²⁰⁷ This argument relies on Article 12 (a) of the Abduction Convention which states that "the judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children". One could argue against this interpretation that it does not take into account the preamble of the Abduction Convention considering the interests of children of paramount importance in matters relating to custody. Indeed, by denying a child the possibility to express his/her views, the judge fails to consider the case as a whole and does not take into account all the parties involved, but rather applies in a strict administrative way the Abduction Convention. By hearing the child, the judge can have further information on the whereabouts of the abduction, and arguably can better understand the situation, even when Article 13 (2) is not raised.²⁰⁸ Finally, even when the child cannot influence the outcome, participating in a hearing will enable him/her to better accept the eventual decision.

3.4.2 Article 13(2)

Article 13 (2) is generally dismissed, often on the basis that the child does not object but expresses a preference, or simply because he/she has not reached an age and level of maturity sufficient for his/her views to be taken into account. Indeed, U.S. Courts generally deny the exception and do not recognize it,²⁰⁹ applying a very strict interpretation.²¹⁰ This even leads some to argue that "in the U.S., analysis under the child's objection exception is fairly straightforward – for the most part, it does not exist".²¹¹ However, Article 13(2) must be treated as a real and stand-alone exception, and can be the sole reason justifying the non-return of the child.²¹² Nevertheless, in these situations, Courts apply a stricter standard in considering a child's wishes as it is not part of a broader analysis. Due to this trend, it is hard to find a decision ordering the non-return of the child on the sole basis of his/her objection to it, and it is much easier to discuss in cases where the child's wishes have not been respected.

In the U.S., by raising the child's objection clause, the party opposing the child's return must prove by a preponderance of the evidence that the child meets the requirements of Article 13(2) of the

²⁰⁵ See Elrod, *supra* note 14.

²⁰⁶ See Elrod, *supra* note 14; M. H. Weiner, *Intolerable Situations and Counsel for Children: Following Switzerland's Example in Hague Abduction Cases*, 58 *Am. U. L. Rev.* 335 at 382-383 (2008); E. Sthoeger, *International Child Abduction and Children's Rights: Two Means to the Same End*, 32 *Mich. J. Int'l L.* 511 at 528-529 (2010-2011).

²⁰⁷ See Greene, *supra* note 20, at 141.

²⁰⁸ See Sthoeger, *supra* note 206 at 541.

²⁰⁹ See Greene, *supra* note 20, at 125-126.

²¹⁰ See arguments for a liberal interpretation of the exception in Greene, *supra* note 20, at 142-153.

²¹¹ *Ibidem* at 117.

²¹² USA, *Blondin v. Dubois*, 189 F.3d 240, 247 (2d Cir.1999).

Abduction Convention i.e. having reached a sufficient age and level of maturity to have his/her views taken into account and strongly objecting to his/her return in his/her country of habitual residence.²¹³ Those two steps have been well analysed and detailed in the recent case *Rodriguez v. Yanez*²¹⁴ in which an 11 years old girl objected to her return in Mexico to her father. Nevertheless, this objection was not the sole ground for the refusal of return, and the judge also based himself/herself on Article 13(a) of the Abduction Convention, arguing that the father was not exercising his custody rights at the time of the removal. This reliance on two bases is not rare in cases involving Article 13(2). Indeed, as said before, judges seem reluctant to justify their decision only on the child's objection clause,²¹⁵ particularly for young children.²¹⁶

Regarding the age and maturity of the child objecting to the return, some divergences appear between courts, certainly due to, as explained before, the huge number of judges dealing with Hague Abduction cases and their lack of experience in this field. For example, the New Jersey Superior Court of Appeal stated that children below the age of nine are not sufficiently mature to have an overall understanding of the conflictual situation,²¹⁷ and thus cannot validly object to their return in their country of habitual residence. This opinion is definitively not in compliance with the UN Committee on the Rights of the Child's recommendations which prohibit such age limitation, but as the U.S. is not a State-Party to the UNCRC, those guidelines do not apply to them. Furthermore, this age limit goes against the requirement of a case by case analysis of the sufficiency of the child's maturity.²¹⁸ In fact, some courts have recognized a nine year old child as sufficiently mature for their views to be taken into account,²¹⁹ and even younger children of seven and eight²²⁰ years old.²²¹ In the same line of reasoning, the Texan Court of Appeal has expressly stated that it has "declined to hold, as a matter of law, that any particular age is sufficient or insufficient to meet the defence".²²² An illustration of this casuistic approach can be seen in the reasoning of the court in *Simcox v. Simcox* in which the mother was arguing that because other courts had found children of eight years old to be sufficiently mature to object to their return, her boy should be considered also as mature enough.²²³ In some cases, judges are helped by experts²²⁴ in assessing the sufficiency of the child's maturity to object.²²⁵ To conclude, the first requirement of Article 13(2) entails a subjective appreciation by judges, and without any guidance, the risk of inconsistency and contradiction between decisions is high. Nevertheless, this margin of appreciation must also be seen as positive as it can benefit young children who have developed an advanced maturity level. This problem of legal uncertainty can only be solved by the

²¹³ See Greene, *supra* note 20 at 117; 42 U.S.C. §11603(e)(2)(B).

²¹⁴ USA, *Rodriguez v. Yanez* 2016 WL1212412 (5th Circuit).

²¹⁵ USA, *England v. England*, 234 F. 3d 268 (5th Cir. 2000).

²¹⁶ See *In the Matter of L.L. (Children)*, (N.Y. Fam. Ct. May 22, 2000), where the return was accepted solely on the ground of the child's objection clause for a boy aged 15 years old.

²¹⁷ USA, *Tahan v. Duquette*, 613 A.2d 486, 490 (N.J. Super. Ct. App. Div. 1992). See also *Sheikh v. Cahill*, 145 Misc.2d 171 (N.Y. Sup. Ct. 1989)

²¹⁸ USA, *Tsai-Yi Yang v. Fu-Chiang Tsui*, 499 F.3d 259 (3d Cir. 2007); USA, *Simcox v. Simcox*, 511 F.3d 594 (6th Cir. 2007).

²¹⁹ See Elrod, *supra* note 14 at 672. USA, *In re Interest of Zarate*, No. 96 C 50394 (N.D. Ill. Dec. 23, 1996).

²²⁰ USA, *Blondin v. Dubois*, 238 F.3d 153 (2d Cir. 2001); USA, *Anderson v. Acree*, 250 F. Supp. 2d 876 (S.D. Ohio 2002).

²²¹ USA, *Rajmakers-Eghaghe v. Haro*, 131 F. Supp. 2d 953.

²²² USA, *Rodriguez v. Yanez* 2016 WL1212412 (5th Circuit) at 11.

²²³ See also USA, *Escaf v. Rodriguez*, 200 F. Supp. 2d 603 (E.D. Va. 2002) where the objection of a 13 years old was dismissed while in USA, *De Silva v. Pitts*, 481 F.3d 1279, (10th Cir. 2007), a 13 years old boy was allowed to stay based on his objection.

²²⁴ USA, *Andropoulos v. Koutrolos*, 2009 WL 1850928 (D. Colo. 2009); USA, *Garcia v. Angarita*, 440 F. Supp. 2d 1364 (S.D. Fla. 2006);

²²⁵ In USA, *Ostevoll v. Ostevoll*, 2000 WL 1611123 (S.D. Ohio 2000), two experts testified that the older children of 13 and 11 years old were of a suitable age and maturity to have their objections listen to.

centralisation of jurisdictions within the country and it is likely that this particular reform will decrease the number of judges competent to deal with Hague abduction cases, and will bring harmonisation and consistency between decisions.

Where they have been recognized as having reached an age and a sufficient level of maturity, children are supposed to be able to interpret their own interests.²²⁶ In *Rodriguez v. Yanez*, the District Court considered that the girl was sufficiently mature as she had shown strong cognitive and social abilities. Indeed, she had justified her wish to stay in the U.S. by the fact that she will be able to learn more languages. However, the Court of Appeal reversed the decision of non-return as, even though, the girl's statement demonstrates that she was mature enough, she was merely expressing a preference rather than an objection. This specific case helps to understand the concept of "objection". Indeed, sometimes, the children's objection clause is raised but, after hearing the child's wishes, the judge considers that the child does not object but rather expresses a preference.²²⁷ This distinction is important, as a preference is far from a strong objection. In *Tsai-Yi Yang v. Fu-Chiang Tsui*, the Court found that the girl was objecting to her return because "she possessed a more generalized desire to remain in Pittsburgh similar to that of any ten-year-old having to move to a new location".²²⁸ A *contrario*, in *Locicero v. Lurashi*, the judges considered that:

the fact that the [thirteen-year-old] child prefers to remain in Puerto Rico, because he has good grades, has friends and enjoys sports activities and outings, is not enough for this Court to disregard the narrowness of the age and maturity exception to the Convention's rule of mandatory return.²²⁹

In these cases, allowing the return on the basis of the child's acclimatisation in his/her new environment "would also signal that a parent might escape the Convention by running out the clock until the wrongfully retained child became accustomed to her new home".²³⁰ Moreover, a decision of non-return in these situations would benefit a lengthy wrongful removal or retention as the child will have more time to meet new friends, to get used to his/her new life, and then object to his/her return to the country of habitual residence.²³¹

Another judge's refusal of the non-return of the child, despite the child's objection, can be illustrated in *Garcia v. Pinelo* where the Court highlighted that the child's objection relied on "his belief that his mother would not be able to travel to and from Mexico because of her immigration status."²³² However, these issues came to the fore because of the mother's actions and lead the Court to order the return of the child as it would send a positive signal to potentially abducting parents. A child's preference can be also seen in cases where the child only wants to stay in the country of abduction to remain with the abductor. In *Norden-Powers v. Beveridge*, the Court ordered the return of siblings despite their wishes to stay together and to remain with their mother.²³³ In fact, in these cases, it has been stated that the defence simply does not apply, as it would reward the abducting parent for his/her action.²³⁴

Finally, specific attention is also given to the possible parental influence on the child's wishes. In *Escaf v. Rodriguez*, the Court stated that parental influence could not be avoided by the caring parent and

²²⁶ USA, *Rodriguez v. Yanez* 2016 WL1212412 (5th Circuit).

²²⁷ USA, *In re Nicholson*, 1997 WL 446432 (1997).

²²⁸ USA, *Tsai-Yi Yang v. Fu-Chiang Tsui*, 499 F.3d 259 (3d Cir. 2007).

²²⁹ USA, *Locicero v. Lurashi* 321 F.Supp.2d 295, 298 (D.P.R.2004).

²³⁰ USA, *Garcia v. Pinelo*, 808 F. 3d 1158 (7th Cir. 2015).

²³¹ USA, *Tsai-Yi Yang v. Fu-Chiang Tsui*, 499 F.3d 259 (3d Cir. 2007).

²³² USA, *Garcia v. Pinelo*, 808 F. 3d 1158 (7th Cir. 2015).

²³³ USA, *Norden-Powers v. Beveridge*, 125F. Supp. 2d. 634 (E.D.N.Y. 2000).

²³⁴ USA, *Hirst v. Tiberghien*, 947 F. Supp. 2d 578, 597 (D.S.C. 2013).

that the real question was to know whether this influence was undue or not.²³⁵ As mentioned before, in *In re Robinson*, the undue influence was detected through the use of the word “settled in” by the young child. When confronting these cases, judges will apply their discretionary power when choosing the weight to give to the child’s views.²³⁶ Regarding this issue, *Trudung v. Trudung* is an interesting case, as it shows that even teenagers of nearly sixteen years old can be considered by the Court to be under undue influence.²³⁷

Despite all these cases of refusal, some cases of admissibility of the child’s objection exist, as in *Broca v. Giron*²³⁸ where the Court allowed the older child to stay in the U.S. The older girl was fifteen years old, and justified her objection to return with several mature objections such as her refusal to see her father, the importance of her new social life and the comprehension of the consequences of her immigration status which will close some employment doors in the future. She balanced pros and cons during the abduction procedure and this balancing act led the Court to allow her to stay in the U.S.²³⁹ The same reasoning has applied to an eleven-year-old girl who made a comparison between her actual life in the U.S and her previous life in Colombia. She raised several rational arguments such as the fact that in Columbia she could not play and be outside due to safety reasons²⁴⁰ or that she was spending a lot of time alone. In this case, the Court did not notice any undue influence and allowed the girl to stay in the U.S.²⁴¹ In *Silverman v. Silverman*, a ten-year-old boy was considered sufficiently mature and had “particularly impressed by his behaviour in learning of the upcoming legal proceedings and his desire to express his views in a letter and have them considered”.²⁴² The youngest child to have been listened to and have his views respected was eight years old and was not returned to Chile.²⁴³

3.5. Final observations

The children’s right to be heard in the U.S. does not depend on domestic provisions, but relies mostly on soft-law. Therefore, there is no uniform method of children’s participation in court proceedings, this divergence being reinforced by the variety of state’s legislation. Despite its federal implementation, Article 13(2) of the Abduction Convention also suffers from this lack of harmonisation and is analysed differently with in the country, which results in incoherent decisions.²⁴⁴ Finally, children’s views are hardly taken into consideration, certainly due to the persisting tradition of *patria potesta* in the U.S. As a consequence, the child’s objection clause is interpreted restrictively, and often dismissed.

²³⁵ USA, *Escaf v. Rodriguez*, 200 F. Supp. 2d 603 (E.D. Va. 2002).

²³⁶ USA, *In re Nicholson*, 1997 WL 446432 (D. Kan. 1997) (unpublished) ; See Kilpatrick Townsend, *Litigating International Child Abduction Cases under the Hague Convention (2012)* at 39 for the discretionary power of American judges.

²³⁷ USA, *Trudung v. Trudung*, 686 F. Supp. 2d 570 (M.D.N.C. 2010); See *Casimiro v Chavez* 2006 WL 2838713 (N.D. Ga. Oct. 13, 2006) for another order of return even though the fifteen years old girl was objecting to it.

²³⁸ USA, *Broca v. Giron*, 2013 WL 867276.

²³⁹ With regards to siblings, some judges have authorized the non-return of the siblings based on the refusal of one or more children such as in *Smyth v. Blatt*. 2009 WL 3786244 (E.D.N.Y. 2009) (unpublished).

²⁴⁰ Safety reasons have also been successfully raised by a fourteen-year-old boy objecting to his return to Mexico in *Haro v. Woltz*, 2010 WL 3279381 (E.D. Wis. 2010).

²⁴¹ USA, *Castillo v. Castillo*, 597 F. Supp. 2d 432 (D. Del. 2009).

²⁴² USA, *Silverman v. Silverman*, 2002 WL 971808 (D. Minn. 2002).

²⁴³ USA, *Escobar v. Flores*, 107 Cal. Rptr. 3d 596 (Ct. App. 2010); *Reyes Olguin v Cruz Santana* 2005 WL 67094 (E.D.N.Y).

²⁴⁴ See Kilpatrick Townsend, *Litigating International Child Abduction Cases under the Hague Convention at 60 (2012)*.

4. South Africa and the child's right to be heard

"There is frequently more to be learned from the unexpected questions of a child than the discourses of men"
J. Locke

After the detailed analysis of the American practice surrounding the children's right to be heard in abduction procedures, this fourth chapter will give a precise overview of both legislation and case-law of South-Africa dealing with children's right to participation in the specific area of Hague abduction cases. The relationship between South-Africa and the UNCRC will be touched upon, as well as the recommendations of the UN Committee on the Rights of the Child on the particular subject of this thesis (4.1). This international framework will be followed by the analysis of the impact of the African Charter on the Rights and Welfare of the Child which has been ratified by South Africa in 2000 (4.2). As done previously with the USA, the author will look at South-African specific children's rights provisions (4.3.) and finally, and end up by an examination of case-law (4.4).

4.1 South-Africa and the UNCRC

South-Africa signed the UNCRC in 1993 and ratified it on the 16th of June 1995. At the time of the ratification, South-Africa was in a process of ending apartheid, and the UNCRC has been of particular relevance as neither race nor colour can be used as a ground for discrimination against children.²⁴⁵

Section 39 (2) of the South-African Constitution states that:

When interpreting the Bill of Rights, a court, tribunal or forum:

- (...)
- (b) must consider international law
- (...)

This particular bullet-point gives a mandatory strength to international law, especially when this treaty has been ratified by South Africa. As a result, judges and others authorities are compelled to rely on the UNCRC but also on the Committee's recommendations during the decision-making process. As a result, some have argued, and the author joins this position, that the UNCRC is directly applicable in South-Africa. In fact, when a children's right is debated in front of a body/institution, this latter should prefer "any reasonable interpretation of legislation that is consistent with international law".²⁴⁶ Therefore, the UNCRC can have a direct impact on the daily life of South-African children, an impact that can be extended by a large scale awareness-raising and a specialised training of professionals working with children.

As every other State-Party to the UNCRC, South-Africa must, in compliance with article 43 and 44 of the UNCRC, submit a report every five years to the UN Committee on the Rights of the Child on the process of implementation of the rights enshrined in the Convention. Surprisingly, the only available concluding observations of the Committee on the Rights of the Child dates back to 2000. Regarding our subject of interests, the Committee pointed out the need to promote public awareness on the

²⁴⁵ See Article 2 UNCRC; *T. Walsh, Advancing the Interests of South-Africa's Children: A Look at the Best Interests of Children under South Africa's Children's Act*, 19 *Mich. St. U. Coll. L. J. Intl'l L.* 201 at 226 (2010-2011).

²⁴⁶ Section 233 of the South-African Constitution.

participatory rights of children and to encourage respect for child's views.²⁴⁷ As these Concluding Observations were released more than fifteen years ago, it is hard to comment on it, since it is not clear if they remain relevant. Nevertheless, the Committee on the Rights of the Child will examine South African situation in September 2016, and this session will hopefully give more up to date data and comments regarding the children's right to participation. The State's report,²⁴⁸ as well as the list of issues²⁴⁹ and the replies to these list of issues by government²⁵⁰ have been released. The children's right to be heard is referred to only in the State's report, and the Committee did not ask any question in this field. Despite this, nothing prevents Committee's members from asking questions related to Article 12 UNCRC and its implementation in South Africa during the session, which might lead to interesting recommendations.

The UNCRC is used by children's rights activists but also by political parties as a tool to justify their claims and legislative proposals to Governments.²⁵¹ Since its entry into force in South-Africa, this international instrument has influenced a lot of national legislation, and especially the national Constitution which has dedicated a specific section to children's rights. This clear-cut impact of the UNCRC on the drafting of the South-African Constitution will be analysed more deeply in section 4.3.1. of this chapter. Besides this use as an implementation tool, reference to the UNCRC is also found in several rulings, and is considered by the Constitutional Court of South Africa as "an international instrument against which to measure legislation and policies".²⁵²

4.2. South-African and the African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child²⁵³ was adopted in July 1990 and ratified by South-Africa in January 2000.²⁵⁴ Even though the ACRWC largely reflects the UNCRC,²⁵⁵ this regional instrument was adopted to respond to the need of a contextualised framework addressing the specific issues that are faced by African children.²⁵⁶ As an example, Article 30 of the ACRWC refers to children of imprisoned mothers and Article 31 mentions children's responsibilities, issues that do not have any counterpart in the UNCRC.

Even though the ACRWC does not identify the children's right to participation in a specific provision, it refers to it in the provision dedicated to the best interests principles - Article 4 (2) of the ACRWC - which states that:

²⁴⁷ U.N. Doc., Committee on the Rights of the Child, Concluding Observations of the Committee on the Rights of the Child: South Africa, CRC/C/15/Add-122, 22 February 2000 at 6.

²⁴⁸ U.N. Doc., Committee on the Rights of the Child, *Second Periodic Reports of States Parties due in 2002: South Africa*, CRC/C/ZAF/2, 17 March 2015.

²⁴⁹ U.N. Doc., Committee on the Rights of the Child, *List of issues in relation to the second periodic report of South Africa*, CRC/C/ZAF/Q/2, 11 March 2016.

²⁵⁰ U.N. Doc., Committee on the Rights of the Child, South Africa's response to list of issues in relation to its second periodic report to the United Nation's Committee on the Right of the Child, CRC/C/ZA/Q/2/Add-1, 3 June 2016.

²⁵¹ A. Skelton, *South-Africa*, in T. Liefaard & J. E. Doek (Ed.), *Litigating the Rights of the Child – The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* 13 at 14 (2015).

²⁵² South-Africa, *S v. M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC), para. 16.

²⁵³ Hereinafter ACRWC.

²⁵⁴ This elapse of time is mainly due to the requirement of fifteen signatures for the entry into force of the ACWRC which was reached in November 1999.

²⁵⁵ See Tobin, *supra* note 34 at 92 and 112.

²⁵⁶ A. Loyd, *The African Regional System for the Protection of Children's Right* 33 at 33 in J. Sloth-Nielsen (ed.) *Children's Rights in Africa: A Legal Perspective* (2008).

In all judicial or administrative proceedings affecting a child who is capable of communicating his/her on views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law

Without doing a lengthy analysis, this provision deserves several comments to allow a better comprehension of the different obligations undertaken by South-Africa. The ACRWC calls for an opportunity for every child to be heard in all judicial or administrative proceedings affecting the child. The use of the verb “affect” is of the utmost importance as the child does not need to be directly involved in the proceedings, and thus, the right to participation also applies to custody issues such as international abduction procedures. Furthermore, the reference is made to the capability of a child to communicate his/her own views rather than to the capability to form and express his/her views. In the author’s opinion, this specific allusion is very important for young children. Indeed, a young child can express his/her opinion in various ways such as painting or simply corporal expression, and the resultant findings can therefore be taken into account by the relevant authority. Article 4(2) departs in this way from Article 12 of the UNCRC, and targets a broader range of children.²⁵⁷ Regarding the manner by which these views are to be presented before decision-makers, the provision allows for a direct hearing but also for an impartial representative to convey the child’s views. By this latter, the drafters did not limit the representation to be done by a lawyer for example. Therefore, any person who knows the child and who is impartial can represent the child’s own views during the proceedings.

As for the UNCRC, South-Africa must submit a report every three years on its domestic implementation of the ACWRC.²⁵⁸ Regarding our subject of interests, the Committee’s Concluding Observations of the initial report of South-Africa²⁵⁹ highlighted the inclusion of children’s participation in various laws affecting children;²⁶⁰ these measures will be discussed in the next section of this chapter.

4.3. Specific children’s rights provisions

Children’s rights are echoed in several laws, and this section will give an overview of the most relevant provisions for our study. As will be shown, the South African Constitution has an important influential role in the implementation of children’s rights (4.3.1.) which is reflected into the Children’s Act 38 of 2005 (4.3.3). The manner by which the Abduction Convention has been implemented in South Africa will also be analysed (4.3.2.) and finally, relevant case-law will be mentioned to assess the effectiveness of the children’s right to participation in Hague abduction cases in South Africa (4.3.4.).

²⁵⁷ It is interesting to note that some authors disagree on the interpretation of the verb “to communicate”, and find that Article 4(2) ACRWC is more restrictive than article 12(2) UNCRC. However, the definition of the verb “to communicate” is to share information with others by speaking, writing, moving your body or using other signals (Cambridge Dictionaries Online). Therefore, communication is not limited to verbal expression and covers others means of communication. K.-A. Cleophas & U. M. Assim, *Child Participation in Family Law Matters Affecting Children in South Africa*, 17 *Eur. J.L. Reform* 294 at 296 (2015).

²⁵⁸ Article 43 (1) (b) of the ACWRC.

²⁵⁹ African Committee of Experts on the Rights and Welfare of the Child, *Concluding Recommendations by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on the Republic of South Africa Initial Report on the status of implementation of the African Charter on the Rights and Welfare of the Child* (2014).

²⁶⁰ *Ibidem* para. 27

4.3.1. South-African Constitution

The South-African Constitution contains civil, political and socioeconomic rights and is described as the result of “one of the most democratic and inclusive constitution-making exercise in history”.²⁶¹ Regarding children, this modern constitution has devoted an entire section “providing for protection and advancement of children’s rights”.²⁶²

It is beyond doubt that Section 28 of the 1996 South African Constitution was largely inspired by the UNCRC. Section 28 (2) refers to the child’s best interests as of paramount importance in all matters concerning the child and plays an important role in the country as a benchmark that must be used in every decision affecting children. This concept did not wait for the UNCRC to appear in South Africa and was established since the 1940’s.²⁶³ Other rights have been taken from the UNCRC such as the right to name and nationality from birth,²⁶⁴ the right to be protected from exploitative labour practices²⁶⁵ and the right not to be detained except as a measure of last resort.²⁶⁶

Even though the South African Constitution does not constitutionalise children’s right to participation, Section 28(1)(h) is of particular relevance for our study as it provides the children’s right “to have a legal practitioner assigned to the child by the state, at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result”.

S28 (1)(h) contains to some extent the principles enshrined in Article 12 UNCRC and 4(2) ACRWC and recognises that the “child’s interests and the adults’ interests may not always intersect”²⁶⁷ It applies in every proceeding where the child is affected regardless of whether the child is a party to the proceedings or not.²⁶⁸ This legal representation is guaranteed, for every child,²⁶⁹ each time a deprivation of such a legal practitioner would result in a risk of injustice, and does not depend on the capability of the child to form and express his/her views²⁷⁰ or to communicate them.²⁷¹ This latter term of “injustice” is not defined by law²⁷² and can cover a large range of situations into which international abduction procedures play a role, in the author’s opinion. These are specifically high conflict cases, and, as seen before, the parents who are directly involved in the proceedings tend to overlook the child’s opinion and interests.²⁷³ Therefore, s28(1)(h) should be applied every time a judge has to

²⁶¹ J. Sarkin, *The Drafting of South Africa’s Final Constitution from a Human Rights Perspective*, 47 *American J. Comp. Law* 67 at 85 (1999).

²⁶² See Skelton, *supra* note 250 at 14.

²⁶³ South-Africa, *Fletcher v. Fletcher* 1948 (1) SA 130 (A).

²⁶⁴ Section 28 (1)(a), counterpart in Article 8 (1) UNCRC.

²⁶⁵ Section 28 (1) (e), counterpart in Article 32 UNCRC.

²⁶⁶ Section 28 (1) (g), counterpart in Article 37 (b) UNCRC

²⁶⁷ South Africa, *Soller NO v. G and Another*, 2003 (5) SA 430 (WLD).

²⁶⁸ J. Sloth-Nielsen & B. D. Mezmur, “2+2=5? Exploring the Domestication of the CRC in South African Jurisprudence (2002-2006)”, 16 *Int’l J. Child. Rts* 1 at 15 (2008); Centre for Child Law, *Guidelines for legal representatives of children in civil matters* at 3 (2016).

²⁶⁹ Section 28(1)(h) includes foreign children including unaccompanied children residing illegally in South Africa as stated in *Centre for Child Law and Another v Minister of Home Affairs and Others* 2005 (6) SA 50 (T) at para. 28-29.

²⁷⁰ As it is in the UNCRC.

²⁷¹ As it is in the ACWRC.

²⁷² See D.W. De Bruin, *Child Participation and Representation in Legal Matters LLD Thesis University of Pretoria at 376-377 (2010)* for criticisms of this vagueness.

²⁷³ Due to this lack of guidance, the Legal Aid South Africa has attempted to define the concept of injustice by mentioning several factors to help ascertain the presence of a substantial injustice such as the seriousness of the

decides about a Hague abduction case. If the national provision appears to be in accordance with its international and regional counterparts, one notable difference must be highlighted. The drafters of the South-African Constitution required that the representation must only be done through a legal representative. This restrictive approach cannot be found either in the UNCRC or in the ACRWC where the doors are left open for the appointment of a psychologist or counsellor.²⁷⁴ Even though it seems that this practice tends to a better protection of the child by a professional who knows the legal specificities of the procedure, he/she might not be the right person to express the child's views. *A contrario*, if the child has been seen by a psychologist before, he/she will be more confident to speak with this person rather than the legal representative. This imposition of a legal professional assistance could have adverse effects in cases where the child is particularly young. Indeed, he/she might have already created bonds with some professionals, and he/she must now create another relationship with his/her attorney. It is a lot of unknown people that the child has to trust in a short period of time, such as the judge and his/her new attorney, and the existence of former relationships with psychologists or social workers should not be underestimated. The question is now to know whether this rule is in compliance with the UNCRC or not, but as no report has been sent to the UN body since the end of the 1990s, it has not yet been answered.²⁷⁵ The author is of the opinion that this contradiction is not fully in compliance with the UNCRC,²⁷⁶ and doors should be left open for other professionals such as social workers or psychologists²⁷⁷ to give effect to the child's right to participate. These latter could be offered a special legal training to be aware of the juridical particularities, and all the stakeholders – judges, parents- could benefit from this precise and accurate representation of the child's views. When the child is very young, the function approximates that of a *Curator ad litem*.²⁷⁸

4.3.2. The Implementation of the Abduction Convention

South-Africa ratified the Abduction Convention in 1996 which had been incorporated into domestic law through The Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996. This latter has been now replaced by Chapter 17 of the Children's Act 38 of 2005 which entered into force on the 1st April 2010. Child Abduction is dealt with in Chapter 17 of the Children's Act where Section 275 mentions that the Abduction Convention "is in force in the Republic and its provisions are law in the Republic, subject to the provisions of this Act". As an indication of this integration, the Abduction Convention has been added as an appendix to the Children's Act.

Section 278 of the Children's Act retains jurisdiction for High Courts, excluding as a result lower courts from the possibility to decide upon international abduction cases. As explained before, this centralization of jurisdiction is beneficial in several aspects such as furthering judges' specialisation or

issue for the child and the complexity of the relevant law and procedure. *Legal Aid Guide 2014* at 65 (13th Edition).

²⁷⁴ South Africa, *Soller NO v. G and Another* (2003 (5) SA 430 (WLD) ; See Sloth-Nielsen & Mezmur, *supra* note 267 at 17.

²⁷⁵ The issue has not been raised by the Committee on the Rights of the Child in its List of Issues mentioned earlier, however, the Committee's members could raise directly the question during the hearing.

²⁷⁶ J. Sloth-Nielsen, *Realising Children's Rights To Legal Representation and to be Heard in Judicial Proceedings: an Update*, 24 *S. Afr. J. On Hum. Rts.* 495 at 498 (2008)

²⁷⁷ The Family Advocate employs social workers as well as psychologists to work on Hague Abduction cases who are trained on how to interview the child. See Section 4.3.3.1 for more details.

²⁷⁸ J. Julyan, *The Hague Convention on the Civil Aspects of International Child Abduction – Recent Developments in South Africa*, 2nd Annual Johannesburg Family Law Conference – 2 October 2015 at 3; South Africa, *Du Toit and Another v. Minister of Welfare and Population Development* (2003 (2) SA 198 (CC); A. Moyo, *Child Participation under South African Law: Beyond the Convention on the Rights of the Child?*, 173 at 178 (2015) 31 SAJHRî. The distinction between the child's legal representative and the *curator ad litem* will be done in Section 4.3.3.1.

and harmonizing decisions. However, South-African High Courts have broad civil and criminal competencies and are not equipped with a specialised family chamber, meaning that loads of judges are competent for international abduction cases. As a consequence, judges were lacking experience and specialisation in this specific field. To counter this, the decision was taken, in 2007, to nominate judges who will be specialised in international family law cases.²⁷⁹ This positive reform is a good example of a best practice surrounding the Abduction Convention and its implementation in domestic law and countries which do not centralise jurisdiction, such as the USA, should take their example from these models. However, if the practice is implemented *de jure*, it seems that *de facto*, this specialised training is not yet correctly implemented and judges still lack specialisation. Indeed, some recent decisions show that judges still lack specialization and are not aware of national landmark cases. For example, the 2015 ruling in *Central Authority v KT* is in total contradiction with the *Penello v Penello* case of 2004,²⁸⁰ despite very similar facts. While in the latter, the argument based on Article 13(1)(b) was dismissed by the court justifying that the abducting parent could not be rewarded for his/her action, the court ruled to the contrary in the former. This decision has been considered to drive “a coach and four through the Convention” and to be an anomaly in the jurisprudence.²⁸¹

The South-African Central Authority is the Chief Family Advocate²⁸² which delegates authority to locally-based Family Advocates.²⁸³ These latter employ social workers as well as advocates who are dedicated to Hague Convention cases. In 2015, twenty-eight incoming and outgoing return and access applications were handled by them.²⁸⁴

4.3.3. Children’s Act 38 of 2005

Even though the UNCRC is not directly enacted into law, the Preamble of the Children’s Act 38 of 2005²⁸⁵ refers to this international instrument as well as to the ACRWC as sources for the need to extend particular care to children. As explained in Section 4.3.1., S28(1)(h) of the South African Constitution consecrates the right for every child affected by a civil proceeding to be legally represented if injustice would otherwise result. This particular right has found its first implementation in the 2003 *Soller v G* case where, for the first time, a child was represented separately from his parents and granted the right to express his views which were considered as equal as his parent’s ones.²⁸⁶ As a result, now, the right to a distinct legal representation from parents is seen in correlation with the child’s right to participation. This specific section will be dedicated to the Children’s Act 38 of 2005 and its coverage of legal representation (4.3.3.1) and of participation (4.3.3.2.).

4.3.3.1. Legal representation

This constitutional right of participation has been accorded more detail by the Children’s Act which entered into force on the 1st of April 2010. Two of its provisions address directly legal representation:

²⁷⁹ Hague Conference, Conclusion and Recommendations of the fourth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (March 22-28, 2001) at para 3.1 î; See Van Heerden, *supra* note 174 at 23-24.

²⁸⁰ South Africa, *Penello v Penello (2004) 1 al SA 32 (SCA)*.

²⁸¹ See Julyan, *supra* note 278, at 14.

²⁸² Section 276 of the Children’s Act 38 of 2005.

²⁸³ Section 277 of the Children’s Act 38 of 2005.

²⁸⁴ Information obtained from a discussion with Julia Sloth-Nielsen.

²⁸⁵ Hereinafter Children’s Act.

²⁸⁶ South Africa, *Soller NO v. G and Another 2003 (5) SA 430 (WLD)*. See South Africa, *Fitschen v Fitschen (1997) JOL 1612 (C)* for an earlier case where s. 28(1)(h) was raised but dismissed; South Africa, *Ex Parte van Niekerk and Another: In re Van Niekerk v. Van Nieker (2005) JOL 14218 (T)*; See De Bruin, *supra* note 272 at 346.

section 29(6) and section 55. In section 29(6), the child's access to legal representation is guaranteed for children in all care, contact and guardianship proceedings, while section 55 expresses the court's power to contact the Legal Aid Board in cases where, in the court's opinion, it is in the best interest of the child to be represented. An important caveat must be highlighted here: section 55 only applies to Children's Court which is a lower court and excluded from hearing Hague cases. However, it must be born in mind that Section 10 of the Children's Act provides for a general right to participate and that these two provisions must be read in combination.

Fortunately, before the enforcement of the right to legal representation, children were not deprived of representation before courts, and *curator ad litem* was appointed for young children. This role still exists and aims to protect children who are lacking capacities.²⁸⁷ Therefore, *curator ad litem* does not represent the child's views but rather what is in his/her best interests.²⁸⁸ In addition to his/her duties of providing reports, the *curator ad litem* will determine the necessity to appoint a legal representative for the child in cases where such an appointment is not made mandatory by law.²⁸⁹ Simultaneously to the *curator ad litem*, the Family Advocate²⁹⁰ was also used before the entry into force of the Children's Act. The Family Advocate is still used in cases where a legal representative is appointed and this particular role is characterised by its neutrality between parties and its advisory role towards the court. This functionary reports²⁹¹ and makes non-binding²⁹² recommendations to the court into which the child's views and best interests are reflected and balanced,²⁹³ even though they, sometimes, do not correspond.²⁹⁴ This is done by the conduct of an inquiry during which all the relevant stakeholders are heard. The Family Advocate does not represent any party to the proceedings, but rather acts like an intermediary between the different parties.

However, in Hague Abduction cases, the Family Advocate has a more active role. Indeed, it is bound to pursue the Hague application for the left-behind-parent who approaches their own central authority. This obligation derives from Article 7 (1) (f) of the Abduction Convention which states that the Central Authority shall "(...) initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child (...)".²⁹⁵ Moreover, this obligation is reinforced in the Children's Act by both Section 276 (2) where it is reminded that "the Chief Family Advocate must perform the functions assigned by the Convention to Central Authorities" and Section 275 which assimilates the Abduction Convention to law in the Republic. In this sense, the Family Advocate is a party to the procedure.

As in the U.S., children's legal representation can be done in two different ways: the client directed legal representative and the best interests legal representative i.e. the former defending the child's position and the latter arguing for the child's best interests. It is, however, important to emphasise that

²⁸⁷ To learn more on the role of *curator ad litem* in South Africa see T. Boezaart, *The role of a curator ad litem and children's access to the courts*, 46 Vol. 3 (2013) *DEJURE* 707-726.

²⁸⁸ See Sloth-Nielsen, *supra* note 275, at 500; A. Engelbrecht, *Critical Analysis of Child Participation and Representation of Children in Legal Matters*, LLM Thesis, University of Pretoria at 27-28 (2013).

²⁸⁹ See Cleophas & Assim, *supra* note 257 at 301.

²⁹⁰ The Family Advocate was created by the Mediation in Certain Divorce Matters Act 24 of 1987.

²⁹¹ Section 278(1) for Hague abduction cases.

²⁹² See Engelbrecht, *supra* note 288 at 26.

²⁹³ See De Bruin, *supra* note 272 at 358.

²⁹⁴ See *Guidelines for legal representatives of children in civil matters*, *supra* note 266 at 5; See Cleophas & Assim, *supra* note 257 at 302.

²⁹⁵ See South Africa, *Family Advocate v. R* (2013) ZAECPHC 10 at para. 5; *KG v. CB & others* (748/11) (2012) ZASCA 17 at para. 20. Before the entry into force of the Children's Act 38 of 2005, this obligation was settled in the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996. See reference to this act in *Family Advocate Cape Town and Another v. Chirume* (6090/05) (2005) ZAWCHC 94.

even if the best interests legal representative defends what he/she thinks is in the child's best interests, the child's views are a necessary part of the determination of the child's best interests.²⁹⁶ The choice between these two types of legal representatives is done by the assessment of the child's sufficient age and maturity:²⁹⁷ when the child has been ascertained as having reached a sufficient capability, his/her attorney will represent the child's wishes, otherwise, the best interests legal representative will make decisions on behalf of the child.²⁹⁸ Obviously, in cases where the child is very young, the role played by *curator ad litem* and the best interests legal representative are very similar.²⁹⁹

4.3.3.2. Mandatory Legal Representation in Hague Cases

Regarding Hague Abduction cases, Section 279 of the Children's Act is the key provision regarding legal representation by making children's representation mandatory in these cases.³⁰⁰ It is the only time that child's legal representation is made compulsory in civil proceedings. This legal representation will be of utmost importance especially when the child objects to his/her return in his/her country of habitual residence based on Article 13(2) of the Abduction Convention. Finally, the legal representative is generally provided by the Legal Aid Board³⁰¹ which recognised abduction cases as matters where legal representation could be ordered even before the entry into force of the Children's Act.³⁰² The training of legal representatives is important, and recent decisions show that legal representatives are not well aware of the specificities of the Abduction Convention. In *Central Authority v. RR*, the court had to dismiss both the psychological report and the child's attorney's report because they had wrongly approached the matter, arguing on the custody dispute rather than discussing on the child's return to the country of habitual residence.³⁰³

4.3.3.3. Participation

Section 10 of the Children's Act, which came into force on the 1st July 2007, enshrines the children's right to participation in a phrasing similar to Article 12(2):

²⁹⁶ South Africa, *Central Authority of the Republic of South Africa v KT 2015 JDR 0036 (GJ)*; See Julyan, *supra* note 277 at 18; South African Law Reform Commission, *Family Dispute Resolution: Care of and Contact with Children* (December 2015) at 35.

²⁹⁷ See Cleophas & Assim, *supra* note 257 at 301; See *Family Dispute Resolution: Care of and Contact with Children*, *supra* note 296 at 55; The Centre for Child Law University of Pretoria has drafted guidelines which are not yet published but which clarified the distinction between these two roles: Centre for Child Law University of Pretoria, *Draft Guidelines for Legal Representatives of Children in Civil Matters* (2010).

²⁹⁸ South-Africa, *B & Others v. G 2012 (2) SA 329 (GSJ)* at para 12.

²⁹⁹ See Julyan, *supra* note 278 at 8; Central Authority Republic of South Africa v. RR 2014 JDR 2645 (GP). South Africa, *Central Authority of the Republic of South Africa v B 2012 2 SA 296 (GSJ)* para. 2; See De Bruin, *supra* note 272 at 372-374; South Africa, *Centre for Child Law v Minister of Home Affairs 2005 (6) SA 50 (T)*.

³⁰⁰ The South African Law Reform Commission has released, in December 2015, a report which argue in favour of an amendment of section 279 of the Children's Act. This reform could have an impact on the role of the Legal Aid South Africa and legal representation of children. See *Family Dispute Resolution: Care Of and Contact with Children*, *supra* note 296 at 51.

³⁰¹ This legal assistance is at State expense.

³⁰² See De Bruin, *supra* note 272 at 368.

³⁰³ South Africa, *Central Authority v. RR 2014 JDR 2645 (GP)*.

Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.³⁰⁴

Before any further comments, it is important to emphasise that Section 10 contains a general principle of children's participation, and is not limited to participation in court proceedings, but covers any decision related to the child such as, for example, school governance. Considering the particular focus of this thesis, Section 10 will be examined in relation to civil proceedings.

The terms "appropriate way" are unusual and cannot be found either in the UNCRC or the ACWRC. This expression, in the author's opinion, emphasises the need for a child-friendly hearing by which the child will be less stressed by the situation,³⁰⁵ and will enable him/her to express a clearer and precise opinion. For example, the language of the judge should be adapted to the child's age, and the official clothes of judges and lawyers should be replaced by informal clothes. Moreover, it also highlights that the method of hearing should correspond to the age and developing competencies of the child:³⁰⁶ the hearing of a teenager cannot be conducted in the same circumstances that the hearing of an infant. This comment illustrates a major difference between Section 10 of the Children's Act and section 28 (1)(h) of the Constitution: when in the latter, children become party to the proceedings by being legally represented, in the former, children's participation is interpreted more broadly and is not narrowed down to legal representation.³⁰⁷

Two distinctions must, however, be highlighted between the domestic provision and its regional and international counterparts. Indeed, for the first one, whereas Article 12(2) UNCRC asks for the views to be expressed freely, the Children's Act did not take this aspect into consideration.³⁰⁸ While this absence does not necessarily have tremendous consequences, it can underestimate the power of parental influence which can definitely have an impact on the child's opinion, especially in custody procedures. The second distinction comes up with the use of the age and maturity of the child. For the drafters of the UNCRC, these two factors should be used to ascertain the weight to give to the child's opinion. *A contrario*, they play a different role in Section 10 of the South African Children's Act, and are to be used at an earlier stage i.e. the judge needs to decide on the capacity of the child before allowing him/her to participate. This requirement can be seen, in the author's opinion, as an obstacle to children's participation. In fact, young children who did not reach, in the judge's opinion, such an age and maturity, will not be able to participate in court, even though it has been prove that every child, regardless of his/her age, can express an opinion.

As seen in the previous section, the Children's Act provides independent legal representation of children involved in Hague abduction cases, and therefore, it gives effect to their right to participation. Moreover, a correlation can be made with section 31(1)(a) of the Children's Act which states that:

Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph (b) involving the child, that person must give due consideration to any views and wishes expressed by the child, bearing in mind the child's age, maturity and stage of development

³⁰⁴ This provision has been inspired by *McCall v. McCall 1994 (3) SA 201 (C)* at 207 where for the first time the child's wishes were recognised as part of the child's best interests. This analysis has been endorsed by the Supreme Court of Appeal in *F v. F 2006 (3) SA 42 (SCA)*.

³⁰⁵ See Section 42(8)(a) of the Children's Act where children's hearing are asked to be conducted in rooms which are furnished and designed in a manner aimed at putting children at ease.

³⁰⁶ See Moyo, *supra* note 278, at 178.

³⁰⁷ See *Family Dispute Resolution: Care Of and Contact with Children*, *supra* note 296, at 35-36 ;See De Bruin, *supra* note 272 at 329.

³⁰⁸ See Moyo, *supra* note 278, at 175.

This provision can be related to our subject of interest as parent holding parental responsibilities must, according to 31(1)(b)(ii), consider their child's views before taking a decision affecting the contact between him/her and the other co-holder of parental responsibilities. This situation is encountered especially in international abduction cases, and the Children's Act emphasises the importance for parents to take into account their child's views.

4.4. Case analysis

This section will be devoted to the analysis of the children's right to participation in Hague Abduction cases. As for the U.S., the first part of this section will look at the participation of children in abduction procedures (4.4.1.) and the second part will analyse the use of Article 13(2) by South-African judges (4.4.2.).

4.4.1. Participation

As explained before, the Children's Act granted jurisdiction to High Courts to hear Hague Abduction cases, and in 2007, a reform allowed the nomination of specialised judges for these particular cases. Moreover, possibilities of participation in such procedures have now become mandatory through legal representation, due to sections 10 and 279 of the Children's Act. Depending on the child's age and maturity, the legal representative will argue on the best interest of the child or on his/her views. Those legal provisions surrounding participation have resulted in a range of decisions which do not depart from each other as can be observed in the U.S.

Courts are now recognising their responsibilities to offer the child an opportunity to express his/her views and to participate in the procedure. In *Central Authority v. Reynders*, the judge stated that both the Abduction Convention and Section 10 of the Children's Act require:

that I must give due consideration to the views expressed by the child, and allow it to participate in the matter before me, obviously with due regard to the child's age, maturity and stage of development.³⁰⁹

This quotation centralises all the important elements which need to be taken into account i.e. the consideration of the views, the opportunity to participate and the balancing act with the personal particularities of the child. The hearing of the child is often done in chambers³¹⁰ which is beneficial to the child as the stress that can be provoked by an official hearing is decreased when this discussion is done in a more informal way. For young children, an advocate will observe them in the family context and have a short and simple conversation with them.³¹¹

Nonetheless, it can happen that the judge refuses to hear the child because he/she is overstressed by the situation,³¹² or refuses to take into consideration the child's views because the answers have been orientated by the way the child has been interviewed. This last situation is deplorable and is illustrated in *Central Authority and Another v. B*³¹³ where the child's attorney neither asked the correct questions nor gave all the correct information to the child to enable him/her to have an overall understanding of the case. However, the judge concluded that even if the child had the adequate information, he was not sufficiently mature to have his views taking into account. Nonetheless, this case illustrates well the importance of the availability of training for attorneys.

³⁰⁹ South Africa, *Central Authority v. Reynders* (12856/2010) [2010] ZAGPPHC 193 at para. 26.4.

³¹⁰ South Africa, *Family Advocate v. R* (2013) ZAECPHC 10 at para. 28.

³¹¹ South Africa, *Central Authority and Another v. MA*(2012) ZAGPJHC 45 at para. 68.

³¹² South Africa, *Ford v. Ford* SCA 52/05 1st December 2005; See Sloth-Nielsen & Mezmur, *supra* note 268 at 18.

³¹³ South Africa, *Central Authority and Another v. B* (2014) ZAGPPHC 1008 at para. 35-37.

The best interests principle as enshrined in Section 28 (2) of the Constitution plays also an important role and is examined by every judge, especially when analysing a defence under the Abduction Convention under either Article 13 or 20. The child's wishes are considered to form part of this analysis, and no age limit can be found in case-law.³¹⁴

This children's participation right is well implemented in South Africa, to the extent that, for example, in *Central Authority v. RR*,³¹⁵ the judge blamed the child's attorney for having given too much consideration to the child's view rather than to have taken a decision on the behalf of the child, therefore acting more like a best interests attorney or a *curator ad litem*.³¹⁶ This case also illustrates the subjective character of the age and maturity assessment. Indeed, while the attorney can consider that the child has reached a sufficient level of maturity to have an overall understanding of the legal implications of the procedure, the judge might not reach the same conclusion.

4.4.2. Article 13 (2)

Article 13(2) of the Abduction Convention is reflected in Section 278 (3) of the Children's Act which states that:

the court when considering a Hague Convention application must afford the affected child an opportunity to object and, having regard to the child's age and maturity, give due weight to any such objection.

In the author's analysis of case-law, few decisions could be found referring directly to the child's objection clause of the Abduction Convention,³¹⁷ and Section 278(3) of the Children's Act could be one of the justification for it. Judges are compelled to encourage children's participation and to allow for separate legal representation. Moreover, they must consider any objection of the child to his/her return to his/her country of habitual residence due to domestic law. Therefore, when an objection is raised, the attorney might rely directly on the domestic provision rather than on its international counterpart, and even if he/she does not do it, the judge is under the obligation to do so. For example, in *Central Authority v. Iguwa*,³¹⁸ an eight-year-old boy objected to his return to Ireland, and threatened to commit suicide. This defence should normally be dealt with under Article 13(2) of the Abduction Convention. However, the judge did not refer to this provision but he recognised that the child's views should not be entertained, certainly due to his domestic obligations regarding the right to children's participation. In this case, the judge decided to order the return of the boy to Ireland arguing, among others, that to ask for a Family Advocate's report would go against the aims of the Abduction Convention. In *Central Authority v. Reynders*, the child objected to her return in U.S., and the court relied mostly upon section 278(3) of the Children's Act rather than on Article 13(2).³¹⁹ In *Family Advocate v. Baillie*,³²⁰ the child objected to his return to England, but the exception was examined

³¹⁴ South Africa, *Central Authority v. K* 2015 (5) SA 408 (GJ) at para. 53. The child was seven years old and even if he did not object to his return, Article 13(1)(b) was raised by the abducting parent. He was asked for his views and requested to remain in South Africa rather than to go back to England. This statement was part of the assessment, by the judge, of his best interests. Indeed, the judge agreed with him and considered that ordering the return would not be in the best interests of the child because it would have a disruptive effect on his schooling and current milestones.

³¹⁵ South Africa, *Central Authority v. RR* 2014 JDR 2645 (GP).

³¹⁶ South Africa, *Central Authority v. K* 2015 (5) SA 408 (GJ) at para. 5.

³¹⁷ See for example South Africa, *Family Advocate v. R* (2013) ZAECPHC where Article 13(2) never appears despite the reliance on the child's objection to return in England to take the decision of non-return.

³¹⁸ South Africa, *Central Authority v. Iguwa* (2010) ZAGPJHC 62, paras. 45-46.

³¹⁹ South Africa, *Central Authority v. Reynders* (12856/2010) [2010] ZAGPPHC 193 paras. 13 and 26.

³²⁰ South Africa, *Family Advocate v. Baillie* (2007) 1 All SA 602 (SE).

under Article 13(1)(b) of the Abduction Convention, a method that can be done but which is not unanimous, as explained in Chapter 2 Section 2.5 of this thesis. However, the child's objection clause is also considered by courts as a separate defence.³²¹

The judges analyse Article 13(2) based on the four questions mentioned in Chapter 2 Section 2.3.1.2 of this thesis, which have been firstly used by an English court in the *Re T.* case.³²² This case is recognised by South-African courts as a landmark decision, and judges have followed the same analysis since then.³²³ In contrast to the U.S., a non-return order can be found relying only on the child's objection clause such as in *Central Authority and Another v. B* where Article 13(2) was the only debated question.

The first step of Article 13(2) analysis is to determine whether the child strongly objects or mainly expresses a preference, and to do so, judges take into account the basis of the child's refusal: it must be based on the objection to return to the country of habitual residence and not on the refusal to return to the left behind parent. This has been emphasised a few times by judges such as in *Central Authority v. De Wet*.³²⁴

The second step is to assess the child's maturity, a phase that is recognised as essential since the 1990s where the court held, in *MacCall v. MacCall*, that:

f the Court is satisfied that the child has the necessary intellectual and emotional maturity to give in his expression of a preference a genuine and accurate reflection of his feelings towards and relationship with each of his parents, in other words to make an informed and intelligent judgement (then) weight should be given to his expressed preference.³²⁵

The role of experts is important here, and judges often rely on their reports to enable an impartial and objective assessment.³²⁶ Experts also intervene sometimes to ascertain the harmful effects that a return order could have on the child. However, these reports can sometimes be dismissed by judges who feel that the statements they contain are too exaggerated.³²⁷ No age limit can be found in case-law, and the assessment is made on a case-by-case basis, taking into account several factors such as the reports of the legal representative and psychologists who met the child earlier.³²⁸

The third step is to decide which weight to give to the child's views, and especially to assess the possibility that the child was under undue influence from the abducting parent. Due to the legal representative, this unconscious influence can be limited to a certain extent and judges have, on several occasions, reminded that the real question is to determine whether or not the influence is undue. The child will undoubtedly be influenced by the proceedings, and judges need to carefully put the circumstances of the case in perspective. In *Central Authority v. Reynders*, the girl's views were recognised as less objective than required, but this lack of impartiality was justified by the proceedings and her involvement in it.³²⁹ Along the same lines, a child can argue that he/she is happier in his/her

³²¹ South Africa, *Central Authority and Another v. B* 2012 (2) SA 296 (GSJ) at paras. 5-6.

³²² United-Kingdom, *Re T. (Abduction: Child's Objections to Return)* (2000) 2 FCR 159.

³²³ South Africa, *Central Authority v. de Wet* 2008 (2) SACR 216 (T) at para. 39; See *Family Dispute Resolution: Care Of and Contact with Children*, supra note 296 at 41.

³²⁴ South Africa, *Central Authority v. de Wet* 2008 (2) SACR 216 (T) at para. 42.

³²⁵ South Africa, *McCall v. McCall* 1994 (3) SA 201 (C) 207 H-I/J. This statement was reinforced in 2001 in *Lubbe v. Du Plessis* 2001 (4) SA 57 (C) 73G-H/I.

³²⁶ South-Africa, *Central Authority v. de Wet* 2008 (2) SACR 216 (T) at para. 41.

³²⁷ South-Africa, *Central Authority v. Reynders* 2011 (2) SA 428 (GNP), at paras. 24 and 29.

³²⁸ South Africa, *KG v. CB & others* (748/11) (2012) ZASCA 17.

³²⁹ South Africa, *Central Authority v. Reynders* (12856/2010) [2010] ZAGPPHC 193 at para. 28.4.

new environment because of the involvement and participation of the abducting parent in his/her life, but, for courts, this does not amount to undue influence but more to parenthood.³³⁰ To the contrary, a case of undoubtable undue influence can be seen in *Family Advocate v F* where a five-year-old girl qualified her mother as evil and stated that she would always be on her father's side. In this case, the judge stated that "her negative attitude towards her mother is not natural", and that she was under influence.³³¹ This step can sometimes be subjective, but impartiality and coherence between decisions are ascertained by the limited number of competent judges for Hague Abduction cases.

The fourth step is whether to use the discretionary power or not accorded by the Abduction Convention to judges through its Article 18.³³² When assessing the child's objection clause, judges must take into account several factors including the best interests of the child³³³ and information relating to the social background of the child as emphasised by the famous ruling of the 2000 South African Constitutional Court in *Sonderup v. Tondelli*.³³⁴ In this case, the constitutional court judges highlighted the special nature of the exceptions contained in Article 13 and 20 of the Abduction Convention which do not call for a broad interpretation but should rather be interpreted as a solution to be used in extreme circumstances to protect the welfare of the child.³³⁵

4.5. Concluding observations

The South African situation is different to the U.S. one, and this thesis will argue that this variation is largely due to the impact of the UNCRC and the ACWRC. Indeed, both legislation and case-law refer to these international and regional instruments. Regarding children's participation, children's legal representation is mandatory in Hague abduction cases, and judges are compelled to give due consideration to child's wishes depending on their age and maturity. Moreover, a centralization of jurisdiction has occurred, decreasing, as a result, the number of competent judges while increasing coherence between decisions. However, despite this idealistic landscape, judges are still not attuned enough to the specificities of the Abduction Convention which could lead to some contradictory decisions.

³³⁰ South Africa, *Central Authority and Another v. B* 2012 (2) SA 296 (GSJ) at para. 16.

³³¹ South Africa, *Family Advocate v. F* (2014) ZAECPHC 93 at para. 28.

³³² South Africa, *Central Authority v. B* 2009 (1) SA 624 (W) at para. 7; *Sonderup v Tondelli and Another* 2001 (1) SA1151 (CC) at para. 12.

³³³ Article 28(2) of the South African Constitution

³³⁴ South Africa, *Sonderup v. Tondelli and Another* 2001 (1) SA1151(CC) at para. 12

³³⁵ *Ibidem* at para 32.

5. The right to be heard in abduction procedures: myth or reality?

“If we are to treat children with dignity, we should not invalidate their objections and views simply because they are young”³³⁶

After this in-depth analysis, it is now time to give a clear answer to our question of research: is the right of children to be heard effective in abduction procedures, and does the UNCRC have an impact on this effectiveness? This thesis will argue that more and more attention is paid to the right of children to be heard in decisions affecting their daily life.³³⁷ This tendency relies on several factors among which the UNCRC is an important one. The author has taken the Abduction Convention as a point of comparison. Both the U.S. and the South African approaches to the children’s right to be heard in abduction procedures have been detailed in the last chapters. This overview has enabled the highlighting of several differences, and, it can be said that the effectiveness of children’s right to be heard does not depend on the Abduction Convention itself, but mainly on the willingness of States-parties, which is largely influenced by their ratification of international and regional human rights treaties.

The first important criterion, which plays a crucial role in the recognition of the children’s right to be heard in domestic proceedings, is the access of children to legal representation. Even if it is considered as an indirect way of enabling the child’s participation, states seem to analyse it as providing the best way to combine the growing consensus towards the need to hear children and their presumed lack of capabilities. The appointment of a legal representative has the advantage to allow the child’s wishes to be represented in front of the court, without requiring the child’s hearing by the judges. This practice is also considered beneficial by those who advocate that the child’s interview provokes some delays and is therefore in contradiction with the aims of the Abduction Convention for a speedy procedure. Moreover, with legal representation, the child’s wishes will be placed in a legal framework and thus have more strength and impact during the debate. Despite these advantages, the child’s legal representation results in the child being a party to the proceedings and, in the author’s opinion, this involvement could contribute to an increase in the tension between the child and his/her parent(s). Of course, this consequence depends on the content of the argumentation of the attorney and the child’s wishes, but it can be wondered whether such participation is always in the best interests of the child.³³⁸

Besides these comments, it is important to highlight some challenges faced when providing the child with a legal representative. Indeed, a legal representative of quality depends largely on the financial resources of the states for two reasons: the availability of the representative and his/her adequate training. Due to financial constraints, states may often not be able to afford the services of senior legal representatives. Therefore, junior legal representatives will generally exercise this task. Without underestimating the capacity of junior attorneys, senior legal representatives have more experience and knowledge and children could have their views better represented by them in front of the court. However, this debate only occurs when the state has the possibility to provide legal representation and it should be emphasised that, sometimes, the state is not even able to supply the legal representation.³³⁹ In these situations, the children’s right to participation is dependent on the legal

³³⁶ See Henaghan & Ballantyne, *supra* note 63 at 388.

³³⁷ The right to be heard applies in every decision affecting the child and is, therefore, not limited to judicial proceedings. However, this conclusion will focus on the implementation of this right in civil proceedings.

³³⁸ See *Family Dispute Resolution: Care Of and Contact with Children*, *supra* note 296 at 48.

³³⁹ *Ibidem* at 51.

framework that must be applied by the judge and by the presence or not of a provision giving the availability for children to express their views.

Besides this issue of availability, the quality of the representation is also an important aspect and should be better thought through. Indeed, as mentioned in the analysis of South Africa, the child's views can be dismissed due to attorney's errors or inexperience. Such discomfiture could be avoided with some specialised training, which should include the analysis of the different exceptions possible under the Abduction Convention but also the overview of best practices around the world. Indeed, it is important that exchanges of methodologies take place between judges, but also between Central Authorities that have to deal with international abduction cases. As everything is linked, the training of a limited number of judges is more affordable and more likely to enhance quality than the training of hundreds of judges.

To conclude on legal representation, it must be acknowledged that this practice represents a welcomed step toward the adding of the child's voice to the voices of the other parties, but also that an indirect hearing through a social worker or psychologist is in compliance with the obligations under Article 12 of UNCRC.³⁴⁰ Nevertheless, some weaknesses of this indirect participation should be mentioned. Indeed, states should not limit the right to be heard to legal representation, and should provide the opportunity for the child to be heard in every case where the decision will affect him/her. The effectiveness of the children's right to be heard cannot only be based on the possibility of legal representation and the child's hearing enables the decisions-makers to gather more information about the conflictual situation. The benefits of a direct hearing must not be undervalued and the hearing of the child will also provide the judge with the means to understand the child's perspective on the situation³⁴¹ and to assess the impact of any possible influence on the child's wishes.

A second factor has a large impact on the effectiveness of the children's right to be heard: the enforceable nature of the rule enshrining the right. In South Africa, children's right to representation is guaranteed by the Constitution and the Children's Act. This legal implementation can be seen as a direct impact of the UNCRC which, in Article 4, requires states to take all appropriate measures to comply with their obligations. In the U.S., this right is contained in guidelines drafted by the American Bar Association which concern only attorneys. As a consequence, judges are not urged to apply these guiding rules to their cases. Therefore, if a child is not represented in a Hague Abduction cases, the law will not be violated and neither the attorney nor the judge will be held responsible. As a result, children are less protected when rules are contained in soft law documents because of their reduced influence and strength. Regarding children's participation, South African judges are compelled to hear children depending on their age and maturity,³⁴² an obligation that has no counterpart in the U.S. This lack of provision enshrining the possibility for every child in each procedure to be heard is a gap that should be resolved by a US federal law applying to all states. Such a provision could benefit children in a numerous way, especially because there is no global consensus on the manner by which to hear child's voices. Considering especially abduction procedures, the Abduction Convention is, in the author's view, lacking a general principle recognising the right for children to be heard in every case. The drafters should not have limited the scope of the right to be heard only in Article 13(2), as this provision is an exception to the prompt return of the child, and is used only in cases where the child objects to his/her return and therefore is put in opposition to the left behind parent.

The effectiveness of the right to be heard is also impacted by the professionalism of judges and attorneys who will have to deal with children. Concerning judges, being able to interview children and

³⁴⁰ See Sthoeger, *supra* note 206, at 542.

³⁴¹ See Elrod, *supra* note 14 at 686.

³⁴² Section 10 of the Children's Act 38 of 2005.

to assess whether they have reached, or not, a sufficient level of maturity to have their views taken into account is largely dependent on the quality of the training provided by the state. Unfortunately, it has been shown that all judges are not well specialised, and that divergences appear between countries, despite several positive steps undertaken, for example, by South Africa such as the decrease of competent judges and their specialization through training. As mentioned earlier, the training of judges depends on the financial resources of the state, and even if *de jure* it could be inferred that the country has reached a powerful level of effectivity, the implementation of the practice can be undermined due to a lack of resources.

Some situations have shown that attorneys are not specialised with the specificities of the Abduction Convention, and such a gap could have damaging consequences for the child. In fact, if on the one hand, the child's objection clause is not raised due to the attorney's lack of knowledge and on the other hand, that there is no provision asking the judge to take into account the child's opinion, he/she will not be heard during the procedure.³⁴³ This could result in the child being seriously harmed by his/her return to the country of habitual residence.

To conclude, the children's right to be heard in abduction procedures is on a trajectory to be more and more effective, but the lack of a clear provision in the Abduction Convention on the necessity to hear children in each case makes this right less effective than it should be. Children are dependent on the national rules of each State-Party, and the enforcement of their rights and their protection varies across the world. Even though this divergence tends to be diminished by the drafting and ratification of international and regional human rights treaties such as the UNCRC, non States-Parties to these conventions are still free agents and children are the most affected persons by this.

³⁴³ See Henaghan & Ballantyne, *supra* note 63 at 388-389.

6. General Conclusion

The aim of this thesis was to analyse the effectiveness of the children's right to be heard in the context of abduction procedures as dealt with by the Abduction Convention. Two countries had been chosen, respectively the United States of America and South Africa, to enable a concrete examination of the right to legal representation and participation in front of domestic courts. This particular opposition had, as a goal, to see whether the UNCRC had a real impact on the children. Indeed, the U.S. is the only country which has not ratified this international human rights treaty. Therefore, in the author's view, the combination of two countries with different international obligations could only be interesting. The purpose of this thesis was to highlight the importance of the ratification of the UNCRC by showing the impact that this instrument can have on the children's right to participation, here in the sombre context of international abductions.

The second chapter was devoted to the in-depth analysis of the children's right to be heard, with a special focus on international abduction procedures. A short history of the shift from considering children as passive actors to children as active participants of the civil society was given as an introduction to the subject. These opening remarks were followed by a broad examination of Article 12 UNCRC which was divided into two main branches. On the one hand, it was reminded that Article 12 (1) UNCRC entails States to assess on a case-by-case basis the child's capacity to form his/her own views, in order to give an according weight to the opinion that was given by the child. In this evaluation, attention must also be paid to the possible influence of parent, also called the parental alienation syndrome, but also to the possible reluctance of the child to give his/her opinion on the conflictual situation. This resistance should be respected, as the UNCRC insists on the "voluntary" character of the opinion expressed. On the other hand, the particular object of Article 12 (2) was highlighted considering its limited application to judicial and administrative proceedings. In this context, the possibility of being heard in various ways was emphasised. These possibilities - which includes among others legal representation, interviews with the judges in chambers, psychological reports, consultations in the familial contexts etc. - are useful and especially so in cases where decision-makers are looking for the views of young children. The same detailed examination was done regarding the Abduction Convention where the objectives of this latter were mentioned as well as its scope of application. This chapter was concluded by a section merging our two fields of research - the children's right to be heard and the Abduction Convention - where the absence of a general principle on children's right to be heard was underlined, even though Article 13(2) of the Abduction Convention allows for this right to play a role in the procedure. This non-appearance was justified by the early drafting of the Abduction Convention, before any international treaty on children's rights. Finally, both the use of the child's clause objection and its history were underscored and four stages were distinguished in the functioning of the exception which can be summarised as the analysis of the strength of the objection, the assessment of child's age and maturity, the decision on the weight to give to the objection and the use, or not, of the judge's discretionary power. Interestingly, these steps were taken by the author from an English decision, and as it has been shown, this ruling had been referred to in South African case-law as a landmark decision. A short reference was also made to the combination used by some judges and attorney between Article 13(2) and Article 13(1)(b); however, this link is not unanimously approved.

The third chapter was dedicated to the analysis of the American practice towards the children's right to be heard in abduction procedures in order to determine whether this right was effective despite the non-ratification of the UNCRC. The arguments justifying this reluctance against the UNCRC were considered, in addition to the opposition to the ratification of the American Convention on human rights. The third section examined the existing specific children's rights provisions in American

legislation. It was here shown that, certainly due to its earlier drafting, the U.S. Bill of Rights largely reflected the opinions of that period, despite some mitigated attempts by courts to include the notion of children as rights-bearers. The next section analysed the statutory law, beginning with the implementation of the Abduction Convention which was effected by the ICARA. It was pointed out that the main problem of this Act, despite it not referring to children's right to participation, was its broad granting of jurisdiction to both federal and states courts, resulting in a large number of competent judges. Subsequently, through this thesis, it has been argued that the number of competent judges should be decreased to enable effective training, but also to avoid divergence between decisions due to a lack of experience and knowledge on the specificities of the Abduction Convention. The analysis of both children's participation and children's legal representation showed that a specific legislation was absent and that legal professionals were mostly relying on the ABA Custody Standards. Regarding participation, these guidelines strengthened the importance of a child's hearing, placing important duties on the sole attorney's responsibility for the child's preparation for the interview with the judge. Attention was drawn to the distinction between the best interests attorney and the child's legal representative, functions that can mainly be distinguished by their use of the child's views: while for the former it will only form part of a broader analysis, for the latter, it will be considered as binding directives. Finally, this Chapter ended up with the analysis of the case law in two domains: participation and Article 13(2). Regarding the first one, it was stressed that the preferred way to deal with children's voices was by the appointment of a legal representative, which results in the avoidance of a child's hearing in most cases. The use of Article 13(2) by American judges was analysed, and the conclusion drawn that these professionals were applying a strict interpretation which was often resulting in the dismissal of the exception. Moreover, decisions of non-return are rarely based solely on the ground of the child's objection clause, and a divergence of interpretations appears between states mainly in regard to the assessment of the child's age and maturity. These deficiencies have been argued to principally be a consequence of two factors: the huge number of judges dealing with Hague Abduction cases and the absence of a guiding legislation on the children's right to be heard in court proceedings.

In the fourth chapter of this study, the focus was turned to South African practice. South Africa ratified the UNCRC in 1995, and it is argued that, compared to the U.S., South Africa is a step in advance regarding children's right to be heard, probably due to its international and regional obligations. Since its entry into force, the UNCRC, as well as the ACWRC, which has been ratified in 2000, have influenced domestic legislation. The Constitution of South Africa directly refers to children's rights and enshrines the right to legal representation in Section 28(1)(h) which is considered to be inspired from Article 12 UNCRC. This Constitution is the point of entry of children's rights in South Africa and has had a large impact on the current legislation. The implementation of the Abduction Convention was examined through Chapter 17 of the Children's Act 38 of 2005, which retains jurisdiction for High Courts. This centralisation was emphasised and considered as a positive step towards a uniform interpretation of the Abduction Convention in South-Africa. To strengthen this specialisation, a reform was taken in 2007 to nominate judges in charge of Hague Abduction cases, but this improvement has not been yet implemented. The third section of this chapter's analysis was dedicated to the Children's Act 38 of 2005 and its appraisal of children's participation and children's legal representation. Section 10 of the Children's Act considered the right to participation as a general principle, and differences with its regional and international equivalents were highlighted. With regards to children's legal representation, an important feature of this right was highlighted in Section 279 of the Children's Act, which makes legal representation mandatory for all Hague Abduction cases. This obligation cannot be found in the U.S., but it should be recognised that the ABA Custody Standards argue in favour of it. Moreover, the different roles of the Family Advocate, the *curator ad litem*, the best interests' attorney and the child's legal representative were distinguished and commented upon. It was underlined that in situations where the child is young, there is a trend to act more like a *curator ad litem* or a best

interests' attorney, and thus to take a decision on behalf of the child. The last part of this chapter was devoted to the analysis of the case law regarding participation and the use of Article 13(2). It was highlighted that South African judges are embracing their role in the effectiveness of the children's right to be heard in court proceedings as emphasised in case law. Children's hearings are often conducted in chambers, and their views given due consideration following a case-by-case assessment of the child's age and maturity. It was argued that this approach is certainly influenced by the UNCRC and the ACRWC which both deal with the child's right to participation. Finally, Article 13(2) was examined and its correlate was found in Section 278(3) of the Children's Act, which gives importance to the child's objection in cases of Hague abduction situations. Due to this equivalence, it was mentioned that few decisions can be found referring directly to Article 13(2) of the Abduction Convention, but that the child's objection clause in the Act can be the sole basis of a decision of non-return in the child's country of habitual residence. The use of this exception was observed as having as a foundation in an English ruling into which the four steps mentioned earlier in this thesis were identified. A certain uniformity and coherence have been found in the overall case law which is, in the author's opinion, also due to the centralisation that has taken place with the entry into force of the Children's Act. Moreover, it was shown that the assessment of the child's age and maturity is done on a case-by-case basis without resorting to age limits as used in the U.S. This practice was argued to be influenced by the Committee on the Rights of the Child and its General Comment 12 into which the establishment of age limits was considered to be in violation of Article 12 UNCRC. Finally, the South African implementation of the children's right to be heard was recognised as influenced by the principles enshrined in the UNCRC, and the positive steps towards fuller effectiveness have been highlighted.

To conclude this comparison, it can be argued that, in international abduction procedures between countries parties to the Abduction Convention, the child who has been the victim of an international abduction by one of his/her relatives does not have a general right to participation in the Abduction Convention. The child's participation, and thus the child's opportunity to give his/her views, is only possible with Article 13(2) of the Abduction, in respect of which interpretation varies among states-parties. It is regrettable that the Convention did not guarantee the right for any child in any situation to be heard by the competent authorities as they are both the victim and the subject –or object - of the parental conflict.

The thesis has shown that the impact of the UNCRC on South Africa is undebateable and children are both offered and guaranteed the possibility to participate in the procedures by various provisions both in law and in the Constitution, which is not the case in the U.S. All these different provisions have been drafted after the ratification of the UNCRC, and clearly reflect the idea of children as rights bearers rather than passive actors. Through these analyses, it is clear that American children could truly benefit from an additional protection of their rights, and in particular their right to participation, if the U.S were considering ratifying the UNCRC. Both countries have enshrined the possibility for children to be legally represented in front of courts. However, South Africa has rendered this legal representation mandatory in Hague Abduction cases, as well as the obligation for judges to give due consideration to the child's views depending on the child's age and maturity. Even though this legal representation is a great step forward, other forms of participation should not be put aside, and this thesis has underlined this particular point many times. Lastly, the importance of the availability of training for judges and attorney should not be undermined, as it can raise awareness on the necessity of hearing children in civil proceedings, and more especially in Hague Abduction cases.

The children's right to be heard has been recognised as one of the four core principles of the UNCRC and contributes to the tendency of giving children the opportunity to have a real impact on decisions affecting their daily life. Indeed, hearing children in family cases such as international abduction

procedures is beneficial for them, and gives credit to the outcome. Several recommendations should be followed to a better implementation of this right. Obviously, the ratification of the UNCRC has been proved to increase children's protection, and the U.S. should definitively consider such ratification. In addition to this, the advantages of enshrining the children's right to participation in law should also not be underestimated. Such provisions should include, among others, the mandatory representation of children in front of courts when the child is affected by the decision, a list of possible forms of children's participation and the obligation for judges to provide the opportunity for children to be heard despite his/her legal representation. Finally, the implementation of these various provisions should be adequately thought through and be the subject of particular training for all the professionals involved.

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