

# International Child Abduction in the European Union: the Solutions Incorporated by the Council Regulation

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Volume 34, numéro 2, 2004

URI : <https://id.erudit.org/iderudit/1027255ar>

DOI : <https://doi.org/10.7202/1027255ar>

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Éditeur(s)

Éditions Wilson & Lafleur, inc.

ISSN

0035-3086 (imprimé)

2292-2512 (numérique)

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Citer cet article

Ballesteros, M. H. (2004). International Child Abduction in the European Union: the Solutions Incorporated by the Council Regulation. *Revue générale de droit*, 34(2), 343–364. <https://doi.org/10.7202/1027255ar>

Résumé de l'article

L'auteur fait ici une analyse sur la réforme de la législation de l'Union européenne dans le domaine de l'enlèvement international d'enfants avec le nouveau *Règlement (CE) N° 2201/2003*. Jusqu'à présent la *Convention sur les aspects civils de l'enlèvement international d'enfants du 25 octobre 1980* est l'instrument juridique que les autorités des États contractants ont appliqué pour résoudre la restitution d'enfants déplacés hors de leur milieu habituel. L'objectif principal de cet article est, tout d'abord, d'analyser la manière dont la *Convention sur les aspects civils de l'enlèvement international d'enfants du 25 octobre 1980* sera appliquée avec le *Règlement (CE) N° 2201/2003*; ensuite d'étudier les modifications sur le nouveau Règlement en relation avec le *Règlement (CE) N° 1347/2000*; et finalement d'analyser l'impact des innovations de la réforme sur la lutte juridique contre les enlèvements internationaux d'enfants.

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# International Child Abduction in the European Union : the Solutions Incorporated by the Council Regulation

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## **ABSTRACT**

*This paper analyzes the new regulation developed in the European Union aimed at international child abductions. The Hague Convention of 25 October, 1980 on the Civil Aspects of International Child Abduction is the instrument that authorities of the contracting States were using to decide about the restitution of the child. The main focus of this article will firstly, study how the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction is going to be put into practice with the Council Regulation (EC) N° 2201/2003; subsequently try to see which are the modifications in the new Community law in relation to the Council Regulation (EC)*

## **RÉSUMÉ**

*L'auteur fait ici une analyse sur la réforme de la législation de l'Union européenne dans le domaine de l'enlèvement international d'enfants avec le nouveau Règlement (CE) N° 2201/2003. Jusqu'à présent la Convention sur les aspects civils de l'enlèvement international d'enfants du 25 octobre 1980 est l'instrument juridique que les autorités des États contractants ont appliqué pour résoudre la restitution d'enfants déplacés hors de leur milieu habituel. L'objectif principal de cet article est, tout d'abord, d'analyser la manière dont la Convention sur les aspects civils de l'enlèvement international d'enfants du 25 octobre 1980 sera appliquée avec le Règlement*

N° 1347/2000; and finally, we will examine the innovations included in the new Council Regulation.

(CE) N° 2201/2003; ensuite d'étudier les modifications sur le nouveau Règlement en relation avec le Règlement (CE) N° 1347/2000; et finalement d'analyser l'impact des innovations de la réforme sur la lutte juridique contre les enlèvements internationaux d'enfants.

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## INTRODUCTION

Creating an area of freedom, security, and justice in which the free movement of persons is ensured is one of the goals in the European Union after the “market citizen” has turned into a European citizen.<sup>1</sup> In family matters, the agreement concerning the rules of jurisdiction recognition and enforcement in the *Council Regulation (EC) N° 1347/2000*<sup>2</sup> was an important achievement for the Community Law.

But this Regulation has several shortcomings. Such limitations have been stated by academic sources.<sup>3</sup> On a legislative level, constant proposals have been taken to change the regulation since the *Council Regulation (EC) N° 1347/2000* became effective :

Initiative of the French Republic with a view to adopting a Council Regulation on the mutual enforcement of judgments on rights of access to children;<sup>4</sup> Proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in matters of parental responsibility;<sup>5</sup> the Proposal for a Council Regulation on jurisdiction and the recognition and enforcement of judgments in matters of parental responsibility, repealing *Regulation (EC) N° 1347/2000*.<sup>6</sup>

Finally, on December 23<sup>rd</sup> 2003, the *Council Regulation (EC) N° 2201/2003* was published in the Official Journal of the

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1. On the term “market citizen” see, G. BARRET, “Family Matters : European Community Law Third-country Family Members”, (2003) *CML Rev.*, vol. 40, p. 369-421.

2. *Council Regulation (EC) N° 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses*. O.J., L 160, 30/06/2000.

3. See H. GAUDEMET-TALLON, “Le Règlement N° 1347/2000 du Conseil du 29 mai : Compétence, reconnaissance et exécution des décisions en matière matrimoniale et en matière de responsabilité parentale des enfants communs”, *Journ. dr. int.*, 2001-2, p. 382-430. J. CARRASCOSA, “Cuestiones polémicas en el Reglamento 1347/2000”, *Mundialización y familia* (dir. CALVO CARAVACA, A.L, IRIARTE ÁNGEL, J.L.), Colex, 2001, p. 213-239.

4. O.J., C 234, 15/08/2000. About this proposal see J. FORNER DELAYGUA, “El acceso de los hijos a sus progenitores : el derecho de visita”, *Mundialización y familia* (dir. CALVO CARAVACA, A.L, IRIARTE ÁNGEL, J.L.), Colex, 2001, p. 23-50, en p. 46-47.

5. O.J., C 332, 27/08/2001.

6. COM (2002) 222, of 3 May.

European Union.<sup>7</sup> The purpose of this paper is to examine the legal regulation in the European Union to remedy international child abductions, with the objective of analyzing whether the *Council Regulation (EC) N° 2201/2003* will influence the instrument that has been applied up to now, the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (Child Abduction Convention).<sup>8</sup>

## I. THE SOLUTION FOR INTERNATIONAL CHILD ABDUCTION IN THE EUROPEAN UNION

The complementary application of the Child Abduction Convention with other international conventions which decide on the merits of the rights of custody and access — the *Hague Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors* — has been possible, firstly because the Child Abduction Convention takes precedence over the aforementioned instrument;<sup>9</sup> secondly, because the aim of this Convention is only the reintegration of the child into his or her habitual residency.

Both for European Non-Member and European Member States, this was the solution up to now.<sup>10</sup> Particularly for the European Member States the *Council Regulation (EC)*

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7. *Council Regulation (EC) N° 2201/2003 of 27 November 2003 concerning jurisdiction, and recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) N° 1347/2000*. O.J., L 338/1, de 23/12/2003.

Article 72 states: "This Regulation shall enter into force on 1 August 2004. The regulation shall apply from 1 March 2005, with the exception of Articles 67, 68, 69 and 70, which shall apply from 1 August 2004".

8. The Child Abduction Convention is now in force in 55 Member States of The Hague Conference and in 20 Non-Member States of The Hague Conference, see <http://www.hcch.net>.

9. Article 34 states: "This Convention shall take priority in matters within its scope over the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors, as between parties to both Conventions. Otherwise the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organizing access rights".

10. All the European Union Member States are party in the *Hague Convention of 25 October 1980*.

Nº 1347/2000 shall take precedence over different multilateral conventions (Art. 37). But the Child Abduction Convention is not included among the instruments mentioned in article 37. The *Council Regulation (EC) Nº 1347/2000* refers directly to the Child Abduction Convention with the objective of applying both instruments in a complementary way, in accordance with the *Council Regulation (EC) Nº 1347/2000* pursuant to article 4, the court where the child is situated shall exercise its jurisdiction under article 3 when it establishes that the child has not been removed from his or her habitual residence.<sup>11</sup> If the court verifies that the child was abducted,<sup>12</sup> and because its jurisdiction has to be in accordance with articles 3 and 16 of the Child Abduction Convention, the courts should refrain from custody orders as long as a return application is pending.<sup>13</sup>

With the *Council Regulation (EC) Nº 2201/2003*, the situation seems to have changed. In accordance with article 60, in cases where there is a relation with other instruments, the *Council Regulation (EC) Nº 2201/2003* shall apply over the

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11. Article 3 establishes: "The Courts of a Member State exercising jurisdiction by virtue article 2 on an application for divorce, legal separation or marriage annulment shall have jurisdiction in a matter relating to parental responsibility over the child of both spouses where the child is habitually resident in that Member State".

12. The removal or retention of the child is considered wrongful, in accordance with article 3 of the Child Abduction Convention: "a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention". Article 4 of the *Council Regulation (EC) Nº 1347/2000* is not a jurisdiction rule, it is a provision about the primacy between the conventions, *cf.*, A. BORRÁS, "La protección de los hijos comunes con motivo de la crisis matrimonial en el Convenio de 28 de mayo de 1998 sobre competencia judicial y reconocimiento de resoluciones en materia matrimonial", *Disyuntivas en los pleitos matrimoniales de separación y divorcio*, Dyckinson, 2000, p. 297-323, en p. 314. C. BRIERE, "Les conflits de conventions en droit international privé", *L.G.D.J.*, 2001, p. 113-114.

13. Art. 16: "After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice".

Child Abduction Convention; consequently the supremacy of the European Community regulation will bring, *prima facie*, a different solution. To verify this assertion, it will be necessary to have an overview of the instrument that has been applied up to now, the Child Abduction Convention.

This Convention has been criticized by several legal commentators.<sup>14</sup> It will be important to analyse the place given by the Child Abduction Convention to the concept of the best interest of the child. For this purpose it is necessary to remember that the Explanatory Report, drawn up by Ms. E. PÉREZ VERA, states: "It is thus legitimate to assert that the two objects of the Convention — one preventive, the other designed to secure the immediate reintegration of the child to its environment, both correspond to a specific idea of what constitutes the "best interest of the child".<sup>15</sup> Consequently, the Convention's main objectives are to promptly return the child and to avoid the establishment of an artificial jurisdiction of the court of refuge.

From this perspective, the Child Abduction Convention does not provide rules governing jurisdiction; rather it establishes an *ad hoc* system for the restitution of the child as soon

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14. *Vid.*, P.P. MIRALLES SANGRO, *El secuestro internacional de menores y su incidencia en España*, Ministerio de Asuntos Sociales, Madrid 1989. E. PÉREZ VERA, "El Convenio de La Haya de 1980 sobre los aspectos civiles de la sustracción internacional de menores", *Cartagena de Indias*, agosto 2001, (inédito). A. CALVO CARAVACA; J. CARRASCOSA GONZÁLEZ, "Problemas del secuestro internacional de menores", *A.C.*, núm., 21 mayo, 1998, p. 481-527. S. ÁLVAREZ GONZÁLEZ, "Secuestro internacional de menores ('legal kidnapping') y cooperación internacional: la posición española ante el problema", *P.J.*, 1986-4, p. 9-32. M. MOYA ESCUDERO, "Secuestro internacional de menores", *La multiculturalidad: especial referencia al islam, Cuadernos de Derecho Judicial*, 2002, p. 413-460. A. BORRÁS, "Conferencia de La Haya de Derecho internacional privado: Tercera reunión de la Comisión especial sobre la aplicación del Convenio de La Haya de 1980 sobre la sustracción internacional de menores (17 a 21 de marzo de 1997)", *R.E.D.I.*, 1997-1, p. 348-350. *Aspectos civiles de la sustracción internacional de menores*, Jornadas celebradas en Toledo 26-27 enero de 1990. A. DYER, "International Child Abduction by Parents", *R. des C.*, t. 168, 1980, p. 123-268. In particular about the Proposal see, M<sup>re</sup> P. DIAGO DIAGO, "El Derecho de los hijos a mantener relaciones personales con ambos progenitores. A propósito de la Propuesta de Reglamento del Consejo relativo a la competencia, el reconocimiento y la ejecución de resoluciones judiciales en materia matrimonial y de responsabilidad parental y su extensión a la sustracción de menores", *Cursos de Derechos Humanos de Donostia-San Sebastián*, vol. IV, Universidad del País Vasco, 2003, p. 206-219.

15. E. PÉREZ VERA, Explanatory Report, *Actes et documents de la Quatorzième session*, Tome II, 1980, par. 25, p. 432.

as possible to his or her habitual residence. The process that has been incorporated in the Convention will be applied by the authorities of the State of refuge, until these authorities render a decision concerning the restitution of the child. This is perhaps the most striking feature of the Child Abduction Convention.

Proper interpretation of article 16 remains an important issue.<sup>16</sup> This provision does not give jurisdiction to the court in the State of refuge to resolve the rights of custody and access. It is in the State of habitual residence to which the child should be returned where the ultimate merits of custody fight are to be decided. But according to article 16 the prohibition for the authorities of the State of refuge to decide on the rights of custody will disappear when it is shown that, according to the Child Abduction Convention, it is not appropriate to return the child because one of the exceptions is applied to the case — art. 13 and 20, or when a reasonable period of time has passed without an application under the Convention.

As it has been noted, article 16 does not give jurisdiction to the court of the State to which the child was removed to decide on the merits of custody rights. This jurisdiction has to be in accordance with other legal instruments, in whose scope these measures have to be included.<sup>17</sup>

The spirit of the Child Abduction Convention is very clear. Pursuant to article 19, it seeks to prevent that a later decision about the merits of custody could be influenced by the judgment taken in application of the Convention. This

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16. About this article see *Sentencia* del Tribunal Supremo de 22/06/1998. J.M. ESPINAR VICENTE, "Comentario a la Sentencia 604/1998 de la Sala 1 del Tribunal Supremo. Recurso en interés de ley. Sustracción internacional de los menores. Interpretación del artículo 16 del Convenio de La Haya de 1980", *A.C.*, 1999-1, p. 31-47. S. ÁLVAREZ GONZÁLEZ, "El Convenio de La Haya sobre los aspectos civiles de la sustracción internacional de menores ante el Tribunal Supremo", *Rev. Jur. La Ley*, núm., 4685, 1998, p. 1-3. M<sup>a</sup> V. CUARTERO RUBIO, "Nota a la sentencia del TS de 22 de junio de 1998", *Cuadernos Civitas de Jurisprudencia Civil*, núm., 48, 1998, p. 1289-1290. H. AGUILAR GRIEDER, "Nota a la STS de 22 de junio de 1998", *REDI*, 1998-2, p. 235-238. S. GARCÍA CANO, "Interpretación del art. 16 del Convenio de La Haya, sobre los aspectos civiles de la sustracción internacional de menores de 1980", *AEDIPR*, t. 0, 2000, p. 938-940.

17. J.M. ESPINAR VICENTE, "Comentario a la Sentencia 604/1998...", *loc. cit.*, note 16, p. 33.



aspect is also illustrated in article 17, this provision differentiates between the protection of the stability of the child, objective of the Child Abduction Convention, and the decisions concerning the rights of custody. It is clear that these judgements are not included in the scope of the Convention, so for the adjudication of rights of custody the court has to use other legal instruments.

From the above considerations one must conclude that the *Council Regulation (EC) N° 2201/2003* and the Child Abduction Convention could be applied in a complementary way. Now I will consider the international jurisdiction rules that have been incorporated in the Council Regulation to solve child abduction cases, and examine the implication of the reform.

## II. INTERNATIONAL JURISDICTION RULES IN CASES OF CHILD ABDUCTION IN THE EUROPEAN UNION

There are several provisions in the *Council Regulation (EC) N° 2201/2003* about international child abduction: "Jurisdiction in cases of child abduction", "Return of the child". In the following considerations I will analyse if the change that took place in the European Community area is consistent with the logic of integration process. And if this logic functions to protect also other interests and not only the best interest of the child.

As it has been explained before, one of the aspects that the Child Abduction Convention does not solve is when the State of refuge has jurisdiction to decide about the merits of access and custody rights. This instrument has only a return procedure to the child's habitual residence. But it is true that after the authorities of the State where the child has been removed refuse the return of the child, no provision in the Convention prevents such authorities to discern about the merits of custody and access.

Looking at the provisions included in the *Council Regulation (EC) N° 1347/2000* it is clear that article 4 does not give special solution for the European Community area. *Council Regulation (EC) N° 2201/2003* establishes when the authorities of the child's habitual residence lose their juris-

diction to decide on the rights of custody and access, and the moment in which the State of refuge will be able to decide about both rights.<sup>18</sup> Hence, this provision gives jurisdiction to know about the merits of custody and access, but not to decide about the return of the child; this decision has to be in accordance with the Child Abduction Convention.

For the complementary application of the *Council Regulation (EC) N° 2201/2003* and the Child Abduction Convention there must be harmonization between the conditions ordered in article 16 of the above mentioned Convention, and the requirements that, in accordance with the European Community regulation, have to be achieved in order to give jurisdiction to the State of refuge authorities.

Apart from this, as it will be seen below, the requirements established in the *Council Regulation (EC) N° 2201/2003* art. 10 “Jurisdiction in cases of child abduction”, and the conditions included in another instrument of The Hague Conference — *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children*<sup>19</sup> — are very similar. The European Community law adds two other cases in which the authorities of the State of refuge will be competent to know about the rights of custody and access. In order to examine the requirements, we are going to divide them into two groups but, for all cases, the child has to acquire habitual residence in the State of refuge.

#### A. AGREEMENT TO THE WRONGFUL REMOVAL OR RETENTION

The first possibility of the alternative is that *each person, institution or other body having rights of custody has acquiesced in the removal or retention*. This provision is included in the *Hague Convention of 19 October 1996 on protection of children* — article 7(a), and in the Child Abduction Convention — article 13.1(a). The same condition is included in both Conventions but the meaning of the requirement

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18. Article 10.

19. The abbreviated form that we are going to use for this text is *Hague Convention of 19 October 1996 on protection of children*.

depends on the instrument. In the last Convention mentioned, the acquiescence in the removal or retention is used as one of the exceptions to refuse the return of the child, while in the *Hague Convention of 19 October 1996 on protection of children* and in the *Council Regulation (EC) N° 2201/2003*, if this condition is fulfilled there will be a legal change of residence.

The concept of wrongful removal or retention has the same meaning for all legal instruments mentioned. Hence, for all of them a situation that may be described as an abduction less these connotations, if the person having rights of custody and access has acquiesced in the removal or retention.<sup>20</sup> In particular, in the *Council Regulation (EC) N° 2201/2003*, when the acquiescence in the removal of the child has been demonstrated, this provision means a legal acquisition of the new habitual residence jurisdiction.

## B. OTHER SITUATIONS

When there is no acquiescence in the wrongful removal or retention, the second branch of the alternative, which could bring about a loss of jurisdiction on the part of the authorities of the child's former habitual residence, is constituted by the conjunction of the following conditions :

- a) the inactivity of the holder of the rights of custody;<sup>21</sup>
- b) the request for return, lodged by the holder of rights of custody, has been withdrawn, and no new request has been lodged;
- c) the judgement of custody in the State where the child was habitually resident immediately after the wrongful removal or retention does not entail the return of the child;
- d) a case before the court of the child's former residence has been closed pursuant to article 11.7.

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20. In particular see P.P., MIRALLES SANGRO, *El secuestro internacional...*, *op. cit.*, note 14, p. 189-190. About the concept of acquiesced see *Cour de Cassation en Sent. de 16/7/1992*, *Rev. crit. dr. int. pr.*, 1993-4, p. 744-745. L., SILBERMAN, "Hague Convention on International Child Abduction: A Brief Overview and Case Law Analysis", *Fam. L. Q.*, vol., 28, 1994-1, p. 25-26.

21. See article 7.1.b) of the *Hague Convention of 19 October 1996*, and article 12 of the *Child Abduction Convention*. In the last instrument the period of one year starts at the moment that the child had been returned to his habitual residence.

For all these cases, the child had to reside in that other Member State for a period of at least one year after the person or institution having rights of custody have had or should have knowledge of the whereabouts of the child, and the child is settled in his or her environment.<sup>22</sup>

The foregoing considerations show that the judgement of custody rights adopted by the authorities of the child's former habitual residence is really important. The *Council Regulation (EC) N° 2201/2003* gives primacy to the jurisdiction of the authorities in the child's former habitual residence over the non-return order. Hence, it means that when the judgement of custody does not entail the return, the child shall continue living in that State, and the authorities of the State of refuge will be able to decide on the merits of custody and access rights. Therefore, if the judgement of custody entails the return of the child, the order of non-restitution adopted in application of the Child Abduction Convention by the authorities of the State to which the child has been removed, shall have no effects. But the authority of the habitual residence of the child shall be able to take into consideration the reasons why the authority of the State of refuge has decided not to return the child.

Although the Child Abduction Convention does not establish the merits of custody and access, the non-return order shall usually produce a change in the holder of both rights. This situation shall not take place with the *Council Regulation (EC) N° 2201/2003*. Notwithstanding a judgement of non-return adopted by the authorities of the State of refuge, the authorities of the habitual residence, immediately before the wrongful removal or retention, maintain their jurisdiction.

### **III. THE RETURN OF THE CHILD AND ITS EXCEPTIONS IN THE COUNCIL REGULATION (EC) N° 2201/2003**

In accordance with the *Council Regulation (EC) N° 2201/2003* the authorities of the State to which the child

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22. The integration of the child in his environment has to be applied with the period of one year. See, E. GALLANT, *Sent. de la Cour de cassation (1<sup>er</sup> Ch. civ.) de 18/4/2000, Rev. crit. dr. int. pr.*, 2000-2, p. 345.

was removed have to decide, on the basis of the Child Abduction Convention, on the return of the child. These authorities shall also apply article 11 paragraphs 2 to 8; in this article European Community law includes the provisions of the mentioned Convention, so the authorities of the State of refuge shall employ both instruments.

Article 11 reflects how the Council Regulation will affect the exceptions incorporated in the Child Abduction Convention to refuse the return of a child to the State of his or her habitual residence. About this aspect there are no modifications in the European Community law in relation to the Child Abduction Convention.<sup>23</sup>

So, the foregoing considerations show that the provisions of the Child Abduction Convention will be applied in order to refuse the return of the child. But the Community law qualifies the decision in a double way: when the competent authority applies article 12 or 13 (Child Abduction Convention) it will be ensured that the child is given the opportunity to be heard during the procedure, unless this appears inappropriate according to his or her maturity or age; and, it is not possible to refuse the return of the child on the basis of article 13(b) if it is established that the authorities of the habitual residence have adopted the arrangements to protect the child after his or her return.

Taking this last aspect into consideration, to apply the provision of the article 13(b) it must be proved that the return of the child is not advisable. In accordance with the *Council Regulation (EC) N° 2201/2003*, if the party that solicits the return of the child proves that the authorities of the State of his habitual residence have adopted adequate arrangements to secure the protection of the child after his or her return, the State of refuge cannot refuse the restitution of the child. So these arrangements have been made during the procedure, and will counteract the proofs in which the abductor based his opposition. This provision, called restitution

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23. On the exceptions included in the Child Abduction Convention see, C. LE GETTE, "International Child Abduction and The Hague Convention : Emerging Practice and Interpretation of the Discretionary Exception", *Texas International Law Journal*, vol. 25, 1990, p. 287-308; L. SILBERMAN, "Hague Convention on International...", *loc. cit.*, note 20, p. 9-34.

without danger, has been pointed out by different judicial decisions; these decisions were possible because there was a good degree of cooperation between judicial and central authorities, with the aim to secure the safe return of the child.<sup>24</sup> These judgements show that the authorities have used in an extensive way the provision included in the Child Abduction Convention article 7(h). This interpretation means that the central authorities have taken all the appropriate measures to secure the safe return of the child, which also includes the period that goes from the child's arrival to the requesting State up to the moment when the court decides about the merits of custody and access rights.<sup>25</sup>

Article 13(b) is not the only exception to return orders contained in the Child Abduction Convention, but has been the most commonly litigated exception, hence, the *Council Regulation (EC) N° 2201/2003* tries to limit its application.<sup>26</sup> In addition article 13 provides : it is possible to order the non-return of the child when he or she objects to being returned, and has attained an age and degree of maturity at which it is appropriate to take into account of his or her views.<sup>27</sup> Besides article 20 contains another exception, as the return of the child may be refused if this would not be permitted by the fundamental principles of the requested State relating to

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24. *Cooper c. Casey* [1995] FCL 92-575; *A. v. Central Authority for New Zealand* [1996] 2 NZFLR 517; *Bell c. Bell*, 23/12/1996 www.hcch.net. In particular an extensive interpretation of article 7h) of the Child Abduction Convention could facilitate to the authorities of the State of refuge to decide about the restitution of the child if the authorities of the State where the child is resident take the appropriate measures to return the child without danger, see C. GONZALEZ BEILFUSS, "International Child Abduction in Spain", *International Journal of Law, Policy and the Family*, 15, 2001, p. 327-249, p. 340-341.

25. See *Reports, Conclusions and Recommendations of the Special Commission concerning The Hague Convention of 25 October 1980, on the Civil Aspects of International Child Abduction*, October 1, 2002, point 4.5.1.3.

26. About the application of this exception see, "Analyse statistique des demandes déposées en 1999 en application de la Convention de La Haye du 25 octobre 1980 sur les aspects civils de l'enlèvement international d'enfants", établie par N. LOWE, S. ARMSTRONG, A. MATHIAS, *Doc. Prel.*, N° 3, marg. 14-15, p. 17-19, in *Quatrième réunion de la Com. spéc. sur le fonctionnement de la Convention de La Haye du 25 octobre 1980 sur les aspects civils de l'enlèvement international d'enfants, del 22-28 de marzo de 2001*.

27. On this exception see, R. NANOS, "The Views of a Child : Emerging Interpretation and Significance of the Child's Objection Defense under The Hague Convention", *Brook. J. Int'l. L.*, 1996-2, p. 459-465.

the protection of human rights and fundamental freedoms;<sup>28</sup> the exception contained in article 20 shall be used as it has been used up to this moment, but in the European area the public policy has to be more restrictive.<sup>29</sup>

The foregoing considerations show that, although the *Council Regulation (EC) N° 2201/2003* permits the application of the exceptions to the child's return contained in the Child Abduction Convention, the Council Regulation tries to limit the application of article 13(b). This provision is the most claimed by the abductors to justify that the child's return is not in accordance with his or her best interest. But if the State of refuge decides not to return the child, this does not mean that the authority of the child residence cannot intervene.

#### IV. JURISDICTION OF THE COURT OF ORIGIN NOTWITHSTANDING A JUDGEMENT OF NON-RETURN

Article 11.8 of the *Council Regulation (EC) N° 2201/2003* establishes: "notwithstanding a judgement of non-return pursuant to article 13 of the Hague Convention 1980, any subsequent judgement which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable in accordance with Section 4, Chapter III below in order to secure the return of the child". So, although *prima facie* it is the authority of the State of refuge who has jurisdiction to decide about the return of the child in accordance with the Child Abduction Convention, in the end any judgement

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28. In general about these exceptions, *vid.*, P.P. MIRALLES SANGRO, "Acerca de la eficacia de los Convenios internacionales contra el 'secuestro' internacional de menores", *La Ley*, núm., 5659, 20/11/2002, p. 1793-1803.

29. In this respect see C. BRUCH, "Religious Law, Secular Practices, and Children's Human Rights in Child Abduction Cases under The Hague Child Abduction Convention", *New York Int. Journ. L. P.*, vol. 33, 2000-1, p. 51-56. "The Hague Child Abduction Conventions: Past Accomplishments, Future Challenges", *Globalization of Child Law. The Role of The Hague Conventions*, Edt., S. DETRICK, P. LAARDINGER-BROEK, MARTINUS NIJHOFF Publishers, 1999, p. 33-52. S. ÁLVAREZ GONZÁLEZ, "Interés del menor y cooperación jurídica internacional en materia de desplazamiento internacional de menores: los casos difíciles", *Cooperación jurídica internacional*, Colección Escuela Diplomática, núm., 5, 2001, p. 125-136.

that requires the restitution of the child is enforceable notwithstanding a judgement of non-return.

In the Child Abduction Convention the return of the child is not automatic. The provisions of the Convention are applied *in casu*, which means that the return of the child is going to be possible when this decision is in accordance with the best interest of the child, and it is not possible when the best interest of the child is to remain in the State of refuge.<sup>30</sup> Regarding the European area, it seems that the solution included in the *Council Regulation (EC) N° 2201/2003* concerning the return of the child is going to be used in a mechanical way. Nevertheless the authority of the child's residence has to apply the provisions according to the spirit of the law (article 42.2(c)); so, the court before deciding whether to return or not return the child, has taken into account, in issuing its judgement, the reasons for and evidence underlying the order issued pursuant to article 13 of the Child Abduction Convention.

From this perspective, the *Council Regulation (EC) N° 2201/2003* includes some provisions, in particular Chapter IV, about the cooperation between the central authorities in matters of parental responsibility. Leaving aside a descriptive analysis of the different provisions, it is necessary to point out that one of the tasks that central authorities have is to "facilitate the communication between courts, in particular for the application of Article 11(6)(7), and Article 15". With regard to these provisions the authority of the Member State to which the child was removed has to transmit to the authority of the habitual residence all the information and relevant documents that were used to decide the non-return order. The latter shall receive the information within one month of the day of the non-return order, and shall invite the parties to make submissions to the court.<sup>31</sup>

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30. J.M. ESPINAR VICENTE states: "se crea un sistema que basa en la restitución del menor cuando proceda y para la no restitución cuando no proceda en los términos que el mismo establece, *cfr.*", "Comentario a la Sentencia 604/1998...", *loc. cit.*, note 16, p. 45. S. ÁLVAREZ GÓNZALEZ, "Desplazamiento internacional de menores procedimiento de retorno y tutela judicial efectiva", *R.D.P.*, núm., 16, 2002, p. 41-63.

31. In the Community area and in the cooperation matter we have to remind *Council Decision of 28 May 2001 establishing a European Judicial Network in Civil O.J.*, L 174, de 27 de junio de 2001.



The role played by the different authorities is fundamental in achieving the Community regulation objectives, so cooperation has to be developed as much as possible. The cooperation provides : the reception, in the State of refuge the judgements adopted by the authority of the State of origin, and these judgements will be in accordance with the best interest of the child, because the authorities of the habitual residence of the child, before the wrongful removal or retention took place, have the information to decide according to this interest.

The results of the new approach will be assessed in the future, but it is true that the regulation is consistent with the logic of an integration process : free movement of judgements, primacy of the origin authority, and a good administration of justice. From this viewpoint, it is important to consider where the best interest of the child is within the Council Regulation, or as Ms. ELISA PÉREZ VERA states “where is the primary interests of a person not to be exposed to a physical or psychological harm or otherwise place the child in an intolerable situation”.<sup>32</sup> With regard to this point, in principle, it is possible to believe that in the *Council Regulation (EC) N° 2201/2003* there is confusion about the manner in which the best interest of the child is interpreted : on the one hand, in custody and access judgements; on the other hand, when the authority has to decide about the return of the child to his habitual residence. This point shall be solved in an appropriate way when the cooperation between the authorities from both States increases; a more intensive cooperation, shall permit judgements in which the best interest of the child is the paramount consideration.

## V. ENFORCEABILITY OF CERTAIN JUDGEMENTS WHICH REQUIRE THE RETURN OF THE CHILD

One of the most important aspects in the *Council Regulation (EC) N° 2201/2003* is the enforceability in other

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32. E. PÉREZ VERA, “Traducción del Convenio núm. XVII de la Conferencia de La Haya sobre los aspectos civiles de la sustracción de menores, de 25 de octubre de 1980 e Informe Explicativo del Convenio”, *B.I.M.J.*, núm., 1895 de 15 de marzo de 2000.

Member States of the judgements that, the court having jurisdiction, has taken. This initiative is in accordance with the Tampere European Council — meeting held in Tampere on 15 and 16 October 1999, where the enforcement of mutual recognition of judicial decisions and judgements was approved as the *cornerstone of the judicial cooperation in both civil and criminal matters within the Union*.<sup>33</sup> With this aim the Council presented the *Draft programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters*.<sup>34</sup>

From this perspective the objective of the Draft programme of mutual recognition is to implement, after several phases, a certificate that has free movement in the European area, so that the requested States will not be able to control it.<sup>35</sup> This decision shall be considered as a national judgement adopted by the requested State.<sup>36</sup> Leaving this aside, and in reference to the objective of this paper, we must take into account that Section 4, Chapter III of the *Council Regu-*

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33. About the different phases of the judicial cooperation in the European Union see, J.B. AVEL, "Le développement de la coopération judiciaire européenne", *Revue du Marché commun et de l'Union européenne*, núm. 445, 2001, p. 112-116.

34. J.O., C 12, 15/1/2001. See C. GONZÁLEZ BEILFUSS, "El proyecto de medidas para la aplicación del principio de reconocimiento mutuo de resoluciones judiciales en materia civil y mercantil", *REDI*, 2002-2, p. 662-669. A. BORRÁS RODRÍGUEZ, "La proyección externa de la comunitarización del Derecho internacional privado: los datos del problema", *La Ley*, núm., 5611, 13/09/2002, p. 1-6.

35. On the abolition of the exequatur procedure, see, B. HESS, "The Integrating Effect of European Civil Procedural Law", *European Journal of Law Reform*, vol. 4, núm., 1, 2002, p. 6-9. About mutual recognition see especially, M. GUZMAN ZAPATER, "Un elemento federalizador para Europa: el reconocimiento mutuo en el ámbito de decisiones judiciales", *Revista de Derecho Comunitario Europeo*, núm. 10, 2001, p. 405-438, p. 436

36. *Cfr.*, 2. b) "Each requested State treats these national judgments as if they had been delivered by one of its own courts." Some authors have analyzed the mutual recognition as another alternative in the view of the effect that the globalization is having in civil procedural area, in this respect see, M<sup>a</sup> A. RODRÍGUEZ VÁZQUEZ, "Los efectos de la globalización en el sector de la eficacia extraterritorial de resoluciones judiciales extranjeras: la superación del exequátur", *Globalización y Derecho*, (dir., A.L. CALVO CARAVACA, P. BLANCO-MORALES LIMONES), Colex, 2003, p. 537-554. From a different viewpoint P.A. DE MIGUEL ASENSIO, "El Derecho internacional privado ante la globalización", *AEDIPr*, t. I, 2001, p. 37-87, en p. 82-83. J. CARRASCOA GONZÁLEZ, *Globalización y Derecho internacional privado*, Liber Libro.com, en p. 259-265. About the European executive title see C. BAKER, "Le titre exécutoire européen. Une avancée pour la libre circulation des décisions?", *La Semaine Juridique*, núm., 22, 28/06/2003, p. 985-991.

lation (EC) N° 2201/2003 is a great step in this direction, in relation with different aspects in the Community family law.

Thus, the first step is to know which decisions are enforceable in accordance with article 40. This provision establishes that Section 4 shall apply to the return of a child entailed by a judgement given pursuant to Article 11(8).<sup>37</sup> In this provision the enforceability applies only to return the child, and not to other aspects that can be included in the judgement (see also article 42). The enforcement takes place when the judge of origin issues the certificate included in Annex VII that gives effect to the national decision in the other Member States, without *exequatur procedure*; it is the certificate, and not the judgement, that is going to be promulgated around the European area. The party seeking enforcement of a judgement has to present, apart from the certificate issued by the requesting State, a copy of the judgement which satisfies the necessary conditions to establish its authenticity. And also this party has to add the arrangements for implementing the measures taken to ensure the child's return.<sup>38</sup>

With regard to the procedure of certification, the authority of the State of origin shall issue the certificate if the conditions included in article 42 are enforced. These requirements are essentially referred: to the right of the parties and also the right of the child to be heard — taking into account his or her age or degree of maturity; and to make sure that the mentioned authority has taken into account, in issuing its judgement, the reasons for the evidence underlying the order issued pursuant to article 13 of the Child Abduction Convention. It has to be noted that this authority will find difficulties in enforcing the right of the child to be heard when a non-return order has been adopted by the State of refuge. This essential requirement can be enforced using *Council Regulation (EC) N° 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters*.<sup>39</sup>

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37. This provision will also be applied to the rights of access, but this aspect is not among the objectives of our paper.

38. Article 45.2. The certificate shall be accompanied by a translation into the official language of the Member State of enforcement.

39. J.O., L 160, 30/06/2000.

The certificate has limited effects, it means that only the order to return the child will be the aspect covered by the certificate. The judgement adopted by the authority of origin could be appealed according to its law, but not the certificate. This aspect gives a view of the provisional effects, since it is possible to dispute the decision again in the State of origin.

When the certificate has been issued, the next step is to put it into effect. The certificate should be issued *ex officio*, but its enforceability shall be required at the petition of the party. The procedure of enforceability shall be in accordance with the law of the requested Member State. With the new European Community regulation it is possible to obtain the enforceability of the mentioned certificate without an *exequatur procedure*.

Conversely, the party who opposes the enforceability of the decision, according to article 47, has to prove that during the judgement of origin all of the conditions included in article 42 were not satisfied; or if the decision is irreconcilable with a subsequent enforceable judgement. With regard to the last mentioned requirement, in the Council Regulation there is no reference to the origin of the decision (of course it has to be a contracting party). The only condition which is included in article 47 is that the irreconcilable judgement has to be subsequent. The temporal requirement makes reference to the moment in which the decision was adopted, and not reference to the moment in which the proceeding was started. At the same time, it is the certificate, issued by the authority of origin, the certificate that is going to have free movement. To know which decision was adopted subsequently, the date that shall be taken into account is the date of the judgement, and not the date in which the certificate was issued.

With regard to the condition of the irreconcilability this requirement means that in the State of origin the decision entails the restitution of the child, while in the requested State there is another subsequent judgement that requires the permanence of the child in that State.

I want to note some reflections about the incidence of the *Council Regulation (EC) N° 2201/2003* over several aspects of internal law, for example Spanish law. The

legislation implementing the Child Abduction Convention is not strictly necessary but States like Spain have introduced internal rules to apply the conventional instrument.<sup>40</sup> With regard to the internal provisions the Law may permit an appeal of judgements adopted by the trial judge, this model has been implemented in Spanish law (article 1908 LEC). If the trial judge has adopted a decision ordering the non-restitution of the child, the appeal of this judgement will be at the request of the party that solicits the return of the child — usually the holder of the rights of custody. Then, would it not be more effective if this party asked, in the State of the habitual residence of the child for a petition about the merit of the custody rights? Now, with the Council Regulation, if the decision adopted by the authority of the State of origin requires the return of the child, this decision will be enforceable after its certification, and the judgement adopted by the second instance (Provincial Court) shall have no effects.

Another difficulty with the model incorporated in Spanish procedural law in relation to the appeal system is, for example, the following: when the trial judge orders the return of the child to the State where he or she has his or her habitual residence, according to Spanish law this decision could be appealed, but the judgement adopted by the judge of first instance could be enforceable even if the petition has been appealed. So if the child is returned to the State of his

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40. These rules were introduced by *Ley Orgánica 1/1996 of 15 January* published in the B.O.E. of 17 January 1996, they are still in force before the law on civil produce was substituted by a new law, *Ley 1/2000 of seven January*. About this see S. ÁLVAREZ GONZÁLEZ, "Nuevas medidas relativas al retorno de menores supuestos de sustracción internacional, en la Ley de Enjuiciamiento Civil", *REDI*, 1996-1, p. 504-506. E. RODRÍGUEZ PINAU, "Sustracción internacional de menores: una tarea para el legislador", *Revista Jurídica La Ley*, núm. 4986, p. 1-6. For example United States have enacted specific legislation to implement the Child Abduction Convention, see L. SILBERMAN, "Hague Convention on International...", *loc. cit.*, note 23, p. 15 s. Or in Canada was adopted the Uniform International Child Abduction Act 1982, see K. FARQUEHAR, "The Hague Convention on International Child Abduction Comes to Canada", *Canadian Journal of Family Law*, vol. 1, 1983, p. 16 s.

habitual residence, which will be the effect of the judgement adopted by the second instance?<sup>41</sup>

Thus, the foregoing considerations show that, with the new Community law, the possibilities of appeal that Spanish law offers are going to be less effective.

## CONCLUSION

A lot can still be done to create an area in which the free movement of person is ensured, but we can assert that there is a change in the European Union area as a result of the integration process. Some of the most important aspects are the problems that European citizens will have in their family relations and, in particular, with respect of international child abduction cases.

The Child Abduction Convention will be applied in a complementary way with the *Council Regulation (EC) N° 2201/2003*. This Convention is the most successful instrument in force to resolve child abduction matters, and we cannot assert that the new model will be better than the Hague Convention's system. The European Community regulation is consistent with the logic of integration, and functions to protect the best interest of the child as well as other interests. Such a step is only possible in an integration area.

The complementary application of the Child Abduction Convention has to be in accordance with the supremacy of the European Community regulation, so in this respect the exceptions to return orders, that the conventional framework includes, will be applied according to the *Council Regulation (EC) N° 2201/2003*. The Community law improves the cooperation between judicial and central authorities, with the aim of securing the safe return of the child, and to limit the application of the exception included in article 13(b) of the Child Abduction Convention.

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41. Especially concerning the appeal system see the important judgement from the Constitutional Court (Sala 1<sup>a</sup>) 20/06/2002, *B.O.E.*, de 19/06/2002, *núm.* 146, S. ÁLVAREZ GONZÁLEZ, "Desplazamiento internacional de menores, procedimiento de retorno y tutela judicial efectiva", *R.D.P.*, *núm.*, 16, 2002, p. 41-63. M. HERRANZ BALLESTEROS, "La sustracción internacional de menores. A propósito de la STC 120/2002, de 20 de mayo de 2002", *R.D.P.*, octubre, 2003, p. 755-770. *REDI*, 2002-2, p. 908-914.

In the European Community area, the decision not to return the child adopted by the authority of the State of refuge, has no effect when there is another judgement adopted by the authority of the State of origin that requires the return of the child. This judgement will be enforceable after the authority of the State of origin issues the certificate included in Annex IV. This certificate has effects without an *exequatur procedure*.

International child abduction is one of the most acute problems of international family law; as it has been shown, there is a conventional framework to deter and to remedy the child abductions across transnational boundaries. We hope that the *Council Regulation (EC) N° 2201/2003* will deter potential abductors and protect the best interest of the child in the Community area.

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