



## INTERNATIONAL LAW

## Special Aspects Regarding the Protection of Children's Rights in the European Union and All Over the World

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**Abstract:** *Objectives: The 1980 Hague Convention applies in all EU member states. for children under the age of 16 who are displaced from their habitual residence in another state or are detained in this second state unlawfully. Also, Romania and the United States of America are partner countries in the Hague Convention on the Civil Aspects of International Child Abductions from 1980. The provisions of the Hague Convention could apply if the child was illegally moved to or from a country which is a party to this Convention and if the minor was under sixteen years of age at the time of his removal or detention. Proposals and methodology: Children are entitled to enjoy full rights. That is why there is a need to raise awareness and improve knowledge of the legal standards that ensure the protection and promotion of these rights in Europe. The Treaty on European Union (TEU) establishes the Union's obligation to promote the protection of children's rights. The Charter of Fundamental Rights of the European Union (EU), EU regulations and directives, as well as the jurisprudence of the Court of Justice of the European Union (CJEU) have in turn contributed to the regulation of the protection of children's rights. Within the Council of Europe, many conventions focus on specific aspects of the protection of children's rights, from their rights and safety in cyberspace to adoption. Results and implications: These conventions complement the protection granted to children under the European Convention on Human Rights and the European Social Charter, including under the jurisprudence of the European Court of Human Rights (ECHR) and the decisions of the European Committee of Social Rights (ECSR).*

**Keywords:** *children; Hague Convention; protection; rights; safety*

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## **1. Introduction**

Regarding the abduction of minors, the rule is that parental authority is exercised by both parents jointly, regardless of whether they are married or divorced. There is an exception that holds that, for good reasons and in the best interests of the child, the court may order that parental authority be exercised by only one parent.

## **2. About Children and Parents**

When parents don't get along, there are several major consequences for the child. The Romanian Civil Code establishes, as a rule, that, for example, a change regarding the child's domicile is made with the prior consent of the parent with whom the child does not live (non-custodial parent). In case of disagreement on these issues, the court will decide based on the child's best interest, considering the support of the parents and the conclusions of a psycho-social investigation report.

In the same way, decisions will be made regarding the child's travel outside the country. Given the enforcement of the law on the free movement of citizens, more and more children are involved in cases of international child abduction.

In such cases, the Hague Convention of 1980 on the civil aspects of international child abduction becomes applicable, which was ratified in Romania by Law no. 100/1992. EC Regulation no. 2201/2003 regarding the competence, recognition, and execution of court decisions in matrimonial matters and in matters of parental responsibility.

The Hague Convention of 1980 applies in all member states of the European Union. for children under the age of 16 who are displaced from their habitual residence in another state or are detained in this second state unlawfully.

Also, Romania and the United States of America are partner countries in the Hague Convention on the Civil Aspects of International Child Abduction from 1980. The provisions of the Hague Convention may apply if your child has been illegally removed to or from -a country that is party to this Convention and if the minor was under sixteen years of age at the time of his removal or detention.

The movement or detention is therefore done in violation of the rights of the parent who has parental authority. Such situations occur when there is a dispute between the child's parents and when one of them moves or detains the minor in another country without the consent of the other parent who either has patent authority or has exclusive parental authority. According to the Convention, the right to parental authority includes the right to decide where the child will have his habitual residence.

Even when parents jointly exercise parental authority, they have joint rights and obligations regarding the minor child, which means that one parent cannot unilaterally decide on the child's residence. Therefore, the detention of a child by one of the parents in a certain state against the will of the other violates the provisions of the Convention.

The procedure to be followed in this situation requires the intervention of the central authority which can initiate the legal proceedings provided for by the Hague Convention, respectively the court that can rule on such a request.

The central authority able to initiate such a procedure is, in the case of Romania, the Ministry of Justice, but it must be emphasized that such a request can be submitted to the court directly by the parent who believes that his rights have been violated in the sense of the provisions of the Convention from Hague.

The procedure provided by the convention for the return of children displaced in violation of the legal provisions or detained illegally in a country other than the one in which the child's habitual residence is located is a procedure that is tried under an emergency regime.

The same convention stipulates that such a procedure must be started within one year from the date on which the child was moved/detained illegally in the non-resident state.

As I mentioned above, the provisions of Regulation no. 2201/2003 which are directly applicable in the member states of the European Union, except for Denmark and which prevail over domestic law. The Regulation also prevails over the Hague Convention of 1980, insofar as it relates to matters regulated by this Regulation, so if we are discussing the recognition of a court decision.

A judicial proceeding regarding the return of the child should be resolved promptly under the most expeditious procedures provided for by national law.

Decisions in such situations are made based on the provisions of Law no. 272/2004 on the protection and promotion of children's rights. The law provides for the child's right to maintain parental relations with his parents and relatives. The child has the right to know and maintain a relationship with his extended family, as long as this is not against his best interests.

However, as mentioned above, Law no. 248/2005, regarding the regime of free movement of Romanian citizens abroad, left an open door in the child protection system. It is about the provisions of article 30, paragraph 1, letter c, which allow a parent to leave the country if he proves that the minor was entrusted to him by a final court decision or that he alone exercises parental authority based on a final court decision.

This phenomenon of removing children from the country without the consent of the non-custodial parent has been repeatedly condemned by the European Court of Human Rights. Therefore, the Court held the following: "The authorities should take into account the interests, rights and freedoms of the child, in particular the best interests of the child, and where contact with the parents is likely to threaten or violate these interests, the authorities national must ensure the establishment of a relationship of proportionality between them."

Cases in which Romania was a party, such as: *Monory vs. Romania and Hungary*, *Ignaccolo-Zenide vs. Romania*, *Lafargue vs. Romania* represent an important jurisprudence of the European Court of Human Rights in which provisions regarding respect for private and family life, the right to a fair trial and a reasonable time for its resolution, the right to an effective remedy, respect for the right of a parent to maintain a natural bond with his own child.

The 1980 Hague Convention applies in all EU member states. for children under the age of 16 who are displaced from their habitual residence in another state or are detained in this second state unlawfully. Romania and the United States of America are partner countries in the Hague Convention on the civil aspects of international child abductions. The provisions of the Hague Convention may apply if the child has been unlawfully removed to or from a country that is a party to this Convention and if the minor was under sixteen years of age at the time of removal or detention.

Regarding obtaining the maintenance pension abroad, there is the Convention of June 20, 1956, concluded in New York and published in the Official Monitor no. 54 of March 19, 1991, after ratification.

There are no international statistics on the number of cases where cross-border recovery of maintenance claims has been needed. However, it is estimated that there are 16 million international couples in the EU and that around 30 million EU citizens live outside the European Union. During 2007 there were 1.2 million divorces in the 27 EU countries, these being the most recent figures. These figures illustrate the significant problems that could arise in the settlement and enforcement of maintenance decisions, generated by situations where one parent lives in a third country.

The Hague Convention on the Obligations of maintenance from 2007 complements the internal legislation of the European Union in the matter of maintenance obligations, adopted on December 18, 2008: EC Regulation no. 4/2009 on jurisdiction, applicable law, recognition and enforcement of judgments and cooperation in matters of maintenance obligations, the Regulation and the protocol on applicable law apply between the member states of the European Union starting from June 18, 2011.

The conclusion of the convention by the European Union strengthens the existing rules of the Union regarding the recognition and execution of judgments in the matter of maintenance obligations and administrative cooperation between central authorities, by creating within the EU a harmonized set of rules applicable to third countries that will become parties to the convention.

Judicial cooperation in civil matters was not among the objectives of the European Community at the time of the adoption of the founding treaty. However, Article 220 of the Treaty establishing the European Community stipulated that member states had to simplify “the formalities on which the mutual recognition and enforcement of judicial decisions and arbitral awards depend.” Judicial cooperation in civil matters was officially integrated into the scope of activity of the European Union through the Maastricht Treaty, within the intergovernmental pillar “Justice and Home Affairs”. The Treaty of Amsterdam brought judicial cooperation in civil matters into the community sphere, transferring it from the Treaty on European Union to the Treaty establishing the European Community, without it becoming the object of the community method. The Treaty of Nice allowed the adoption of some measures that reveal the field of judicial cooperation in civil matters - except for family law - through the co-decision legislative procedure.

The Tampere European Council of October 1999 laid the foundations for the construction of the European area of justice. Finding the insufficient implementation of this program, the European Council in The Hague, in November 2004, launched a new action plan for the period 2005-2010. The Hague Program emphasized the need to continue the implementation of mutual recognition and to extend it to new areas such as family patrimony, successions, and wills. It was followed by the Stockholm Program, which was the roadmap for further developments around freedom, security, and justice during the five-year period between 2010 and 2014.

The Treaty of Lisbon subjects all measures in the field of judicial cooperation in civil matters to the ordinary legislative procedure. However, family law continues to be the subject of a special legislative procedure: the Council decides unanimously, after consulting Parliament.

It should be noted that Denmark and Ireland benefit from non-participation clauses in Title V of Part III of the TFEU (area of freedom, security and justice), under Protocols no. 21 and 22 annexed to the treaties. Ireland has a flexible opt-out clause in legislation adopted in this area, which allows them to choose, on a case-by-case basis, either to accede or not to accede to legislation or legislative initiatives, as set out in Protocol no. 21 annexed to the treaties. In contrast, Denmark has a more rigid non-participation clause in relation to the area of freedom, security and justice, which means that it does not participate in this policy at all. In the Lisbon Treaty negotiations, Denmark obtained the option to convert its non-participation clause

into a flexible participation clause modeled on Ireland's non-participation clause and in the application of Protocol no. 22. To approve obtaining this option, a referendum was held on December 3, 2015, and 53% of voters voted against it.

In 2001, by order of the Minister of Justice, the Network of local correspondents in the field of international legal assistance was established, modeled on the European Judicial Network. In March 2004, this Network was reorganized, by two orders of the Minister of Justice, into two specialized networks: the Romanian Judicial Network in criminal matters - the correspondent of the European Judicial Network - and the Romanian Judicial Network in civil and commercial matters - the correspondent of the European Judicial Network in civil and commercial. Subsequently, these two networks were successively reorganized in 2005, 2007, 2010, 2014, 2016, 2019 and 2022 following changes in the EU legislation in the field and the personnel of the domestic judicial system.

By Order of the Minister of Justice no. 3501/C/25.07.2022 was last updated in accordance with Decision no. 568/2009/CE of the European Parliament and of the Council of June 18, 2009 amending Decision 2001/470/CE of the Council of May 28, 2001. The Order was elaborated in Government Ordinance no. 123/2007 regarding measures to strengthen judicial cooperation with the member states of the European Union, approved with amendments by Law no. 85/2008.

The Romanian Judicial Network in civil and commercial matters is the national correspondent of the European Judicial Network in civil and commercial matters.

Romania has designated two national contact points for the European Judicial Network in civil and commercial matters. The contact points of the European Judicial Network in civil and commercial matters are within the Ministry of Justice. Through them, the fulfillment of the duties of the European Judicial Network in civil and commercial matters is ensured.

In accordance with the provisions of article 6, the Romanian Judicial Network in civil and commercial matters is made up of a judge from the first civil section and a judge from the second civil section (formerly commercial) within the High Court of Cassation and Justice; one judge from each civil section I and civil section II (formerly commercial) of the appeal courts; one judge each from the specialized court/section for minors and family, specialized in the field of civil aspects of international child abduction and granting of financial compensation to victims of crimes; staff from the Department of International Law and Judicial Cooperation who also fulfill the duties of the Ministry of Justice as the central authority in the field of international judicial cooperation in civil and commercial matters; one representative designated by each of the professional associations in Romania of public notaries, bailiffs and lawyers. The national contact points within the

European Judicial Network in civil and commercial matters are, by full rights, members of the Romanian Judicial Network in civil and commercial matters.

The judges who are members of the Romanian Judicial Network were appointed by the decision of the Superior Council of the Magistracy.

Members of the Romanian Judicial Network in civil and commercial matters are mentioned in the annex to the Order of the Minister of Justice no. 3501/C/25.07.2022. This annex is an integral part of the Order.

Members of the Romanian Judicial Network in civil and commercial matters, judges from the High Court of Cassation and Justice, Courts of Appeal, specialized courts/sections for minors and family, Bucharest Court, liaison judges in the Global Network for the 1980 Hague Convention with on the civil aspects of international child abduction and judge appointed to the Commission for the award of financial compensation to victims of crimes.

### **3. Judicial Communication of the International Network of Judges at The Hague**

The Hague Conference is a worldwide, intergovernmental organization that aims to gradually unify the norms established in Private International Law. It therefore develops and manages services for multilateral legal instruments that become legally binding in countries that are party to it. The HCCH is made up of 87 members (86 states and the European Union) and adopts conventions on civil law issues such as service of proceedings, obtaining evidence abroad, access to justice, international child abduction, interstate adoption, conflicts of laws regarding the form of testamentary dispositions, maintenance obligations, recognition of divorces and the abolition of the legalization of foreign official documents, respectively the Apostille Convention.

In the absence of comprehensive evidence, in judicial practice it has been appreciated that the child's statement cannot constitute a sufficient basis for the pronouncement of the solution.

In European Union law, Article 24 paragraph 1 of the EU Charter of Fundamental Rights provides that minors can freely express their opinion, which is taken into account in matters that concern them, depending on their age and degree of maturity. This provision has general applicability and is not limited to certain procedures. The CJEU interpreted the meaning of this provision in conjunction with the Brussels II bis Regulation.

In international law, Article 12(1) of the CRC states that a child who can form his own views has the right to express those views freely in relation to all matters

affecting him. The child's views should be given due weight in accordance with the child's age and level of maturity. In addition, Article 12(2) of the CDC states that the child must be given the opportunity to be heard in any judicial or administrative proceeding concerning him or her, either directly or through a representative or a competent body, in accordance with the rules procedures from national legislation. The UN Committee on the Rights of the Child emphasized that States Parties should either guarantee this right directly or adopt or revise laws so that the child can fully exercise this right. Furthermore, they must ensure that the child receives all the information and guidance necessary to decide in accordance with his best interest. The Committee also notes that a child has the right not to exercise that right; the expression of opinions by the child is an option, not an obligation.

In administrative or judicial proceedings concerning him, the hearing of the child who has reached the age of 10 is mandatory. However, the child who has not reached the age of 10 can also be heard if the competent authority considers this necessary for the resolution of the case.

The obligation stated above, provided for in art. 264 of the Civil Code has recently been the subject of a criticism of unconstitutionality, motivated by the fact that the criticized legal provisions transform the child's right to be heard in judicial proceedings into a genuine obligation for him. The author claims that, in fact, his child was brought before the court several times, this being an abuse of him.

In the opinion of the author of the exception of unconstitutionality, the criticized legal provisions violate the constitutional provisions contained in art. 11 regarding international law and domestic law, art. 20 regarding international treaties on human rights and art. 48 regarding the family, as well as the provisions of art. 12 regarding the opinion of the child from the Convention on the rights of the child.

CCR rejected, as unfounded, the criticism of unconstitutionality.

To be pronounced in this way by Decision no. 15/2019, published in the Official Gazette no. 637/31.07.2019, the Court considered the need to hear the child, including from previous decisions based on similar criticisms and which we summarize below. Other claims are based on the jurisprudence of the European Court of Human Rights, from which we resume, selectively, at the end of our presentation material.

#### **4. The Child's Point of View, Essential in the Formation of a Correct Opinion, Dominated by his Best Interest**

The criticized legal text is the very expression of the fulfillment of this obligation by the Romanian state. The criticisms of the author of the exception of

unconstitutionality regarding possible abusive behavior that would have ordered the hearing of his daughter several times, in different but related cases, do not represent a constitutionality issue, but one of interpretation and application of the law.

The legislator appreciated that, in sensitive matters related to the determination of the best interests of the child, such as the establishment or modification of the minor's habitual residence, the appointment of the guardian, the constitution of the family council, etc., he must be heard. Thus, listening to the child is mandatory in resolving disagreements between parents regarding the exercise of parental authority provided for in art. 486 of the Civil Code, in the resolution of misunderstandings regarding the restriction of the child's rights to maintain relations with other persons with whom he has family ties - art. 494 of the Civil Code, in cases of requesting the return of the child from any person who holds him without right provided for in art. 495 of the Civil Code, in the event of resolving the misunderstanding between the parents regarding the establishment or change of the child's residence, as appears in art. 496-497 of the Civil Code, in case of changing the type of education or professional training as provided in art. 498 para. 2 of the Civil Code, in the event of the court's approval of the parents' understanding regarding the exercise of parental authority - art. 506 of the Civil Code, in the court decision regarding the relations between divorced parents and their children - art. 396 of the Civil Code), in the assumption of establishing the ways for the parent separated from the child to have personal ties with him after the divorce expressly provided for in art. 401 of the Civil Code.

- As a procedural guarantee to protect his interest, according to art. 226 of the Civil Procedure Code: "If, according to the law, a minor is to be heard, the hearing will take place in the council chamber. Taking into account the circumstances of the trial, the court decides whether the parents, guardian or other persons will be present at the hearing of the minor."

As far as administrative procedures are concerned, the child has the right, but not the obligation, to express himself before the competent authority. It is true that the competent authorities have an obligation to hear him. This obligation of the authorities was introduced because, in accordance with the assumed obligations, the state has the positive obligation to ensure the administrative and procedural framework conducive to the expression of the child's opinion and it does so by establishing an age threshold from which it is mandatory to listen to the minor, respectively 10 years, and by the fact that it is heard in the council room, in the court. Also, hearing the minor under 10 years old is left to the discretion of competent authority. The child faces no penalty if he refuses to answer the competent authorities. Therefore, in the present case, the Court notes that the minor's refusal to

express his opinion in the administrative or judicial procedures concerning him cannot be sanctioned in any way, since the child has, in this regard, the right, but not the obligation, to express before the judge.

In its jurisprudence, the European Court of Human Rights has given particular importance to the best interests of the child, as for example, in the Judgment of September 28, 2004, in the Case of S. and P. v. Romania, or in the Judgment of January 11, 2000, in Case I.-Z. against Romania. From the cited jurisprudence it emerges that states have positive obligations of a procedural nature, in the situation where measures are taken that represent an interference in family life, an obligation that consists in the fact that the decision-making process must be fair and respect the interests protected by art. 8 of the Convention. The most important of these interests, however, is that of the minor.

Through the Judgment of July 8, 2003, pronounced in the Case of S. against Germany, the European Court of Human Rights found a violation of the provisions of the European Convention on Human Rights, in the sense that the judge who decided the case took into account the opinion of a psychologist and not proceeded directly to the hearing of the minor. However, the child's relationship with the parent is an indispensable tool in establishing the child's real wishes, without correct information the court cannot make a decision that reflects a correct balance between the interests of the parties. The applicant's complaint concerned the domestic courts' refusal to grant the applicant the right to visit his child born out of wedlock. Under the law at the time, birth parents could not obtain visitation rights unless the court found it to be in the best interests of the child. In the present case, the Court found that the domestic court had failed to hear the child, aged five at the time, in order to more easily determine to what extent, he wished to see his father and whether or not such visits were within his interest. This omission indicates that the applicant did not play a sufficient role in the proceedings relating to the right to visit his child, the Court recalling that courts should not limit themselves to blindly following the vague conclusions of an expert relative to the risk of hearing about a child.

The European Court of Human Rights ruled in the Judgment of 21 June 2007, pronounced in the Case of H. and others v. Czech Republic, that the direct disobedience by the court of children who were 13, 12 and 11 years old at the time the protection authority social institution that formulated the request to place the children in a governmental child protection institution (given the role of their guardian) was not able to provide the plaintiffs with the protection required by their interests in the decision-making process.

By the Decision of February 2, 2016, pronounced in the Case of N.Ts. and others against Georgia, the Strasbourg Court condemned the Georgian state for violating art. 8 of the Convention for the fact that, in its internal procedure, children whose

mother had died and whose father had had drug problems were not heard by any of the national courts when it was decided to establish their domicile, the authorities having to choose between the father who he had also medically rehabilitated the mother's parents.

## **5. Conclusions**

In art. 1 of the Hague Convention provides for its object, namely to ensure the immediate return of children displaced or unlawfully detained in any contracting state, and to effectively respect in the other contracting states the rights regarding custody and visitation, which exist in a contracting state", and art. 5 explains "the right regarding custody includes the right regarding the care due to the person of the child and, in particular, the right to decide on the place of residence,

and the right of visitation includes the right to take the child for a limited period of time to a place other than that of his usual residence."

It is important to note that the increase over time in the number of confirmed cases of child rights violations highlights the fact that the monitoring and reporting mechanism has been increasingly strengthened over the years. The development of guidelines on monitoring and reporting, training, and capacity-building activities by the UN and its partners on documenting serious rights violations, as well as awareness campaigns among families and communities on the risks to which children are exposed, have contributed to strengthening mechanism and have allowed the collection of more information regarding cases of serious violations of children's rights.

Although it has increased over time, the overall capacity of the UN to document and verify incidents c has involved serious abuse has fluctuated from year to year, from situation to situation and from one abuse to another. In this context and based on the information above, direct comparisons between situations, years or forms of abuse should be made with caution.

In Romania, UNICEF is involved in the activity of the Government, Parliament, national and international partners, mass media to create the possibility that all children have access to quality education and to school, to protect adolescents and monitor children's rights, to mobilize resources for their benefit and of course for social protection.

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