The Implementation of the Hague Convention on the Civil Aspects of International Child Abduction under Turkish Law and the Individual Application Judgments of the Turkish Constitutional Court related to International Parental Child Abduction Disputes

Mehmet Akif POROY*

INTRODUCTION

International parental child abduction is a very controversial, difficult, and complex issue. Nowadays the world is getting smaller. Transportation has transformed our world. It has made it easier, cheaper, and faster for people to move. This is one of the reasons why the number of international migrants worldwide has grown rapidly. According to the United Nations International Migration report, it is estimated that in 2020, 281 million people live outside of their country of origin[1]. Moreover, with the increase of international marriages, international parental child abduction and its consequences have increased. The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter referred to as the "Convention") is the first international treaty regulating international parental child abduction issues.

According to the preamble, the main aim of the Convention is to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the state of their habitual residence, as well as to secure protection for rights of access. It is said that the main goal of the Convention is to restore the *status quo*, with the prompt return of the child[2]. The Convention allows the refusal of the child's return request only under certain strict

* Assistant Professor of Law, Faculty of Law, Istanbul Medipol University. (E-mail: mporoy@gmail.com)
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1) United Nations Department of Economic and Social Affairs, Population Division (2020). International Migration 2020 Highlights (ST/ESA/SER.A/452), https://www.un.org/development/desa/pd/news/international-migration-2020 (last visited on 09 November 2021).

2) Elisa Perez-Vera, *Explanatory Report*, p.429; *"... [Convention] places at the head of its objectives the restoration of the status quo, by means of the prompt return of children wrongfully removed to or retained in any Contracting State."*, https://assets.hcch.net/docs/a5fb103c-2ceb-4d17-87e3-a7528a0d368c.pdf (last visited on 09 November 2021).

conditions and such reasons are to be narrowly interpreted. It is worth pointing out that there is no clear provision regarding the best interests of the child in the Convention. However, this shall not lead to ignoring the best interests of the child while rendering judgments regarding the return of the child arising from the implementation of the Convention[3]. Otherwise, one may say that according to the Convention, the best interests of the child can only be achieved by returning the child to his or her habitual residence. Firmly adopting such an approach may lead to a result of the return of the child even when the child's best interests conflict with the return. Such would not only do harm to the child, but it will also be against the spirit of the Convention.

The concept of the best interests of the child is based on the United Nations Convention on the Rights of the Child. All institutions and organizations, including the courts, must consider the best interests of the child when making decisions related to the child[4]. Any interpretation of best interests must be consistent with the spirit of the entire Convention on the Rights of the Child, and states cannot interpret best interests in an overly culturally biased way, and cannot use their own interpretation of "best interests" to deny rights[5]. Thus, neither the states nor the parents can see the child as the property of the parents. The rights and best interests of the child are above all other considerations. In this regard, it is worth noting that the Council of Europe Parliamentary Assembly, explicitly stated in its Recommendation 874 (1979) that; *"... children are not the property of the parents and that their own needs and rights must be considered..."*[6].

It has been more than 40 years since the Convention was drafted. The different approaches and practices of the contracting States and the developments in human rights have forced the Hague Conference on Private International Law (hereinafter referred to as the "HCCH") to adopt the Guide to Good Practice for judges and Central Authorities implementing the Convention in the contracting States. The best interests of the child must also be considered while implementing the Convention so that no further harm is caused to the child.

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3) Bahadır Erdem, *"Turk Hukukunda Uluslararasi Cocuk Kacirma ve Uygulamalari" [International Child Abduction in Turkish Law and Its Practice]*, Public and Private International Law Bulletin, Volume 35, Issue 2, 2015, ISSN: 2651-5377, p.147.

4) Article 3/1 of the United Nations Convention on the Rights of the Child; *"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration"*.

5) Rachel Hodgkin and Peter Newel, "Implementation Handbook for The Convention on The Rights of the Child", fully revised third edition, September 2007, ISBN 978-92-806-4183-7, p.38.

6) The Council of Europe, Parliamentary Assembly Recommendation 874 (1979); *"...Children must no longer be considered as parents' property, but must be recognised as individuals with their own rights and needs ..."*, http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=14908&lang=en (last visited on 09 November 2021)

The Convention's success depends on the increase in the number of states that party to the Convention and the implementation of the provisions of the Convention by the contracting States from a human rights perspective. As of the date of this paper, the number of states party to the Convention is 101[7]. The Convention outlined the procedures and principles regarding the return of the child but left the details of the process to the contracting States. Therefore, each contracting State must adopt arrangements in their domestic laws to enforce the Convention.

There are numerous reasons for international child abduction. Cultural or religious differences between the couples, ongoing and deep marital conflicts, domestic violence, and economic difficulties might be listed as some of these reasons. In this paper, I will not discuss the motives behind the reason a parent abducts his or her child and leaves the other parent behind in a big dilemma and frustration. In the first part of this paper, I will try to address the implementation of the Convention in Turkey. In this regard, the current legal environment in Turkey in reference to the relevant articles regulated under the *"Law Numbered 5717, Law on the Legal Aspects and Scopes of International Child Abduction"* (hereinafter referred to as the "Law 5717") and recent judgments of the relevant Turkish courts will be explained. In the second part, the recent individual application judgments of the Turkish Constitutional Court with regard to violations of human rights in respect to international parental child abduction disputes will be evaluated.

PART I – INTERNATIONAL CHILD ABDUCTION UNDER TURKISH LAW

1. Evaluation of Law 5717 and Circular 65/2

Turkey signed the Convention on 21.08.1998 and it entered into force on 01.08.2007[8]. Since late 2007, Turkey is evaluating and concluding applications made within the framework of the Convention. In order to arrange the procedures and principles in the implementation of the Convention, the Turkish lawmaker enacted Law 5717 on 22.11.2007 which entered into force on 04.12.2007[9]. In addition to Law 5717, the Ministry of Justice General Directorate of International Law and Foreign Relations issued

7) For information concerning contracting parties to the Convention please see "Status Table", website of the Hague Conference on Private International Law, https://www.hcch.net/en/instruments/conventions/status-table/?cid=24 (last visited on 09 November 2021).

8) Official Gazette no.: 23965, February 15, 2000, https://www.resmigazete.gov.tr/arsiv/23965.pdf (last visited on 09 November 2021).

9) Official Gazette no.: 26720, December 4, 2007, https://www.resmigazete.gov.tr/eskiler/2007/12/20071204-5.htm (last visited on 09 November 2021).

a circular numbered 65/2 on 16 November 2011[10] (hereinafter referred to as the "Circular 65/2") to overcome the implementation difficulties of the Convention and Law 5717.

According to the Convention, each contracting State must designate a Central Authority to fulfill the duties imposed by the Convention[11]. The Central Authority of Turkey is the Ministry of Justice[12]. The Ministry of Justice assigned the General Directorate of International Law and Foreign Relations as the Central Authority to meet its obligations foreseen in the Convention[13]. The General Directorate has been renamed as the Directorate General for Foreign Relations and European Union Affairs with the Presidential Decree numbered 27 and dated 09.01.2019[14].

The HCCH is keeping close tabs on the implementation of the Convention by the contracting States. In this regard, a Special Commission was established by the HCCH and regular meetings are held by the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention to observe the operation of the Convention. The latest research study took place at the seventh meeting of the Special Commission in October 2017. The Special Commission drafted the national reports in July 2018 on a statistical analysis of applications made in 2015 to provide an analysis of statistical trends over 16 years. Pursuant to the report, in 2015 Turkey received 82 return and 2 access applications from 19 contracting States. 15 outgoing return applications and 5 outgoing access applications were sent by the Turkish Central Authority. In total, the Turkish Central Authority dealt with 104 applications. Information on outcomes was only available in 42 of the 82 applications received by the Turkish Central Authority. Out of these 42 applications received, 25 applications ended in the child's return, 2 applications were rejected, and 11 applications were withdrawn. There is no information regarding the outcomes of the other applications as they were pending when the report was drafted. The average time for a final settlement in the return applications received by the Turkish Central Authority was determined to be 153 days[15].

10) The Ministry of Justice, General Directorate of International Law and Foreign Relations, Circular numbered 65/2 dated 16 November 2011, https://diabgm.adalet.gov.tr/Resimler/Dokuman/48202010405065-2%20Uluslararas%C4%B1%20%C3%87ocuk%20Ka%C3%A7%C4%B1rman%C4%B1n%20Hukuki%20Kapsam%C4%B1%20ve%20Uygulamas%C4%B1.pdf (last visited on 09 November 2021).

11) Article 6 of the Convention.

12) Article 3 of Law 5717.

13) Article I (3) of Circular 65/2.

14) Article 7 of the Presidential Decree numbered 27, Official Gazette no.: 30651, January 10, 2019, https://www.resmigazete.gov.tr/eskiler/2019/01/20190110-8.pdf (last visited on 09 November 2021).

15) Part III — A statistical analysis of applications made in 2015 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction — National Reports, https://assets.hcch.net/docs/6ca61ff3-5ca6-4fbe-a79a-cb6e7485f4b0.pdf (last visited on 09 November 2021).

The Turkish Central Authority accomplishes the requirements of the Convention through local Public Prosecutor's Offices[16]. The duties of the Central Authority are (i) to discover the whereabouts of the child immediately upon receipt of an application requesting the child's return, or access rights within the scope of the Convention, (ii) to take all appropriate measures, including assigning the law enforcement and local authorities to prevent harm to the child, (iii) to take all necessary steps to secure the voluntary return of the child or to bring about an amicable resolution of the issues, (iv) to file a lawsuit with the competent court, to receive a decision securing the return of the child or securing the effective exercise of rights access, in case a voluntary return of the child or an amicable resolution is not possible[17].

The duties of the public prosecutor's offices while performing their tasks for the implementation of the Convention and Law 5717, on behalf of the Central Authority, are classified in two categories, depending on whether it is a "requesting state" in outgoing applications or a "requested state" in incoming applications.

1.1. The Duties of the Turkish Central Authority as the Requesting State in Outgoing Applications

In the event that a child whose habitual residence was in Turkey and was abducted to another contracting State of the Convention in violation of the rights of custody, the left-behind parent may submit an application to the public prosecutor's offices for the return of the child or to ensure the right of access. Only in such a case can the public prosecutor's office act as the requesting state. In other words, the Central Authority cannot initiate the procedures in relation to outgoing applications *ex officio*. As soon as the public prosecutor's office receives an application, the first thing it shall do is to determine whether the state where the child is abducted, is a party to the Convention or not. If the abducted child is in one of the contracting States, then the public prosecutor's office shall assist the left-behind parent to prepare the application and its attachments. Once the application and its attachments are prepared, the public prosecutor's office shall send them to the Ministry of Justice so that the Central Authority transmits the application on behalf of the left-behind parent to the attention of the competent authority in the "requested state" to which the child has been abducted.

The application must be in conformity with Article 8 of the Convention and shall contain (i) information concerning the identity of the applicant, of the child, and of the person alleged to have abducted the child; (ii) the date of birth of the child; (iii) the grounds on

16) Article 4 of Law 5717.
17) Article 5 of Law 5717 and Article (I) 6 of Circular 65/2.

which the applicant's claim for return of the child is based, and (iv) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be[18]. It is also useful to attach, if applicable, the copy of any relevant decision or agreement made by and between the parties; translation of the Turkish legislation concerning custody, any relevant document that might be helpful for the settlement of the dispute, and recent photos of the child and abducting person to the application form[19]. Neither the application form nor attached document needs to be notarized or requires any authentication[20].

The application form and any attachment to it shall be accompanied by a translation into the official language of the requested state or, where that is not possible, a translation into French or English[21].

After transmitting the application to the competent authority in the "requested state", the Central Authority monitors the progress of the application, provides further documentation to the relevant authority in the foreign "requested state", as necessary, and provides regular updates to the left-behind parent.

1.2. The Duties of the Turkish Central Authority as the Requested State regarding Incoming Applications

In case the abducted child is in Turkey and an application is received by the Turkish Central Authority from the competent authority in the "requesting state", before examining and concluding the application, the Turkish Central Authority determines, (i) if the requesting state is a contracting State of the Convention, (ii) if the child attained the age of 16[22], and (iii) if the application is made within one year following the abduction of the child[23]. If the application received was transmitted by a contracting State, and the child is below 16 and a period of less than one year has elapsed since the abduction of the child, then the Turkish Central Authority will check whether the application received is complete and contains the possible address of the abducted child in Turkey. If the application or its attachments are complete, then the Turkish Central Authority will evaluate the application and instruct the relevant public prosecutor's office to carry out the procedures.

Following the request of the Central Authority, first the public prosecutor's office shall

18) Article II A) (3) of Circular 65/2.
19) Article II A) (4) of Circular 65/2.
20) Article II A) (3) of Circular 65/2.
21) Article 24 of the Convention, Article II A) (5) of Circular 65/2.
22) Article 4 of the Convention, Article 3/1-c of Law 5717, and Article I (4) of Circular 65/2.
23) Article 12 of the Convention.

order the law enforcement and local authorities to investigate the whereabouts of the child and to take all appropriate measures for the protection of the child[24]. Once the child is found, the public prosecutor's office shall take all necessary steps to secure the voluntary return of the child or to bring about an amicable resolution. In this regard, the public prosecutor's office shall take the statement of the abducting parent and encourage him or her to voluntarily return the child or find an amicable solution[25]. If the abducting parent accepts to voluntarily return the child, then the public prosecutor's office shall immediately report the case to the Central Authority so that the Central Authority may inform the competent authority in the "requesting state" accordingly[26]. However, if the abducting parent rejects voluntarily returning the child, at such a stage, the public prosecutor's office has no power to remove the child. It may only be considered as an allegation that has to be examined by the competent family court[27] and a final decision must be rendered for the return of the child[28]. In such a case, the public prosecutor's office must file a lawsuit with the competent family court[29] to obtain a decision regarding the return of the child or the right of access[30].

2. The Judicial Proceedings Under Turkish Law

In order to achieve the objectives of the Convention, all contracting States are expected to use the most expeditious procedures available[31]. This has been reemphasized in Article 11 of the Convention by stating that all judicial or administrative authorities of the contracting States shall act expeditiously in proceedings for the return of the child. In this regard, all contracting States are expected to render their decisions within six weeks from the date of commencement of the proceedings. I must admit that it is not realistic to expect to obtain a decision within six weeks under the current Turkish legal system due to the heavy workload. However, it should also be noted that this six-week period is not

24) Article 5/1-a of Law 5717 and Article II B) (7) of Circular 65/2.
25) Article 5/1-b of Law 5717 and Article II B) (7) of Circular 65/2.
26) Article II B) (8) of Circular 65/2.
27) According to Article 6/1 of Law 5717, family courts are the competent courts to examine lawsuits and related judicial proceedings arising from Law 5717.
28) Bahadır Erdem, *"Turk Hukukunda Uluslararasi Cocuk Kacirma ve Uygulamalari" [International Child Abduction in Turkish Law and Its Practice],* Public and Private International Law Bulletin, Volume 35, Issue 2, 2015, ISSN: 2651-5377, p.165. Please also see; Aysel Celikel and Bahadir Erdem, *"Milletlerarasi Ozel Hukuk" [Private International Law]*, Beta Yayincilik, Istanbul, 2021, seventeenth edition, ISBN: 978-605-242-599-2, p.311.
29) According to Article 6/2 of Law 5717, the competent family court is the family court in the district where the child is being kept by the abducting parent or where the child is taken under protection by the official authorities.
30) Article 5/1-c of Law 5717 and Article II B) (9) of Circular 65/2.
31) Article 2 of the Convention.

binding, and it is desirable to comply with the best interests of the child. Yet, no sanctions are foreseen in the Convention if a decision cannot be rendered within these six weeks[32]. The only facility for the applicant or the Central Authority of the requesting state is to have the right to request a statement of the reasons for the delay[33]. Thus, such six weeks period was not adopted by the Turkish lawmaker while enacting Law 5717. Instead of determining a specific time limit, the lawmaker stated that all lawsuits related to the implementation of Law 5717 should be conducted with petty sessional procedural principles (simple procedure), and handled promptly with priority[34]. To prevent any delay and to ensure the speedy resolution of a lawsuit, all judicial proceedings, including hearings and administrative proceedings, are subject to being dealt with during judicial holidays as well[35].

Lawsuits and all related judicial proceedings are not subject to any fee, levy, duty, charge, or whatsoever and litigation costs are covered by the prosecution funds[36]. Having said that, it shall be noted that, litigation costs are later to be covered by the party who has lost the lawsuit. It should be noted that no security, bond, or deposit is required to file the lawsuit[37]. Moreover, those applicants who have financial difficulties are entitled to legal aid[38].

According to the Turkish jurisprudence, the public prosecutor must be notified of the trial date and the parties and the public prosecutor must be present during the trial and all examinations shall be conducted at the trial[39]. Any examination of the file without a

32) Gonca Gulfem Bozdag, *"Uluslararasi Cocuk Kacirmanin Hukuki Yonlerine Dair Lahey Sozleşmesi Kapsaminda Cocugun Iadesi Talebinin Red Nedenleri" [the refusal Reasons of the return of the child in the scope of the Hague Convention on the Civil Aspects of International Child Abduction]*, Yetkin Yayinlari, Ankara, 2014, ISBN: 978-975-464-895-9, p.52.

33) Article 11 of the Convention.

34) Article 9/2 of Law 5717.

35) Article 16 of Law 5717. Please also see; Court of Cassation 2nd Civil Chamber, file numbered 2016/22847 E., 2016/15726 K. and dated 08.12.2016; *"... According to the provisions of the Convention, the cases regarding the return of the wrongfully removed children to the country of their habitual residence are subject to simple trial procedure and urgent matters in accordance with the Law No.5717, which regulates the procedures and principles to ensure the implementation of the Convention and in cases and works arising from the implementation of this law, the provisions regarding the extension of the deadlines due to the judicial holiday shall not be applied ..."*, translated by the author, www.kararama.yargitay.gov.tr, (last visited on 09 November 2021).

36) Article 27/1 of Law 5717 and Article II B) (10) of Circular 65/2.

37) Article I (7) of Circular 65/2.

38) Article 25 of the Convention and Article 28 of Law 5717.

39) Court of Cassation 2nd Civil Chamber, file numbered 2016/11428 E., 2016/14224 K. and dated 31.10.2016; also see, Court of Cassation Assembly of Civil Chamber, file numbered 2014/2-2489 E., 2015/1475 K. and dated 29.05.2015 *"...rendering the decision without sending a notification of the trial date to the public*

hearing is not acceptable.

According to Article 7 of the Convention, one of the main duties of the Central Authorities is to discover the whereabouts of the child who has been wrongfully removed or retained. While enacting Law 5717, additional to such duty, the Turkish lawmaker also adopted some provisional protection measures not to lose the place of residence of the child. More precisely, with such measures, the courts are entitled to track the place of residence of the child. In this regard, until a final judgment regarding the return of the child and/or access rights are obtained the courts may (i) stop the child from leaving the country temporarily, (ii) suspend the issuance or renewal of a passport to the child, (iii) suspend moving the school, registration or local records of the child, (iv) confiscate the passport or identification records of the child, (v) check the child's welfare and whereabouts and take all appropriate and necessary measures[40].

The other important duty of the Central Authority stated in Article 7 of the Convention is to take all appropriate measures to prevent further harm to the child or prejudice to interested parties. To ensure this Turkish lawmakers adopted some provisional protection measures. In this regard, until a final judgment regarding the return of the child and/or access rights are obtained the courts may, upon request or *ex officio,* by taking the child's and an expert's opinion if necessary, (i) hand the child over to one of the relatives who will take care of him or her, (ii) place the child with a confidential family who will take care of him or her, (iii) place the child in a state or private child care institution or orphanage, (iv) place the child in a state or private hospital or a special training school[41]. If the child is placed in a family or a private institution, all costs are to be covered by the Government[42].

In order to apply the provisional protection measures stated above (Articles 10 and 24 of the Law 5717), a return lawsuit must be pending. In other words, it is not possible to apply for the said measures before filing a return lawsuit[43].

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prosecutor who filed the lawsuit on behalf of the Central Authority and without ensuring the presence of the public prosecutor at the trial is wrong…", translated by the author, www.kazanci.com.tr (last visited on 09 November 2021).

40) Article 24 of Law 5717.

41) Article 10 of Law 5717.

42) Article 26/1 of Law 5717.

43) Court of Cassation 2nd Civil Chamber, file numbered 2013/2054 E., 2013/3856 K. and dated 18.02.2013; *"… According to Law 5717, which regulates the procedures and principles for the implementation of the Convention, return lawsuit must be filed in order for provisional protection measures to be taken (art.10) … The provisional protection measures that can be taken upon request or ex officio until the end of the case is listed in Article 10 of the Law … The measures in Article 10 of the law cannot be applied without filing a lawsuit … Since a return lawsuit has not been filed yet, it is not possible to evaluate the claimant's request*

Once the lawsuit is filed with the competent family court, but before the trial commences, the court shall encourage the voluntary return of the child. If no agreement is reached, then the court shall continue with the trial and render its decision[44].

In case a custody lawsuit is filed while the lawsuit arising from Law 5717 is pending, the custody lawsuit shall be put on hold[45] and the relevant court shall not decide on custody, as the return case constitutes a prejudicial question. Thus, if a return lawsuit and a custody lawsuit are consolidated, the lawsuits must be separated, and the return lawsuit shall be settled first[46]. If the court decides for the return of the child, a decision regarding custody cannot be given in the same decision[47]. It shall be left to the relevant state authorities to which the child is returned to make the decision regarding the right of custody[48]. This is also an obligation arising from the HCCH Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement, and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children[49] to which Turkey is a party since 01.02.2017. However, if the court rejects the return of the child, then a decision regarding the right of custody can be made[50]. It should be noted that a custody order rendered after the application is filed for the return of the child cannot be a reason for denial of the return of the child[51].

Decisions regarding the return of the child or access rights are enforceable when they become final[52]. The family court decision becomes final either when no appeal process has been initiated or when the appeal process is exhausted.

Decisions regarding the rejection of the return request are notified to the Turkish Central Authority through the relevant office of the chief public prosecutor, and the Turkish

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within the framework of Article 10 ...”, translated by the author, www.kararara ma.yargitay.gov.tr (last visited on 09 November 2021).

44) Article 8 of Law 5717.

45) Article 14 of Law 5717.

46) Article 15 of Law 5717. Please also see; Court of Cassation 2nd Civil Chamber, file numbered 2010/6336 E., 2010/12225 K. and dated 21.06.2010, *“... proceedings and principles of a divorce lawsuit [including custody request] and a return lawsuit are different. Thus, it is wrong to consolidate those lawsuits without considering such different proceedings and principles ...”*, translated by the author, www.kazanci.com.tr (last visited on 09 November 2021).

47) Article 12 of Law 5717.

48) Article III (5) of Circular 65/2.

49) Article 5 of the HCCH Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement, and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.

50) Article 12 of Law 5717.

51) Article 13 of Law 5717.

52) Article 17(1) of Law 5717.

Central Authority transmits the said decision to the requesting State's Central Authority. If the requesting State Central Authority wishes to appeal the refusal decision, an appeal is made by the office of the chief public prosecutor. As of 20 July 2016, Turkish civil litigation is composed of a three-stage system that comprises first instance proceedings, an *istinaf* appeal review, and a *temyiz* appeal review. In Turkish civil litigation, there are two appellate remedies namely, "*istinaf*" and "*temyiz*". *Istinaf* is the appellate remedy to be applied against the decisions of the first instance courts and is carried out by the relevant regional courts of appeal, while *temyiz* is the remedy to be applied against the decisions of the relevant chambers of regional courts of appeal and are carried out by the Court of Cassation[53]. Against the family court decision, an *istinaf* appeal can be filed within 2 weeks as from the communication date of the decision of the family court to the parties[54]. Following the *istinaf* appeal process, the parties are also entitled to file a *temyiz* appeal within 2 weeks as from the chambers of the regional courts of appeal decisions' communication date [55].

The final decision regarding the return of the child or establishment of personal contact with the child shall be exercised through the Department of Judical Support and Victim Services at the child's place of residence, without the notification of the enforcement order[56]. Thus, the abducting parent will not be aware of the proceedings on time, and the lack of notification will prevent the abducting parent from abducting the child again[57]. The relevant Department of Judical Support and Victim Services at the child's place of residence has the power to exercise the final decision regarding the return of the child or access rights in the absence of the abducting parent or person[58]. If the abducting parent is present, he or she must cooperate with the officers and show the place where the child is being kept. The officers are entitled to the power of entry to such place by force[59].

In order to prevent further physical or psychological harm to the child, a decision of the return of the child or establishment of personal contact with the child shall be enforced by a social worker, pedagogue, psychologist or child development specialist or in their

53) Mustafa Goksu, *"Civil Litigation and Dispute Resolution in Turkey"*, Banka ve Ticaret Hukuku Arastirma Enstitusu [The Research Institute of Banking and Commercial Law, Ankara Law Faculty], 2016, ISBN: 978-975-537-236-5, p.179, 180.

54) Article 345 of the Turkish Civil Procedure Code numbered 6100 and dated 12.01.2011.

55) Article 361 of the Turkish Civil Procedure Code numbered 6100 and dated 12.01.2011.

56) Article 18 (1) of Law 5717.

57) Sebnem Nebioglu Oner, *"Uluslararası Cocuk Kacirmanin Hukuki Yonlerine Dair Lahey Sozlesmesi: Amaci, Uygulamasi ve Kisa Bir İctihat Analizi"*, [*The Hague Convention on the Civil Aspects of International Child Abduction: The Scope, Implementation and a Short Analyses of Jurisprudence*], Union of Turkish Bar Associations Review, Volume 115, November/ December 2014, ISSN: 1304-2408, p.498.

58) Article 19 (1) of Law 5717.

59) Article 19 (2) of Law 5717.

absence, by an educator, together with the authorized officer of the Department of Judical Support and Victim Services[60]. If it is determined by the experts that the enforcement of the final decision of the return of the child or establishment of personal contact with the child will cause a grave risk to the physical and psychological development of the child, the Department of Judical Support and Victim Services shall postpone the enforcement proceedings of the decision until such risk vanishes[61].

According to Article 25 of Law 5717 those who hide or abduct the child again after a final decision, and/or are complicit in any way in the abduction, or those who disobey notifications, orders, and measures imposed by Law 5717 are subject to disciplinary imprisonment up to three months[62], as specified in Article 41/F of the Law numbered 5395, Juvenile Protection Law.

3. Refusal of Return Requests Under the Convention and the Turkish Practice

As stated previously, the core and the main aim of the Convention is based on the principle of the prompt return of the child wrongfully removed to or retained in any contracting State. The Convention allows the refusal of the child's return request only under certain conditions. These conditions are set forth in Articles 12/2, 13/1(a), 13/1(b), 13/2, and 20 of the Convention. There is no specific provision in the text of Law 5717 that corresponds to the above mentioned articles of the Convention. Such shortfall has been substituted by Circular 65/2. According to Circular 65/2, after the court determines that the child has been wrongfully removed or retained, it should take into account Articles 12, 13, and 20 of the Convention and consider whether the child shall be returned or not[63]. It would have been more appropriate if the lawmaker had explicitly specified the conditions of refusal of return requests while enacting Law 5717, rather than being silent on the issue. Since the conditions are not set forth in Law 5717 and it has been referred to the Convention, I will explain each specific condition for the refusal of return requests stated in the Convention, and then evaluate the Turkish practice accordingly.

3.1. Grounds for Refusal of Return Requests Pursuant to Article 12/2 of the Convention and the Turkish Jurisprudence

In case that an application for return is made within one year following an abduction, the

60) Article 21 of Law 5717.
61) Article 22 of Law 5717.
62) Article 25 of Law 5717.
63) Article III (2) of Circular 65/2.

child must be returned unless there are conditions that require the return to be refused as specified in Article 13 and 20 of the Convention. If an application to the Turkish Central Authority for the child's return is made after one year of the abduction, the return request will still be processed. The one-year period specified in the article is not a prescription period for the application[64]. However, in the application to be made after this period, even if it is accepted that the child's habitual residence has been changed, it will be examined to determine whether the child has adapted to his or her new life. In this regard, the social and school life, and his or her circle of friends shall be examined by the courts and experts to assess whether the child has adapted to his or her new environment and whether it is in the best interests of the child to stay in the new environment[65]. It would also be useful to get the opinion of the child, if considered to be of appropriate age and maturity, while making an assessment in this regard[66]. If it is determined that the child has adapted to his or her new life and created a social environment, such return request may be refused.

In a case heard by the Izmir 5th Family Court, the applicant (father) claimed that the child was retained in Turkey by the mother against the applicant's consent and the child's return to Germany was requested. The Court dismissed the case with its decision dated 07.02.2013 and file numbered 2012/998 E., 2013/109 K. for the following reasons: *"... According to the psychologist's report and all the contents of the file, it is understood that the child's habitual residence was in Germany, but after he was brought to Turkey on 05 February 2011, he started school here, adapted to the environment, preferred to live with his mother, and the plaintiff father applied to the German Central Authority on 01 October 2012, one year later. Therefore, it was necessary to dismiss the case..."*[67]. The

64) Ilknur Altuntas, *"Uluslararasi Cocuk Kacirmanin Hukuki Yonlerine Dair Lahey Sozlesmesi" [Hague Convention on the Civil Aspects of International Child Abduction]*, Bilge Yayinevi, Ankara, 2006, p.96; please also see; Gonca Gulfem Bozdag, *"Uluslararasi Cocuk Kacirmanin Hukuki Yonlerine Dair Lahey Sozleşmesi Kapsaminda Cocugun Iadesi Talebinin Red Nedenleri" [the refusal Reasons of the return of the child in the scope of the Hague Convention on the Civil Aspects of International Child Abduction]*, Yetkin Yayinlari, Ankara, 2014, ISBN: 978-975-464-895-9, p.100.

65) Tugce Takci, *"Uluslararasi Cocuk Kacirmanin Hukuki Vecihelerine Dair Lahey Sozlesmesinin Uygulanmasinda Karsilasilan Bazi Sorunlar ve Bu Sorunlara Cozum Onerileri" [Implementation of the Hague Convention on the Civil Aspects of International Child Abduction, Problems Encountered and Suggestions for Solution]*, Turkiye Adalet Akademisi Dergisi [Journal of Turkish Justice Academy], Year:5, Issue: 19, October 2019, ISSN: 1309-6826, p.1054.

66) Gonca Gulfem Bozdag, *"Uluslararasi Cocuk Kacirmanin Hukuki Yonlerine Dair Lahey Sozleşmesi Kapsaminda Cocugun Iadesi Talebinin Red Nedenleri" [the refusal Reasons of the return of the child in the scope of the Hague Convention on the Civil Aspects of International Child Abduction]*, Yetkin Yayinlari, Ankara, 2014, ISBN: 978-975-464-895-9, p.105.

67) Translated by the author. For the Turkish court decision please see; Gonca Gulfem Bozdag, "Uluslararasi Cocuk Kacirmanin Hukuki Yonlerine Dair Lahey Sozleşmesi Kapsaminda Cocugun Iadesi Talebinin Red Nedenleri" [the refusal Reasons of the return of the child in the scope of the Hague Convention on the Civil

decision was appealed and the Court of Cassation 2nd Civil Chamber rejected the appeal claims and approved the decision of the Izmir 5th Family Court stating that there was no mistake in the evaluation of the evidence and that the decision was in accordance with the procedure and law[68].

However, if the child has not adapted to his or her new environment, then an order shall be placed for the return of the child.

In a case heard by the Aksaray 1st Family Court, the defendant father took the children from their habitual residence, Germany, to Turkey in January 2004. The mother applied to the Central Authority to secure the return of the children on 13 March 2005. After the defendant father abducted the children, he left them with the woman with whom he had an affair and returned to Germany. The Aksaray 1st Family Court dismissed the lawsuit. An appeal was filed against the Aksaray 1st Family Court decision. The Court of Cassation 2nd Civil Chamber evaluated the file and decided that although one year had passed since the abduction took place, it was not possible for the small children to get adapted to their new environment where they were forced to stay with the woman with whom their father had an affair. Thus, the Court of Cassation 2nd Civil Chamber overruled the decision of the family court rejecting the return request[69].

3.2. Grounds for Refusal of Return Requests Pursuant to Article 13/1 (a) of the Convention and the Turkish Jurisprudence

In Article 13/1 (a) two different reasons for refusal are specified. The first reason is based on failure to fulfill the custody obligation or actually exercise the custody rights at the time of abduction. The second refusal reason arises if the left behind parent had consented to or subsequently acquiesced to the removal or retention of the child.

3.2.1. Failure to Fulfill the Custody Obligation

If the applicant requesting the return of the child has not fulfilled his or her duty of care while the child was living in his or her habitual residence, then the judicial or administrative authorities of the requested state may reject such return request. It is the abductor who must prove that the left behind parent had not actually exercised his or her

Aspects of International Child Abduction], Yetkin Yayinlari, Ankara, 2014, ISBN: 978-975-464-895-9, p.171.

68) Court of Cassation 2nd Civil Chamber, file numbered 2013/6282 E., 2013/9973 K. and dated 10.04.2013. www.karararama.yargitay.gov.tr (last visited on 09 November 2021).

69) Court of Cassation 2nd Civil Chamber, file numbered 2006/15204 E., 2007/8448 K. and dated 21.05.2007. www.karararama.yargitay.gov.tr (last visited on 09 November 2021).

rights of custody. More precisely the burden of proof is placed on the abductor[70]. The fact that the duty of custody is not fulfilled by the left behind parent can be proven by the witness statements, the child's statements, and the report to be prepared by the experts, as well as by all kinds of evidence that the child is cared for and supervised by the other parent[71].

In a case heard by the Eskisehir 4th Family Court, the applicant (father), mother and their two children went to Turkey for summer vacation in 2011. The applicant and his wife had an argument and the applicant used violence against his wife. So, the wife filed a complaint on the applicant's use of violence against her. After the complaint, the applicant returned to Belgium, leaving his children and wife in Turkey. A criminal case was opened against the applicant in Turkey. The mother also filed a divorce case against her husband after the violence incident and the court, with an interim decision dated 22.08.2011, ruled that the children should stay with the mother during the case. Following such decision, the applicant applied to the Brussels Court and on 16.02.2012 obtained a decision regarding joint custody of the children. The applicant, who received joint custody decision, applied to the Central Authority in Belgium to initiate the procedures for the return of the children. After the Turkish Central Authority received the request, the Eskisehir Chief Public Prosecutor's Office filed a lawsuit for the return of the children on 15.08.2012. The Eskisehir 4th Family Court decided to reject the return request on the grounds that in the divorce case filed by the defendant wife, it was decided that the children should stay with the wife as a precautionary measure, that the parties were divorced and custody was given to the mother at the end of the trial, that the applicant was represented by his attorney in the divorce case and that the children were not abducted to Turkey. Upon the applicant's appeal against this decision, the Court of Cassation 2nd Civil Chamber, with its decision dated 19.03.2013 and numbered 2013/4064 E., 2013/7473 K. decided that the father's custody right was violated, that the custody of the children temporarily left to the mother was not important in accordance with the provisions of the Convention, and that the refusal of the return request was not legal. The decision was overturned and the file sent back to the Eskisehir 4th Family Court. The Court resisted, stating that its decision was correct. The decision was appealed by the Eskisehir Chief Public Prosecutor's Office. The Court of Cassation Assembly of Civil Chamber examined the appeal and stated in its decision that the parties came to Turkey with their children for a summer vacation, that the applicant returned to Belgium without his wife and children after physically abusing

70) Elisa Perez-Vera, "*Explanatory Report"*, p.448, https://assets.hcch.net/docs/a5fb103c-2ceb-4d17-87e3-a7528a0d368c.pdf (last visited on 09 November 2021).

71) Bilal Koseoglu, "*Uluslararasi Cocuk Iadesi ve Uluslararasi Nafaka Alacaklari Davalari" [Cases of International Child Return and International Alimony (Child Support)]*, Turkiye Barolar Birligi Yayinlari [Publications of the Union of Turkish Bar Associations], 4th edition, Ankara, 2007, ISBN: 978-9944-234-06-1, p.24.

his wife, and therefore it could not be said that the children were brought to Turkey illegally. The Court of Cassation stressed in its decision the fact that the applicant inflicting violence on his wife, leaving his wife and children in Turkey, and returning to Belgium alone meant that he abandoned his children and wife. Thus, it could not be said that the children were forcibly retained. In addition to the above-mentioned assessment, the Court of Cassation also pointed out that from the documents and information in the file, it was understood that the decision regarding the custody of the children was given to the mother on 22.08.2011 in the divorce case, and the application for the return of the children was made by the applicant after such decision on 05.03.2012. Thus, the custody was given to the mother before the application for return, and since the applicant did not actually use the custody right, it could not be concluded that the children were unlawfully retained in Turkey due to the violation of the right of custody. For these reasons, the Court of Cassation Assembly of Civil Chamber ruled that the decision of the Eskisehir 4th Family Court to reject the return request was in accordance with the law[72].

3.2.2. Consent to or Subsequently Acquiesce in the Removal

According to Article 13/1 (a) of the Convention, a return order may not be granted if the abductor can make out that the applicant "consented to or subsequently acquiesced to the removal or retention" of the child. The difference between consent and acquiescence is that consent precedes the removal, whereas acquiescence follows it[73].

In a case heard by the Trabzon 1st Family Court, the applicant (father) applied to the Central Authority to obtain a return order of the children. During the trial the defendant mother submitted to the Court a document proving that the applicant allowed the children to return to Turkey and go to school there. An expert report stating that the children should stay with their mother was obtained. Information from the school was also collected and the Court also took the statements of the children and the defendant. The Trabzon 1st Family Court rejected the request and dismissed the case with its decision dated 11.09.2012 and file numbered 2012/411 E., 2012/524 K on the grounds that the applicant (father) consented to the removal of the children by allowing them to return to Turkey and go to school there[74]. The decision was appealed, and the Court of Cassation 2nd Civil Chamber rejected the appeal claims and approved the decision of the Trabzon

72) Court of Cassation Assembly of Civil Chamber, file numbered 2017/2-2489 E., 2018/1473 K. and dated 18.10.2018 www.kararama.yargitay.gov.tr (last visited on 09 November 2021).

73) Samantha Davey, "Family Law", Red Globe Press, 2020, ISBN: 978-1-352-00919-4, p.407.

74) For the court decision please see; Gonca Gulfem Bozdag, "Uluslararasi Cocuk Kacirmanin Hukuki Yonlerine Dair Lahey Sozleşmesi Kapsaminda Cocugun Iadesi Talebinin Red Nedenleri" [the refusal Reasons of the return of the child in the scope of the Hague Convention on the Civil Aspects of International Child Abduction], Yetkin Yayinlari, Ankara, 2014, ISBN: 978-975-464-895-9, p.174.

1st Family Court stating that it was understood that the father requesting return consented to the relocation and retention of the children thus the decision was in accordance with the procedure and law[75].

Consent to or acquiescence should be regarding the change of the habitual residence of the child. Allowing the other parent to take the child on a vacation for a certain period of time cannot be considered as consent for the removal or retention[76] of the child or changing his or her habitual residence. As in such a case the right to custody is not waived, but the child is allowed to temporarily leave his or her habitual residence for vacation[77].

In a case heard by the Biga Court of First Instance (acting as Family Court) the applicant consented to the children traveling with their mother from Austria to Turkey for vacation. The mother did not return with the children at the end of the holiday and the applicant applied to the Central Authority to obtain a return order of the children. The Biga Court of First Instance (acting as Family Court) rejected the request and dismissed the case with its decision dated 13.03.2012 and file numbered 2011/ 446 E., 2012/107 K. The father expected that the removal was only temporary (for vacation), he had not given clear agreement to the children remaining in Turkey, and at no time did he relinquish his right to make a Convention application. The decision was appealed, and the Court of Cassation 2nd Civil Chamber reviewed the file and accepted the appeal for the following reasons; *"... Although it is true that the children were brought to Turkey from Austria by their mother in February 2011 with the consent of the father, it is understood from the investigation and evidence gathered that the defendant mother unjustly retained the children by not returning later. As a result, it is understood that the father's right of custody and access has been violated. There was no evidence of a grave risk that their return would expose children to physical or psychological danger or otherwise place them in an intolerable situation. The mere age of the children is not sufficient to accept the existence of such a risk. The other reasons stipulated in the Convention which necessitated the rejection of the return request were also not realized in the case. Considering that the provisions of the convention are in the nature of a measure to protect children from the harmful effects of displacement, the return request should be accepted, but the rejection of the request was*

75) Court of Cassation 2nd Civil Chamber, file numbered 2012/24312 E., 2012/29024 K. and dated 03.12.2012. www.karararama.yargitay.gov.tr (last visited on 09 November 2021).

76) Ebru Akduman, *"Uluslararasi Cocuk Kacirmanin Hukuki Yonlerine Dair Lahey Sozlesmesi Uyarinca Koruma ve Ziyaret Hakki" [The Rights of Custody and Access in the Framework of the Hague Convention on the Civil Aspects of International Child Abduction]*, Public and Private International Law Bulletin, Volume 40, Issue 2, 2020, ISSN: 2651-5377, p.1389.

77) Ziya Akinci, *"Milletlerarasi Ozel Hukukta Cocuk Kacirma" [Child Abduction Under Private International Law]*, Galatasaray Universitesi Hukuk Fakultesi Dergisi [Journal of Galatasaray University Faculty of Law], 2011/1, ISSN: 1303-6556, p.72.

not found correct...”[78].

In another similar case heard by the Bursa 5th Family Court, the defendant mother brought her child from her habitual residence Belgium to Turkey for summer vacation on 17.07.2012 and did not return to Belgium as she was supposed to on 09.08.2012, but unjustly retained the child, violating the father’s right to custody. The applicant (father) applied to the Belgian Central Authority for the return of the child to his habitual residence in accordance with the provisions of the Convention. The Bursa 5th Family Court rejected the request and dismissed the case with its decision dated 30.12.2013 and file numbered 2013/537 E., 2013/1019 K. The decision was appealed, and the Court of Cassation 2nd Civil Chamber reviewed the file and accepted the appeal for the following reasons; *“... it is understood from the investigation and evidence gathered that the defendant mother brought her child from his habitual residence Belgium to Turkey for a vacation but did not return to Belgium on 09.08.2012 and thus unjustly retained the child, violating the father’s right to custody. It is understood that the father made an application to the Belgian Central Authority on 28.09.2012, before one year had passed, for the return of the child to his habitual residence in accordance with the provisions of the Convention. The existence of a grave danger that will necessitate the refusal of the return request or a grave risk that the return will expose the child to physical and psychological danger or otherwise put him in an intolerable situation (Convention. Art. l3/b) and other reasons for avoiding return accepted in the Convention had not been proven. The child’s getting used to the environment he is with his mother is not accepted as a reason for avoiding return in the Convention. As a result, the decision to be taken is a temporary measure that allows the return to the situation before the retention. Such decision does not prevent the relevant court from arranging custody separately. For the reasons explained, a decision of return should be given by the court, but the rejection of the request was not found correct ...”*[79].

In a very recent case, the Court of Cassation 2nd Civil Chamber drew attention to the following issues in its decision subject to the appeal review: *“... it is understood from the evidence gathered that the defendant mother brought her child from her habitual residence Switzerland to Turkey in August 2019 and thus unjustly retained the child by violating the father’s right to custody. Violation of the law according to the provisions of the Convention had occurred (Convention Article 3). There was no evidence or fact that there*

78) Translated by the author. For the Turkish text of the decision please see; Court of Cassation 2nd Civil Chamber, file numbered 2012/10227 E., 2012/15537 K. and dated 07.06.2012. www.karararama.yargitay.gov.tr (last visited on 09 November 2021).

79) Translated by the author. For the Turkish text of the decision please see; Court of Cassation 2nd Civil Chamber, file numbered 2014/5428 E., 2014/7050 K. and dated 27.03.2014. www.karararama.yargitay.gov.tr (last visited on 09 November 2021).

was a grave risk that the child's return would expose the child to physical or psychological danger or otherwise place her in an intolerable situation. There are no grounds for rejecting the return request. For the reasons explained, it is wrong to decide to reject the case when it should be accepted, and it required annulment ..."[80].

It should be noted that in most of the cases it is used as a defence to a claim of wrongful removal or retention of a child that the applicant had consented to or subsequently acquiesced in the removal or retention[81]. The existence of consent or acquiescence in the removal of a child must be clear and proven without any room for doubt[82].

3.3. Grounds for Refusal of Return Requests Pursuant to Article 13/1 (b) of the Convention and the Turkish Jurisprudence

This article is one of the exceptional provisions regulated by considering that a return order of the child to his or her habitual residence may be contrary to the child's interests. It is worth to note that this article is the most frequently used exception for the rejection of the child's return requests in Turkey. According to this article, if 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 judicial or administrative authority of the requested State may refuse such return request. In order for the return request to be rejected, three different situations are stipulated in the article and at least one of them must exist. These are (i) exposure of the child to physical danger, (ii) exposure of the child to psychological danger and (iii) exposure of the child to an intolerable situation[83]. In these three cases, the judicial or administrative authorities of the requested State have the power to refuse the return of the child. The definition of "grave risk" is not made in the Convention[84] and in practice, States interpret the concept of "grave risk" in different

80) Translated by the author. For the Turkish text of the decision please see; Court of Cassation 2nd Civil Chamber, file numbered 2021/3172 E., 2021/3190 K. and dated 19.04.2021 www.kazanci.com.tr (last visited on 09 November 2021).

81) Gonca Gulfem Bozdag, *"Uluslararasi Cocuk Kacirmanin Hukuki Yonlerine Dair Lahey Sozleşmesi Kapsaminda Cocugun Iadesi Talebinin Red Nedenleri" [the refusal Reasons of the return of the child in the scope of the Hague Convention on the Civil Aspects of International Child Abduction]*, Yetkin Yayinlari, Ankara, 2014, ISBN: 978-975-464-895-9, p.100.

82) Faruk Kerem Giray, *"Milletlerarasi Ozel Hukukta Kacirilan ve Alikonan Cocuklarin Iadesi" [Return of Abducted and Retained Children under International Private Law]*, Beta, Istanbul 2010, ISBN: 978-605-377-211-8, p.130–131.

83) Guide to Good Practice Under the 1980 Convention – Part VI: Article 13(1)(b), Published by The Hague Conference on Private International Law – HCCH Permanent Bureau, ISBN 978-94-90265-93-9, p.25

84) Kutlay Telli, *"The Role of Central Authorities in the Application of the 1980 Hague Convention on Child Abduction: A Critical Analysis of a Genuine Area of Public International Law"*, Uyusmazlik Mahkemesi Dergisi [Journal of Court of Jurisdictional Disputes], June 2015, Issue 5, ISSN: 2147-8376, p.771.

ways[85]. In order to remove differences in practice and to determine a uniform practice between States party to the Convention the HCCH adopted the Guide to Good Practice Under the 1980 Convention – Part VI: Article 13(1)(b). According to such Guide to Good Practice, "*… the term "grave" qualifies the risk and not the harm to the child. It indicates that the risk must be real and reach such a level of seriousness to be characterised as "grave". As for the level of harm, it must amount to an "intolerable situation", that is, a situation that an individual child should not be expected to tolerate. The relative level of risk necessary to constitute a grave risk may vary, however, depending on the nature and seriousness of the potential harm to the child …*"[86]. The danger and risk must either already exist or, if not, be highly probable rather than ordinary. Therefore, an intangible possibility should not be regarded as a grave risk in the event of the child's return.

It is the abductor who must prove that the child will face a grave risk if a return order is issued and the courts must evaluate each case separately and interpret Article 13/1 (b) of the Convention very narrowly[87]. According to the Explanatory Report, the exceptions referred in Article 13 *"are to be interpreted in a restrictive fashion if the Convention is not to become a dead letter"*[88]. It should be noted that the ultimate aim of the Convention is to reject the international phenomenon of parental child abduction and the new situation created by the abducting parent by the contracting States. Therefore, a delicate balance must be established between the ultimate goal of the Convention, the issue of the prompt return of the child, and the exceptional grounds for refusal of return requests and the interests of the child[89]. The Court of Cassation pointed out in its established jurisprudence that a report from a specialist, such as a social worker, psychologist or pedagogue, should be obtained on whether there is a grave risk that the child will be exposed to physical or psychological danger in the event of return, or that he or she will be placed in an otherwise intolerable situation[90].

85) Rachel Koehn, "Family Law Frustrations: Addressing Hague Convention Issues in Federal Courts", Baylor Law Review, Vol.69, No.3, Fall 2017, ISSN: 0005-7274, P.645.

86) Guide to Good Practice Under the 1980 Convention – Part VI: Article 13(1)(b), Published by The Hague Conference on Private International Law – HCCH Permanent Bureau, 2020, ISBN 978-94-90265-93-9, p.26.

87) Fatma Betul Ozdemir, *"Uluslararası Cocuk Kacirma ve Kacirilan Cocuklarin Iadesi" [International Child Abduction and Extradition]*, Marmara Universitesi Hukuk Fakultesi Hukuk Arastirmalari Dergisi [Legal Research Journal of Marmara University Faculty of Law], 25/2, December 2019, ISSN: 2146-0590, p.1181.

88) Elisa Perez-Vera, *"Explanatory Report"*, https://assets.hcch.net/docs/a5fb103c-2ceb-4d17-87e3-a7528a0d368c.pdf (last visited on 09 November 2021).

89) Sebnem Nebioglu Oner, *"Uluslararası Cocuk Kacirmanin Hukuki Yonlerine Dair Lahey Sozlesmesi: Amaci, Uygulamasi ve Kisa Bir İctihat Analizi", [The Hague Convention on the Civil Aspects of International Child Abduction: The Scope, Implementation and a Short Analyses of Jurisprudence]*, Union of Turkish Bar Associations Review, Volume 115, November/ December 2014, ISSN: 1304-2408, p.496.

90) Court of Cassation Assembly of Civil Chamber, file numbered 2013/2-769 E., 2014/142 K. and dated 26.02.2014; please also see Court of Cassation 2nd Civil Chamber, file numbered 2016/10737 E., 2016/13560 K. and dated 05.10.2016; www.kararama.yargitay.gov.tr (last visited on 09 November 2021).

Examples of grave risks of physical harm to the child are the presence of domestic violence, sexual harassment, or war, famine, and/or epidemic in the country to which they are to be returned. The Court of Cassation reveals that Article 13/1 (b) of the Convention should be interpreted narrowly, and it refers to some of the serious situations in the following decision: *"... Article 13/1 (b) of the Hague Convention on the Civil Aspects of International Child Abduction should be interpreted very narrowly. If the child is returned, there is a serious danger that he or she will be exposed to violence or abuse, or if there are serious situations such as famine, epidemic or war, it should be avoided. The fact that the child is too young in itself does not constitute a reason for the rejection of the request. ..."*[91].

It is necessary to accept that there is a grave risk that the father or mother is indifferent to the child, engages in acts of physical violence against the child, that the child's psychological and physical development is endangered if he or she is returned to his or her habitual residence[92].

Examples of grave risks that psychologically harm a child are the psychological destruction and psychological trauma that will result in the separation of the child from the abductor. In one case, the Court of Cassation drew attention to the following: *"...The minutes kept during the personal meeting and the father's dialogues and statements in front of little Mina, the fact that the child will be deprived of the mother's love and affection that she needs in her childhood if the child's return is decided will expose the child to a physical and psychological danger. It is clear that there is a grave risk that the separation of the child creates a mental risk as set out in Article 13/1 (b) of the Convention, that the father's insensitive behaviours towards the child, according to the scope of the file, will pose a danger to the mental development of the 2-year-old child, and that the father's communication structure reflected in the minutes will put her in an intolerable situation. Thus, in this case, it is necessary to accept the existence of a grave situation that requires avoidance of return of the child..."*[93].

Extreme poverty or domestic violence can be given as examples of the grave risk to the

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91) Translated by the author. For the Turkish text of the decision please see; Court of Cassation 2nd Civil Chamber, file numbered 2004/10536 E., 2004/11797 K. and dated 14.10.2004 www.kararara ma.yargitay.gov.tr (last visited on 09 November 2021). Please also see; Court of Cassation 2nd Civil Chamber, file numbered 2009/17810 E., 2009/18611 K. and dated 02.11.2009.

92) Court of Cassation 2nd Civil Chamber, file numbered 2017/6098 E., 2017/12945 K. and dated 20.11.2017 www.kararara ma.yargitay.gov.tr (last visited on 09 November 2021).

93) Translated by the author. For the Turkish text of the decision please see; Court of Cassation Assembly of Civil Chamber, file numbered 2010/2-628 E., 2010/693 K. and dated 22.12.2010; www.kararara ma.yargitay.gov.tr (last visited on 09 November 2021).

child, resulting in an intolerable situation if returned. Especially domestic violence is one of the most important problems that needs to be overcome. Many domestic violence incidents happen in the presence of children and children witnessing violence hear screams, begging, shouting and sobs. The negative effects of domestic violence on children are severe. It is known that the mental health of children who witness or sense the violence of one of their parents to another is seriously affected. In this regard, children who witness domestic violence are faced with very difficult and traumatic situations such as behavioural problems, school adjustment problems, starting to exhibit abusive behaviours and believing that they are responsible for violence at home. Thus, it is quite natural that the abducting parent wants to protect the child from these harms. However, domestic violence against the other parent is not among the reasons for refusing return requests, and the contracting States show different practices in this regard. There is no doubt that the grounds for refusal of a child's return will be applied if domestic violence is directed against the child, as the child will be physically and psychologically harmed. The problem arises when domestic violence is directed at the other parent, especially the mother who is the primary caregiver of the child[94]. What will happen in such situations? It is obvious that if the mother fleeing from domestic violence has also abducted her child, the child will probably fall into an intolerable situation, although there will be no direct physical harm to the child[95].

In a case heard by the Uskudar 2nd Family Court, the mother abducted the child to Turkey and claimed that the applicant used violence on her, which also caused psychological harm to the child. The defendant mother argued that it would be an intolerable situation for the child if a return order was issued. The Court observed that although the father did not directly harm the child's physical health, it was observed that the psycho-social development of the child was adversely affected due to the physical and psychological violence he applied to his wife, and the child was reactive to the father. Therefore, the Court concluded that there would be a grave risk that the child would be exposed to psychological danger if a return order was issued, and it was decided to reject the request for return[96]. Although the court rejected the request for the child's return due to the

94) Onur Can Saatcioglu, *"Uluslararasi Cocuk Kacirmanin Hukuki Vecheleri Hakkinda Sozlesme m.13/1-b Hukmu Kapsaminda "Ev Ici Siddet" Olgusu: Elestirel Bir Degerlendirme" [Convention on the Civil Aspects of International Child Abduction Article 13/1(b) and "Domestic Violence": A Critical Review]*, Public and Private International Law Bulletin, Volume 40, Issue 1, 2021, ISSN: 2651-5377, p.7.

95) Ali Gumrah Toker, *"Uluslararasi Cocuk Kacirmanin Hukuki Yonlerine Dair Lahey Sozlesmesi Kapsaminda Cocugun Mutad Meskeni Kavrami" [The Concept of the Habitual Residence of a Child within the Scope of the Hague Convention on the Civil Aspects of International Child Abduction]*, Adalet Yayinevi, Ankara, 2020, ISBN: 978-605-300-938-2, p.99.

96) For the decision of the Uskudar 2nd Family Court file numbered 2006/483 E., 2007/207 K. and dated 19.04.2007 please see; Tugce Takci, *"Uluslararasi Cocuk Kacirmanin Hukuki Vecihelerine Dair Lahey Sozlesmesinin Uygulanmasinda Karsilasilan Bazi Sorunlar ve Bu Sorunlara Cozum Onerileri" [Implementation*

potential psychological danger, it is obvious that this situation also creates an intolerable situation for the child if a return order is issued.

Another example of an intolerable situation is the Covid 19 pandemic. As of the date of this paper, almost 340 million confirmed Covid 19 cases and roughly 5.5 million deaths globally have been reported by the World Health Organization. There is no single region in the world that Covid 19 has not affected. However, the situation is not the same everywhere. In some countries the numbers are low due to the high-level measures implemented. Unfortunately, in some countries the infection numbers and death toll are on rise. Thus, it is understandable that Covid 19 may be used as a justification for refusing return requests by the courts, as a grave risk for the child as stated in article 13/1 (b) of the Convention.

The Covid 19 pandemic has caused problems for parents and children meeting in different countries, travel restrictions, closure of international borders, quarantine processes, and closure of courts and postponed hearings[97]. As part of the measures to combat the Covid 19 pandemic in Turkey, on 13 March 2020, the Council of Judges and Prosecutors recommended that all hearings should be postponed except for hearings concerning detained suspects and other urgent matters. In this regard, the General Assembly of the Grand National Assembly of Turkey enacted Law numbered 7226 to suspend the time limits in legal proceedings retrospectively from 13 March 2020 until 30 April 2020[98]. The suspended period was extended from 1 May 2020 until 15 June 2020 with the Presidential Decree numbered 2480[99]. However, the pandemic did not vanish and almost one year later, on 26 April 2021 nation-wide curfew measures had to be implemented starting from 29 April 2021 until 17 May 2021. Accordingly, the Council of Judges and Prosecutors decided that all pending hearings, negotiations and court surveys and proceedings before the civil and administrative courts of first instance and regional courts of appeal should be postponed as from 29 April 2021 until 17 May 2021[100]. Thus, Covid 19 seriously affected the judicial procedures, including the procedures arising from the Convention in Turkey.

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of the Hague Convention on the Civil Aspects of International Child Abduction, Problems Encountered and Suggestions for Solution], Turkiye Adalet Akademisi Dergisi [Journal of Turkish Justice Academy], Year:5, Issue: 19, October 2019, ISSN: 1309-6826, p.1059, 1060.

97) Martina Drventic, *"Covid-19 Challenges to the Child Abduction Proceedings"*, EU and Comparative Law Issues and Challenges Series (ECLIC), Issue 5, ISSN (Online) 2459-9425, p.632. Please see; https://hrcak.srce.hr/ojs/index.php/eclic/article/view/18323/10019 (last visited on 09 November 2021).

98) Official Gazette no.: 31080, 26 March 2020, https://www.resmigazete.gov.tr/eskiler/2020/03/20200326M1-1.htm (last visited on 09 November 2021).

99) Official Gazette no.: 31114, 30 April 2020, https://www.resmigazete.gov.tr/eskiler/2020/04/20200430-1.pdf (last visited on 09 November 2021).

100) Full closure measures taken by the Council of Judges and Prosecutors, https://www.hsk.gov.tr/Eklentiler/files/KARAR-27-04-2021.pdf (last visited on 09 November 2021).

The same situation occurred in many countries across the world. Being aware of all the issues and concerns, the HCCH prepared the "Toolkit for the 1980 Child Abduction Convention in Times of Covid-19"[101] (hereinafter referred to as the "Toolkit"). The primary aim of the Convention has been reiterated in the Toolkit, and it has been emphasised that cases should be considered and dealt with on a case-by-case basis. It is understood from the Toolkit, that it has been accepted by the HCCH that the Covid 19 epidemic in the country where the child's return is requested may be a reason for refusal of the child's return to his or her habitual residence.

Apart from the Toolkit, also according to the Guide to Good Practice Under the 1980 Convention – Part VI: Article 13(1)(b), risks threatening the health of the child in case of return may cause the rejection of the return. Considering that the health system is blocked in many countries due to the speed of the pandemic, the accessibility and functioning of the health system of the country for which the child's return is requested should also be evaluated in terms of the child's best interests[102]. Since the situation regarding the pandemic is in a constant state of flux, this makes it even more difficult for the courts and or Central Authorities to decide on the return of the child. Thus, as stated in the Toolkit, each case needs delicate consideration of the child's best interests. As of the date of this paper, I did not find any data regarding the refusal of return request of the child to his or her habitual residence due to Covid 19 in the Turkish judiciary. The Permanent Bureau of the HCCH prepared a list of case laws of some contracting States related to the Covid 19 situation[103].

As an example of a case related to the Covid 19 situation heard by the Higher Regional Court of Thuringia, Germany, in the case of OLG Thüringen - 1 UF 11 20 - 17 March 2020, the Youth Welfare Office applied to have enforcement of the return order deferred for a limited period due to the COVID-19 pandemic. The Court discussed whether the Covid 19 situation would cause "grave risk" and concluded that; *"... no impediments existed to the child entering Australia. The obligation to undertake self-isolation for 14 days upon arrival did not endanger the child's well-being or pose a grave risk of harm. The short stopover in Dubai changed nothing about this as according to the information*

101) HCCH, Toolkit for the 1980 Child Abduction Convention in Times of Covid-19, https://assets.hcch.net/docs/2aee3e82-8524-4450-8c9a-97b250b00749.pdf (last visited on 09 November 2021).

102) Lale Ayhan Izmirli, *"Milletlerarasi Cocuk Kacirmanin Hukuki Yonlerine dair Lahey Sozlesmesi'nin 13/1-B Maddesi Baglaminda Covid 19 Pandemisinin Cocugun Mutad Meskenine İadesine Etkisi" [The Effect of Covid 19 Pandemic on the Return of the Child in the Context of Article 13/1-B of the Hague Convention on the Civil Aspects of International Child Abduction]*, Yildirim Beyazit Law Review, Issue: 2021/2, ISSN: 2149-5831, p.478.

103) "Case law on the HCCH 1980 Child Abduction Convention related to the COVID-19 situation", https://assets.hcch.net/docs/07dd6176-e736-4487-ae33-f354cd0d97fb.pdf (last visited on 09 November 2021).

available to the court, the onward flight to Australia was guaranteed to take place…"[104]

In the case of AX v CY [2020] EWHC 1599 (Fam), heard by The High Court of Justice Family Division, the United Kingdom, the Court stated that it was aware of the Covid 19 situation and stated that; *"… All the defences raised by M fail. It follows that an order for return shall be made. I am conscious that with the current state of travel between England and Spain severely curtailed by the Covid-19 pandemic, it may take a little time to organise a safe return, but I expect it to take place as soon as reasonably practicable …"*[105].

All the cases listed in the HCCH's list are dated back to the first half of 2020, which go back to early days of the pandemic, at which stage there was limited information with regard to the disease and it was thought at that time that children were not at risk of coronavirus[106]; thus, the courts took nearly the same approach and did not consider Covid 19 as a grave risk to the child. However, recent data shows us that children are also affected by Covid 19 and the long-term effects of Covid 19 are not known yet. Thus, with such limited knowledge, assuming that children do not constitute a risk group is not a valid or a wise argument. Covid 19 can be fatal and has a severe disease course. It is transmitted very quickly and easily despite all precautions and vaccination does not provide 100 percent protection. Moreover, Covid 19 mutates very fast. Considering the effects of Covid 19, the epidemic poses a serious danger. As stated, previously, pursuant to Article 13/1 (b) of the Convention, the court sought shall not be required to order the return of the child if it determines that there is a grave risk that his or her return will place him or her in an intolerable situation. Although it is a controversial issue, the Covid 19 pandemic can be considered within the scope of Article 13/1 (b) which may place the child in an intolerable situation. However, this shall not encourage parents to use the risk associated with Covid 19 as a shield to justify wrongful removal or retention of the child outside his or her habitual residence. Therefore, although it is a very difficult task, all competent authorities and courts dealing with return requests must carefully evaluate each application on a case-by-case basis as advised in the Toolkit, so that the child should not

104) For case OLG Thüringen - 1 UF 11 20 - 17 March 2020 please see; https://www.incadat.com/en/case/1475 (last visited on 09 November 2021).

105) For case AX v CY [2020] EWHC 1599 (Fam) please see; https://www.incadat.com/en/case/1462 (last visited on 09 November 2021).

106) Please see paragraph 47 of the judgment of case KR v HH [2020] EWHC 834 (Fam) rendered by The High Court of Justice Family Division, United Kingdom; *"…it appears that those who are considered most at risk of serious complications from coronavirus are the elderly and those with underlying health conditions. Neither [the child], nor her parents, fall within this category. children did not fall into the category of the elderly or those with underlying health condition …"*; https://www.incadat.com/en/case/1460 (last visited on 09 November 2021).

be put in grave risk or, on the contrary, that the Covid 19 pandemic does not become a general excuse for justifying the wrongful removal or retention of the child.

3.4. Grounds for Refusal of Return Requests Pursuant to Article 13/2 of the Convention and the Turkish Jurisprudence

According to Article 13/2 of the Convention, 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 appropriate to take account of his or her views. According to this article, even if one year has not passed since the child's abduction date and it is proven that the child's habitual residence is in the requesting state and there are no grounds for refusing return request, if the court considers the child's age and maturity to be sufficient and the child also objects to return to his or her habitual residence, then the request for return may be rejected.

This article is also in compliance with Article 12 of the United Nations Convention on the Rights of the Child[107]. Moreover, the European Convention on the Exercise of Children's Rights[108] guarantees the right of children to express their views in cases that concern them. In Articles 3[109] and 6[110] of the European Convention on the Exercise of Children's

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107) Article 12 of the United Nations Convention on the Rights of the Child: *"1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law". For the United Nations Convention on the Rights of the Child please see; https://treaties.un.org/doc/Treaties/1990/09/19900902%2003-14%20AM/Ch_IV_11p.pdf (last visited on 09 November 2021).

108) For the European Convention on the Exercise of Children's Rights please see; https://rm.coe.int/european-convention-on-the-exercise-of-children-s-rights/1680a40f72 (last visited on 09 November 2021).

109) Article 3 of the European Convention on the Exercise of Children's Rights: *"A child considered by internal law as having sufficient understanding, in the case of proceedings before a judicial authority affecting him or her, shall be granted, and shall be entitled to request, the following rights:*

a) to receive all relevant information;

b) to be consulted and express his or her views;

c) to be informed of the possible consequences of compliance with these views and the possible consequences of any decision".

110) Article 6 of the European Convention on the Exercise of Children's Rights: *"In proceedings affecting a child, the judicial authority, before taking a decision, shall:*

a) consider whether it has sufficient information at its disposal in order to take a decision in the best interests of the child and, where necessary, it shall obtain further information, in particular from the holders of parental responsibilities;

b) in a case where the child is considered by internal law as having sufficient understanding:

Rights, a child who is accepted by domestic law as having sufficient understanding is given the right to express his or her opinion in cases affecting him or her before the judicial authority, and moreover, the judicial authority gives due importance to the opinion expressed, unless it clearly contradicts the best interests of the child.

Since Turkey is also a party to both the United Nations Convention on the Rights of the Child, and the European Convention on the Exercise of Children's Rights, when rendering its decisions, the Turkish Judiciary takes into consideration the statement of the child who attained an age and degree of maturity. In this regard, the Court of Cassation Assembly of the Civil Chamber stated in its decision that even if there is no other reason to reject the return request, the child must be listened to and if the child has the ability to form his or her views independently of his or her parents due to his or her age then such statement of the child must be taken into consideration[111].

The child's opinion may not be in line with the child's interests in some cases, in such circumstances the purpose of the Convention should be considered. If the child is not of appropriate age, then his or her opinion with regard to return or not shall not be taken into consideration by the court[112]. However, it should also be noted that there is no specific age

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– ensure that the child has received all relevant information;

– consult the child in person in appropriate cases, if necessary privately, itself or through other persons or bodies, in a manner appropriate to his or her understanding, unless this would be manifestly contrary to the best interests of the child;

– allow the child to express his or her views;

c) give due weight to the views expressed by the child".

111) Court of Cassation Assembly of Civil Chamber, file numbered 2013/2-1772 E., 2013/1557 K. and dated 13.11.2013; *"... Although the court has given a return order on the grounds that the conditions in Article 13/1 (b) of the Convention are not met, a separate evaluation should be made in terms of other reasons stipulated in the Convention for refusal of return requests. Gizem was born in 1999 and has the ability to form her views independently of her parents due to her age at the time she was listened to. In her statement she said that she wanted to stay with her mother in Turkey and stated she did not want to return to her father. Since it is not claimed and proven that the child's stay with her mother is against the principle of the best interests of the child, the request for return should be rejected ...",* translated by the author, www.kazanci.com.tr (last visited on 09 November 2021),. Please also see; Court of Cassation 2nd Civil Chamber, file numbered 2007/15728 E., 2007/16679 K. and dated 29.11.2007; *"... The child is 14 years old. this child has reached an age and maturity at which it would be appropriate to have his opinion taken into account. He was heard at the hearing and stated that he did not want to return. There is no evidence or fact that the child's refusal to return is contrary to the child's best interests. If the judicial or administrative authority considers that the child does not want to return and has reached an age and maturity at which it would be appropriate to consider his opinion, he may refuse the request to return ...",* translated by the author, www.karararama.yargitay.gov.tr (last visited on 09 November 2021).

112) Court of Cassation 2nd Civil Chamber, file numbered 2011/10673 E., 2011/22032 K. and dated 14.12.2011; *"... Since the children have not reached an age and maturity where their views are appropriate, their requests that they do not want to return are not effective in the result ...",* translated by the author, www.karararama.

limit for the child's opinion to be taken into consideration. The Convention leaves the minimum age at which the opinion of the child should be taken into account to the discretion of the competent authorities[113]. It should be ensured that the child decides on his or her free will, without being influenced by anyone, understanding the consequences of his or her decision in general.

3.5. Grounds for Refusal of Return Requests Pursuant to Article 20 of the Convention and the Turkish Jurisprudence

According to Article 20 of the Convention, the judicial or administrative authority may refuse to order the return of the child if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms. According to this article, even if the removal or retention of the child from the country of habitual residence is wrongful, the court may reject the request for return for the purpose of protecting human rights. For example, a request for return may be refused if the child will become a refugee if returned or the child will be treated in violation of human rights in the country of habitual residence because of his or her racial, religious or ethnic identity[114]. This article shall not be interpreted broadly and while evaluating this article, the competent authorities and courts shall not go beyond the scope of universally accepted human rights regulations. As of the date of this paper I did not find any data regarding the refusal of return request of the child to his or her habitual residence due to Article 20 of the Convention in the Turkish judiciary.

PART II – EVALUATION OF THE INDIVIDUAL APPLICATION JUDGMENTS OF THE TURKISH CONSTITUTIONAL COURT

In this part of my paper, I will examine the recent individual application judgments of the Turkish Constitutional Court regarding violations of human rights with respect to international parental child abduction disputes. Before explaining the judgments of the Constitutional Court, it is essential to give some basic information about individual application procedures and the Turkish Constitutional Court.

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yargitay.gov.tr (last visited on 09 November 2021).

113) Elisa Perez-Vera, *Explanatory Report*, p.430, para.30; *"... all efforts to agree on a minimum age at which the views of the child could be taken into account failed, since all the ages suggested seems artificial, even arbitrary. It seemed best to leave the application of this clause to the discretion of the competent authorities."*, https://assets.hcch.net/docs/a5fb103c-2ceb-4d17-87e3-a7528a0d368c.pdf (last visited on 09 November 2021).

114) Ziya Akinci, *"Milletlerarasi Ozel Hukukta Cocuk Kacirma" [Child Abduction Under Private International Law]*, Galatasaray Universitesi Hukuk Fakultesi Dergisi [Journal of Galatasaray University Faculty of Law], 2011/1, ISSN: 1303-6556, p.76.

1. Basic Information of Individual Application Procedures and The Turkish Constitutional Court

The individual application, or in other words the constitutional complaint mechanism, was introduced into the Turkish legal system by the 2010 constitutional amendments, and as of 23 September 2012, a person claiming that one or more of his or her fundamental rights and freedoms within the scope of the European Convention on Human Rights guaranteed by the Constitution was violated by public authorities can lodge a complaint with the Turkish Constitutional Court[115]. This mechanism was inspired by the European Court of Human Rights and the main aim of the individual application mechanism is to create a more effective domestic remedy for the violation of fundamental rights and freedoms. Moreover, the individual application procedure has a significant impact on the protection and development of human rights as each individual application judgment guides public authorities to foster understanding and promoting human rights. Unfortunately, the Constitutional Court has no right to examine an instance *ex officio*. In order for the Constitutional Court to examine a violation, there must be a complaint lodged with the Constitutional Court by an individual, on the basis that his or her right has been violated by the public authorities.

It should be noted that individual application is not an additional remedy of appeal. It is an extraordinary complaint mechanism established to protect individuals' fundamental rights against state encroachment[116].

In order to have the right to apply to the Constitutional Court, the applicant must first exhaust all ordinary legal remedies. It is very important to mention that the application must be lodged within thirty days starting from the exhaustion of legal remedies, or from the date when the violation is known, if there is no other remedy[117].

The European Court of Human Rights has acknowledged that the Turkish Constitutional Court constitutes an effective remedy for violations of fundamental rights and freedoms. The European Court of Human Rights also stated that anyone wishing to lodge an

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115) Article 148 paragraph 5 of the Constitution of the Republic of Turkey: *"(Paragraph added on September 12, 2010; Act No.5982) Everyone may apply to the Constitutional Court on the grounds that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public authorities. In order to make an application, ordinary legal remedies must be exhausted"*.

116) Korkut Kanadoglu, *"Anayasa Mahkemesi'ne Bireysel Basvuru" [Individual Application to the Constitutional Court]*, On iki levha Yayincilik, Istanbul, 2015, ISBN: 978-605-152-252-4, p.41, 42.

117) Article 47/5 of Law No.6216 dated 30 March 2011 on the Establishment and Rules of Procedure of The Constitutional Court.

application with the European Court of Human Rights against Turkey must first exhaust domestic remedies, which also includes submitting an individual application to the Turkish Constitutional Court[118].

The Constitutional Court examines the individual application and decides whether fundamental rights of the applicant have been violated or not. In case of a decision of violation, the actions to be taken in order to eliminate the violation and its consequences are determined in the judgments of the Constitutional Court. If the violation was caused by a court decision, the Constitutional Court sends the file to the relevant court for retrial in order to eliminate the violation and its consequences. In cases where there is no legal benefit in retrial, compensation may be awarded in favour of the applicant[119].

International parental child abduction is an act that interferes with the right to respect for family life of both the parent and the child. Therefore, when dealing with international parental child abduction disputes, it is vital that all state authorities comply with their positive obligations within the scope of the right to respect for family life, which is guaranteed in articles 20[120] and 41[121] of the Constitution. Thus, in individual applications related to international child abduction disputes, the Turkish Constitutional Court examines whether positive obligations regarding the right to respect for family life have been fulfilled, whether the relevant judicial processes have been completed promptly, and whether the right to a fair trial has been complied with.

The Constitutional Court deals with disputes related to international parental child abduction. The first individual application lodged with the Turkish Constitutional Court relating to an international child abduction dispute was the application of Marcus Frank

118) Please see; Uzun v. Turkey 10755/13 Decision 30.4.2013 [Section II] of the European Court of Human Rights. Please also see; Slavica Burmazovic v. Turkey 13178/18 Decision 01.10.2020 [Section II] of the European Court of Human Rights, https://hudoc.echr.coe.int (last visited 09 November 2021).

119) Article 50 of Law No.6216 on the Establishment and Rules of Procedure of The Constitutional Court.

120) Article 20 paragraph 1 of the Turkish Constitution: *"Everyone has the right to demand respect for his/her private and family life. Privacy of private or family life shall not be violated"*.

121) Article 41 of the Turkish Constitution: *"ARTICLE 41- (Paragraph added on October 3, 2001; Act No.4709) Family is the foundation of the Turkish society and based on the equality between the spouses.*

The State shall take the necessary measures and establish the necessary organization to protect peace and welfare of the family, especially mother and children, and to ensure the instruction of family planning and its practice.

(Paragraph added on September 12, 2010; Act No.5982)

Every child has the right to protection and care and the right to have and maintain a personal and direct relation with his/her mother and father unless it is contrary to his/her high interests.

(Paragraph added on September 12, 2010; Act No.5982)

The State shall take measures for the protection of the children against all kinds of abuse and violence".

Cerny[122]. Some of the individual applications lodged with the Turkish Constitutional Court with regard to violations of human rights in international parental child abduction disputes are Angela Jane Kilkenny – Application Number 2015/10826[123]; Cem Ramazan Ninek – Application Number 2015/13760[124]; Ali Korkmaz – Application Number 2019/26899[125]; Mehmet Emin Balcı – Application Number 2015/10459[126]; Dilek Tsakiridis – Application Number 2018/35068[127]; and Nuray Öztürk – Application Number 2017/38142[128].

2. The Turkish Constitutional Court's Judgment on the Marcus Frank Cerny Case (Application No.: 2013/5126)

The conflict: In this case, the applicant claimed that his right to demand respect for his family life was violated since the application he filed within the scope of the Convention was dismissed.

The facts of the case: The applicant, a citizen of the USA, and A.A., a Turkish citizen, have a child who was born on 31/5/2011. The applicant applied to the U.S. State Department to initiate the return procedures within the scope of the Convention, claiming that his child was unlawfully removed from his habitual residence and was not allowed to return. The request was conveyed by the U.S. State Department to the Ministry of Justice of Turkey. The Directorate General for International Law and Foreign Relations of the

122) Marcus Frank Cerny (Application Number 2013/5126) Judgment dated 02.07.2015 of the Turkish Constitutional Court, https://kararlarbilgibankasi.anayasa.gov.tr/BB/2013/5126?Dil=tr (last visited on 09 November 2021).

123) Please see the Angela Jane Kilkenny (Application Number 2015/10826) Judgment dated 17.07.2018 of the Turkish Constitutional Court, https://kararlarbilgibankasi.anayasa.gov.tr/BB/2015/10826 (last visited on 09 November 2021).

124) Please see the Cem Ramazan Ninek (Application Number 2015/13760) Judgment dated 18.07.2018 of the Turkish Constitutional Court, https://kararlarbilgibankasi.anayasa.gov.tr/BB/2015/13760 (last visited on 09 November 2021).

125) Please see the Ali Korkmaz (Application Number 2019/26899) Judgment dated 11.12.2019 of the Turkish Constitutional Court, https://kararlarbilgibankasi.anayasa.gov.tr/BB/2019/26899?KelimeAra%5B0%5D=ya&page=212 (last visited on 09 November 2021).

126) Please see the Mehmet Emin Balcı (Application Number 2015/10459) Judgment dated 08.01.2020 of the Turkish Constitutional Court, https://kararlarbilgibankasi.anayasa.gov.tr/BB/2015/10459 (last visited on 09 November 2021).

127) Please see the Dilek Tsakiridis (Application Number 2018/35068) Judgment dated 09.06.2020 of the Turkish Constitutional Court, https://kararlarbilgibankasi.anayasa.gov.tr/BB/2018/35068 (last visited on 09 November 2021).

128) Please see the Nuray Öztürk (Application Number 2017/38142) Judgment dated 10.06.2020 of the Turkish Constitutional Court, https://kararlarbilgibankasi.anayasa.gov.tr/BB/2017/38142?KelimeAra%5B0%5D=ya&page=96 (last visited on 09 November 2021).

Ministry of Justice of Turkey conveyed the request to the Chief Public Prosecutor's Office of Ankara for the initiation of the child's return procedures. The Chief Public Prosecutor's Office of Ankara filed a lawsuit with the Ankara 7th Family Court to obtain a return order. The return request was rejected by the Ankara 7th Family Court. According to the court decision, the defendant came to Turkey with the child for her sister's wedding and during her stay she initiated a divorce case against the applicant. In the divorce case it was ruled that temporary custody of the child was granted to the mother, that a personal relation was established between the applicant father and the child, and that the conditions for prompt return as regulated in Article 12 of the Convention did not materialize. Considering the child's age and dependence on the mother it was decided to reject the request. The decision was appealed, but the 2nd Civil Chamber of the Court of Cassation rejected the appeal claims and approved the decision of the Ankara 7th Family Court.

The applicant lodged an individual application with the Constitutional Court. He claimed that (i) the judgment was delivered without examining the claims of the parties and without conducting the necessary expert examination, (ii) the local public prosecutor's participation in the proceedings on behalf of the Ministry of Justice was not ensured, (iii) although the age of the child and the need for the affection and attention of the mother was not listed among the exceptions for refusing return requests in the Convention, this matter was specified in the reasoning of the judgment refusing the return request, (iv) the main purpose of the Convention was to ensure the prompt return of the child, who was wrongfully removed from the habitual residence, and to establish a direct and personal relationship with his or her mother and father (vi) it was necessary to deliver a judgment in line with the provisions of the Convention that was a decree in the force of law as per Article 90[129] of the Constitution (vii) the Convention aimed to execute legal proceedings with regard to custody and the personal relation at the habitual residence of the child without interrupting the relations between the mother, father and child; (viii) the provisions of the Convention on merits and procedure which needed to be applied in the incident by the courts of instance were not taken into consideration, (ix) his personal relationship with his child was prevented, and (x) his rights defined in Articles 36, 41, 90 and 138 of the Constitution were violated[130].

The Constitutional Court's assessment of admissibility: In the admissibility examination, the Court ruled that the application was admissible since the application was not

129) Article 90 paragraph 5 of the Constitution: *"International agreements duly put into effect have the force of law. No appeal to the Constitutional Court shall be made with regard to these agreements, on the grounds that they are unconstitutional. (Sentence added on May 7, 2004; Act No.5170) In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail".*

130) Paragraph 27 of the Marcus Frank Cerny (Application Number 2013/5126) Judgment.

manifestly ill-founded and there was no other reason for its inadmissibility[131].

The Constitutional Court's findings: The Court pointed out that the right to respect for family life is enshrined in Article 20(1) of the Constitution and that Article 41 of the Constitution needs to be taken into consideration especially as regards the assessment of positive obligations in relation to the right to respect for family life[132]. The Court stressed that the main element of family life is the development of family relations in a normal way and, accordingly, the family members' right to live together. According to the Court, it is not possible to consider the scope of this right independently from the liability of respect for family life[133].

The Court highlighted that within the scope of the right to respect for family life, the obligation for the state is not limited to avoiding interference with the stated right, which appears as a negative obligation. In addition to this negative obligation, the state has some positive obligations to effectively respect family life. These positive obligations necessitate taking measures to ensure respect for family life, even in the field of interpersonal relations[134].

The Court cited the *Ignaccolo-Zenide v. Romania (Application No.: 31679/96)* Judgment of the European Court of Human Rights[135] and stressed that the obligation of the state to

131) Paragraph 29 of the Marcus Frank Cerny (Application Number 2013/5126) Judgment.
132) Paragraph 36 of the Marcus Frank Cerny (Application Number 2013/5126) Judgment.
133) Paragraph 38 of the Marcus Frank Cerny (Application Number 2013/5126) Judgment.
134) Paragraph 40 of the Marcus Frank Cerny (Application Number 2013/5126) Judgment.
135) The Constitutional Court cited to paragraph 94 of the *Ignaccolo-Zenide v. Romania* (Application No.: 31679/96) judgment of the European Court of Human Rights: *"... The Court reiterates that the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There are in addition positive obligations inherent in an effective "respect" for family life. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation ... As to the State's obligation to take positive measures, the Court has repeatedly held that Article 8 includes a parent's right to the taking of measures with a view to his or her being reunited with his or her child and an obligation on the national authorities to take such action ... However, the national authorities' obligation to take measures to facilitate reunion is not absolute, since the reunion of a parent with children who have lived for some time with the other parent may not be able to take place immediately and may require preparatory measures to be taken. The nature and extent of such preparation will depend on the circumstances of each case, but the understanding and cooperation of all concerned are always an important ingredient. Whilst national authorities must do their utmost to facilitate such cooperation, any obligation to apply coercion in this area must be limited since the interests as well as the rights and freedoms of all concerned must be taken into account, and more particularly the best interests of the child and his or her rights under Article 8 of the Convention. Where contacts with the parent might appear to threaten those interests or interfere with those rights, it is for the national authorities to strike a fair balance between them ...".* https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58448%22]} (last visited on 09 November 2021).

take positive measures arising from Articles 20 and 41 of the Constitution include the applicant's right to request measures to be taken to ensure that he is reunited with his child, and that public authorities take such necessary measures. It is explicitly stated in Article 41 of the Constitution that every child has the right to have and maintain a personal and direct relationship with his or her mother and father unless it is contrary to his or her best interests. However, this liability is not absolute and the measures to be taken may vary depending on the specific circumstances of each case[136].

The Court highlighted that the right of the mother, father, and children to live together is the essential element of family life and in the event that rights of custody and establishment of a personal relation granted to the other spouse are unlawfully prevented by the mother or the father when the relationship has not legally ceased, the state is under obligation to adopt the required regulatory measures of individual rights protection. Moreover, the Court concluded that international child abduction disputes constitute an important group of cases that require an assessment in the context of the right to respect for family life[137].

The Court outlined the negative impacts of international child abduction on both children and parents. It stressed that the child is not only deprived of contact with the other parent and of love, affection, and protection that he or she needs to receive, but he or she is also taken away from his or her home and environment to a new culture, a different legal system, language, and a social structure, and these differences bring into question serious problems in terms of the right to respect for family life[138]. The Court observed that international child abduction cases require serious international cooperation and that the Convention is a vital instrument for such international cooperation[139].

The Court mentioned that various aspects of the Convention were referred to in many judgments of the European Court of Human Rights and that especially Article 8[140] of the European Convention on Human Rights (hereinafter referred to as the "ECHR") was interpreted in these cases. In addition, the European Court of Human Rights makes

136) Paragraph 41 of the Marcus Frank Cerny (Application Number 2013/5126) Judgment.
137) Paragraph 44 of the Marcus Frank Cerny (Application Number 2013/5126) Judgment.
138) Paragraph 45 of the Marcus Frank Cerny (Application Number 2013/5126) Judgment.
139) Paragraph 46 of the Marcus Frank Cerny (Application Number 2013/5126) Judgment.
140) Article 8 of the ECHR - Right to respect for private and family life
"1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

assessments by considering the provisions and implementation of the Convention in the context of Article 6[141] of the ECHR and especially in relation to the right to trial within a reasonable time[142].

The Court noted that the Convention is also a part of Turkish law and that the provisions of the Convention should be taken into account in determining the positive obligations of the state with regard to the right to respect for family life guaranteed in Articles 20 and 41 of the Constitution[143]. The Court also stated in its judgment that the interpretation of the legislation and the resolution of the dispute are the jurisdiction and responsibility of the courts of instance. According to the Court, the role of the Constitutional Court is limited to determining whether the rules have been interpreted in accordance with the Constitution. For this reason, the Constitutional Court concluded that it has the authority to review the procedure followed by the courts of instance and to determine whether the courts pay regard to the guarantees in Articles 20 and 41 of the Constitution while interpreting and implementing the provisions of the Convention[144].

In the present case, the Court noted that the removal of the child from the USA had an impact on the father's right to custody and it was obvious that the dismissal of the request for the return of the child restricted the applicant's right to establish a relationship with his child and thus constituted an interference in the right to respect for family life[145]. Noting the existence of interference, the Court proceeded with its examination to determine if such interference constituted a violation. In this regard, the Court first examined whether a legal provision existed that authorized the interference. The Court concluded that since Turkey was a party to the Convention and enacted Law 5717, the judgment on the dismissal of the request for the return of the child had a sufficient legal basis[146]. The Court continued its examination whether the interference took place due to a legitimate aim and concluded that the courts of instance pursued a legitimate purpose with the aim to ensure the health and safety of the child and thus, the interference was based on legitimate

141) Article 6 of the ECHR - Right to a fair trial
"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice…"

142) Paragraph 50 of the Marcus Frank Cerny (Application Number 2013/5126) Judgment.

143) Paragraph 53 of the Marcus Frank Cerny (Application Number 2013/5126) Judgment.

144) Paragraph 62 of the Marcus Frank Cerny (Application Number 2013/5126) Judgment.

145) Paragraph 63 of the Marcus Frank Cerny (Application Number 2013/5126) Judgment.

146) Paragraph 68 of the Marcus Frank Cerny (Application Number 2013/5126) Judgment.

grounds[147].

According to Article 13 of the Constitution, fundamental rights and freedoms can only be restricted by or pursuant to a law. The restrictions shall also not be contrary to the spirit of the Constitution, the requirements of the democratic order of the society and the principle of proportionality. Thus, the Court continued its examination whether the interference in the right to respect for family life of the applicant was necessary and proportional in the democratic order of the society.

The Court emphasized that modern democracies are regimes in which fundamental rights and freedoms are ensured and guaranteed in the broadest manner. It should be accepted that the restrictions that make the use of the right significantly difficult or render the right unusable or eliminate it harm the essence of the right. Thus, the restriction of the fundamental rights more than necessary in a democratic society are prevented with the application of the principle of proportionality[148]. After stating this basic principle, the Constitutional Court stated that although it is possible to restrict the right to respect for family life, there should be no disproportionality and a fair balance must be struck between the interest which can be achieved through the restriction and the loss of the individual's fundamental right and freedom due to such restriction. In this context, particularly in disputes related to custody and personal relations it should be determined whether a fair balance was struck between the interests of the parent and the child[149].

In addition, the Constitutional Court cited the relevant judgments of the European Court of Human Rights and highlighted that it must be ascertained whether the relevant courts conducted an in-depth examination of the entire family situation including a whole series of factual, emotional, psychological, material and medical factors. The court's decisions had to be a balanced and reasonable legal assessment of the respective interests of each person, with a constant concern for determining what the best solution would be for the abducted child in the context of an application for his return to his country of origin[150].

The Constitutional Court stated that determination of the best interests of the child is the most important issue to be taken into account in these cases, and that such determination is the duty of the judicial bodies which are directly in contact with the relevant parties. Therefore, the Constitutional Court did not find itself authorised to replace the courts of instance which examine whether there would be a grave risk that the child would be

147) Paragraph 69 of the Marcus Frank Cerny (Application Number 2013/5126) Judgment.
148) Paragraph 72 of the Marcus Frank Cerny (Application Number 2013/5126) Judgment.
149) Paragraph 73 of the Marcus Frank Cerny (Application Number 2013/5126) Judgment.
150) Paragraph 76 of the Marcus Frank Cerny (Application Number 2013/5126) Judgment.

exposed to psychological harm within the context of Article 13 of the Convention, if returned to the USA. However, the Constitutional Court concluded that it has the authority to determine whether the courts of instance ensured the protection of the guarantees set forth in Article 20 of the Constitution, by way of establishing the balance that needs to be struck among the interests of the mother, father, child and the public order while implementing the provisions of the Convention and whether the judgment of the courts of instance on the refusal of the return of the child to the USA is a proportionate interference to the applicant's right for respect for family life[151].

According to the Constitutional Court, the positive obligations of the state within the scope of the right to respect for family life regulated in Article 20 of the Constitution, should also include the measures ensuring that the judicial process is swift, open to the participation of the parties and in compliance with the procedural requirements of the right to a fair trial[152].

The Constitutional Court noted that in the judgment of the court of first instance, the return request was refused on the grounds that (i) the conditions of prompt return as regulated in Article 12 of the Convention did not materialize, and (ii) the child was dependent on the mother. However, the Constitutional Court stressed that the court of first instance had not made any explanation as to whether the presence of the child in Turkey was lawful as per the relevant provisions of the Convention, where the habitual residence to be taken as the basis for the judgment of return was and how it was determined and in which way the conditions of return in Article 12 of the Convention did not materialize. Furthermore, the Constitutional Court also noted that no examination was conducted by the courts of instance with regard to the relevant provisions of exception (i.e. reasons for refusal as stated in Article 13/1 b of the Convention) and their applicability in the present case and no relevant explanation was made. Therefore, the Constitutional Court concluded that the reasonings of the said judgment were not sufficient in terms of the right to respect for family life and that the interference in this right by refusing the return request was not proportionate[153].

The decision of the Constitutional Court: The Constitutional Court decided that the applicant's right to respect for family life guaranteed under Article 20 of the Constitution was violated[154]. Although it was determined that Article 20 of the Constitution was violated and that the applicant also requested a retrial, the Constitutional Court rejected

151) Paragraph 80 of the Marcus Frank Cerny (Application Number 2013/5126) Judgment.
152) Paragraph 81 of the Marcus Frank Cerny (Application Number 2013/5126) Judgment.
153) Paragraph 87 of the Marcus Frank Cerny (Application Number 2013/5126) Judgment.
154) Paragraph 88 of the Marcus Frank Cerny (Application Number 2013/5126) Judgment.

the applicant's retrial request as it was understood that merits of the right to custody and personal relation as a result of the divorce case filed with the Ankara 9th Family Court (2011/1268) became final and a personal relation between the applicant and the child was established. The Constitutional Court also highlighted the fact that the applicant himself also initiated a divorce case in California and that the Supreme Court of California considered that the Turkish courts were competent and authorized to decide on the merits of custody and personal relation. Thus, the Constitutional Court concluded that there was no legal benefit in the holding of a retrial as the merits of the right to custody were decided and personal relation between the applicant and the child was established[155]. The Constitutional Court also stated that although non-pecuniary damages were an appropriate remedy for the removal of the consequences of the violation, it had not deemed necessary to rule on this matter as no request was filed by the applicant with regard to compensation[156].

3. The Turkish Constitutional Court's Judgment on the Ali Korkmaz Case (Application No.: 2019/26899)

The conflict: In this case, the application concerns the allegations that the right to respect for family life had been violated due to the return of the children to their habitual residence.

The facts of the case: The applicant, who is a Turkish citizen and the mother D.V.D.P. a Dutch citizen came to Turkey for the summer holiday in July 2017 with their twin daughters. From the application it is understood that the applicant and the mother of the twin daughters had an argument and that the mother went back to Netherlands alone leaving her daughters back in Turkey. The mother alleged that the applicant retained her daughters unlawfully and did not allow them to return to the Netherlands and filed a complaint with the Chief Public Prosecutor's Office of Sakarya. The Chief Public Prosecutor's Office of Sakarya filed a lawsuit with the Sakarya Family Court to obtain a return order. The mother of the twins claimed that she had the custody rights of the children, that they just came for a vacation to Turkey and she had not agreed that the children should remain in Turkey, that they even had the return tickets to the Netherlands, that she had to go back to the Netherlands alone due to the pressure and threats, that she tried to live together with the applicant since 2010 but that the applicant chose to stay with his wife instead and that the applicant never lived in the same house with the mother and twins, that her daughters were unlawfully retained in Turkey, that the habitual residence of the children was the Netherlands and thus they should be returned to

155) Paragraph 93 of the Marcus Frank Cerny (Application Number 2013/5126) Judgment.
156) Paragraph 94 of the Marcus Frank Cerny (Application Number 2013/5126) Judgment.

Netherlands.

During the trial at the Sakarya Family Court, three expert reports were obtained by the court and, according to the expert reports, it was determined that the children were not mature enough to make a decision about themselves, and that their relationship with their mother was in their best interest. The Sakarya Family Court took the statement of the teacher of the twins and according to such statement it was noted that the twins did not go to school in the 2018/2019 academic year. The Sakarya Family Court accepted the case and decided on the return of the children to the Netherlands, emphasizing that the children had been retained in Turkey since July 2017 in violation of the mother's custody rights, that the mother of the twins requested the return of the children within the legal period, and that it had not been proven that the children would be exposed to physical or psychological harm within the context of Article 13 of the Convention if returned to the Netherlands. The applicant appealed the decision of the Sakarya Family Court. The Sakarya Regional Court of Appeal rejected the appeal requests of the applicant on the grounds that it was understood from the scope of the file that the children were born out of wedlock in the Netherlands, that the parties did not live together due to disagreements, that the mother always took care of the children, that they came to Turkey for the vacation, but the applicant did not want to return and sent the children's mother back to the Netherlands alone and, keeping the children. According to expert reports, the children could not get used to their new environment and living conditions in Turkey, and the claim that the children would be exposed to physical or psychological harm if returned to the Netherlands could not be proven. The applicant appealed the decision of the Sakarya Regional Court of Appeal. The 2nd Civil Chamber of the Court of Cassation rejected the appeal claims and approved the decision.

The applicant lodged an individual application with the Constitutional Court on 06 August 2019. He claimed that the court based its decision on the mother's misleading statements, ruled that the children were retained unlawfully and ordered their return, that the court did not consider the holiday photos, airline tickets and hotel reservations, that the children were not consulted and heard in front of the court, that the new environment of the children was not considered within the concept of the best interests of the child by the court, that a return order of the children to the Netherlands was not suitable for the children's future and psychology, and that his right to a fair trial was violated[157].

The Constitutional Court's assessment of admissibility: In the admissibility examination, the Court ruled that the application was admissible since the application was not

157) Paragraph 21 of the Ali Korkmaz (Application Number 2019/26899) Judgment.

manifestly ill-founded and there was no other reason for its inadmissibility[158].

The Constitutional Court's findings: While examining the present case, the Constitutional Court followed and applied the principles that it had established and developed in its case-law under Article 20 and 41 of the Constitution and in this regard, it cited its previous judgments and, especially, the *Marcus and Frank Cerny (Application No.: 2013/5126)* Judgment. The Court stated that the right to respect for family life is enshrined in Article 20 of the Constitution and that Article 41 of the Constitution needs to be taken into consideration while assessing positive obligations of the state in relation to the right to respect family life. According to the Court, the positive obligations of the state include the applicant's right to request measures to be taken to ensure that he or she is reunited with his or her child and that the public authorities take all necessary measures in this regard. The Court highlighted that it was stated in Article 41 of the Constitution that every child has the right to have and maintain a personal and direct relationship with his or her mother and father unless it is contrary to the best interests of the child[159].

The Court emphasized that the Convention provides for the prompt return of the unlawfully removed or retained child and the swift resolution of the dispute[160]. In order to ensure the prompt return of the child, the contracting States are under an obligation to take all necessary measures. Such obligation is also important in order to fulfil the positive obligations of the state in relation to the right to respect family life[161].

The Constitutional Court cited its previous judgment (*Marcus Frank Cerny – Application No.: 2013/5126*) and stated that the interpretation of the legislation and the resolution of the dispute are the jurisdiction and responsibility of the courts of instance. According to the Court the role of the Constitutional Court is limited to determining whether the rules have been interpreted in accordance with the Constitution. For this reason, the Constitutional Court concluded that it has the authority to review the procedure followed by the courts of instance and to determine whether the courts pay regard to the guarantees in Articles 20 and 41 of the Constitution while interpreting and implementing the provisions of the Convention[162].

According to the Constitutional Court, the positive obligations of the state within the scope of the right to respect for family life regulated in Article 20 of the Constitution should also include the measures ensuring that the judicial process is fast, open to the

158) Paragraph 27 of the Ali Korkmaz (Application Number 2019/26899) Judgment.
159) Paragraph 28 of the Ali Korkmaz (Application Number 2019/26899) Judgment.
160) Paragraph 29 of the Ali Korkmaz (Application Number 2019/26899) Judgment.
161) Paragraph 30 of the Ali Korkmaz (Application Number 2019/26899) Judgment.
162) Paragraph 31 of the Ali Korkmaz (Application Number 2019/26899) Judgment.

participation of the parties and in compliance with the procedural requirements of the right to a fair trial[163].

The Court emphasized in its judgment that the present case would be evaluated in a way that was previously stated in the *Marcus and Frank Cerny (Application No.: 2013/5126)* Judgment, whether the courts of instance ensured the protection of the guarantees set forth in Article 20 of the Constitution by way of establishing the balance that needs to be struck among the interests of the mother, father, and child while implementing the provisions of the Convention[164].

According to the Constitutional Court there was no doubt that in the present case, the children came to Turkey with the joint consent of their parents. As from the court files it was understood that the purpose of coming to Turkey was stated by the applicant as settling, and as a vacation by the children's mother. The applicant claimed that the children were staying in Turkey with the consent of their mother, that the children got used to Turkey, that their habitual residence should be accepted as Turkey and that his objections for the return were denied without adequate scrutiny[165].

It was noted by the Constitutional Court that during the trial at the court of instances, three expert reports were obtained and according to such expert reports, it was determined that it was difficult for the children to adapt to the living conditions and school environment because they did not know Turkish, that the children had close ties with their mothers and that it was in their best interest to spend time with their mother. Furthermore, the fact that the children were born in the Netherlands and lived there for a long time, that the mother took care of the children during this period, and that there was no proven claim that the children would suffer physical or psychological harm if they were returned, constituted the basis of the decision[166].

The Constitutional Court stated that it was understood from the decision rendered by the court that evaluated the return request subject to the application, that the expert reports, the statements of people who were knowledgeable about the family life of the children, and the refusal of return reasons set forth in Article 13 of the Convention were deeply examined. In addition, it was also noted that a personal relationship was established between the applicant and his children, and a balance was established between the applicant and the children within the scope of the best interests of the children.

163) Paragraph 34 of the Ali Korkmaz (Application Number 2019/26899) Judgment.
164) Paragraph 35 of the Ali Korkmaz (Application Number 2019/26899) Judgment.
165) Paragraph 38 of the Ali Korkmaz (Application Number 2019/26899) Judgment.
166) Paragraph 40 of the Ali Korkmaz (Application Number 2019/26899) Judgment.

Furthermore, the Constitutional Court stated that it had been observed that the applicant was able to express his claims and defences in the litigation processes, and he had an effective participation by resorting to legal remedies against the decision. Thus, the Constitutional Court concluded that considering the guarantees brought by the Convention, it had been evaluated that the reasoning of the decision made by the court of instance was relevant and sufficient in the context of the right to respect for family life, and thus a balance had been struck between the interests of the applicant and the children[167].

The decision of the Constitutional Court: For the reasons explained above, the Constitutional Court decided that the applicant's right to respect for family life guaranteed under Article 20 of the Constitution was not violated[168].

4. Evaluation of the Judgments of the Constitutional Court

International child abduction is an act that interferes with the right to respect for the family life of both the parent and the child by interrupting the family life between the child and the parent whose child was abducted.

As stated before, Turkey is a party to the ECHR and thus the provisions of the ECHR form part of domestic law. Therefore, it must be noted that Turkey is obliged to implement the Convention in conformity with the ECHR and the jurisprudence of the European Court of Human Rights. According to the European Court of Human Rights, in matters of international child abduction, the positive obligations emphasized in Article 8 of the ECHR must be taken into account while implementing the Convention. The European Court of Human Rights stated in its Judgment of Neulinger and Shuruk v. Switzerland (Application no.41615/07) that it is competent to review the procedure followed by domestic courts, in particular to ascertain whether the domestic courts, in applying and interpreting the provisions of the Convention, have secured the guarantees of the ECHR and especially those of Article 8 of the ECHR[169].

In this regard, while dealing with disputes related to international child abduction, the Constitutional Court, examines whether the courts of instance take into account Articles 20 and 41 of the Constitution which corresponds to Article 8 of the ECHR and which impose positive obligations on the state authorities within the scope of the right to respect for family life. Thus, in both of the above explained individual applications, the

167) Paragraph 41 of the Ali Korkmaz (Application Number 2019/26899) Judgment.
168) Paragraph 42 of the Ali Korkmaz (Application Number 2019/26899) Judgment.
169) NEULINGER AND SHURUK v. SWITZERLAND (Application no.41615/07) Judgment of the European Court of Human Rights, paragraphs 132 and 133, https://hudoc.echr.coe.int/FRE#{%22itemid%22:[%22001-99817%22]} (last visited on 9.11.2021).

Constitutional Court examined whether the positive obligations regarding the right to respect for family life were fulfilled, whether the relevant judicial processes were completed promptly, and whether the right to a fair trial was complied with.

4.1. Evaluation of the Marcus Frank Cerny Judgment of the Constitutional Court

With regard to the Marcus Frank Cerny Judgment of the Constitutional Court, it must be noted that this individual application was the first case related to international child abduction disputes that the Constitutional Court had to deal. In this regard, it is observed that after giving detailed information about the Convention and its implementation in its judgment, the Constitutional Court dealt with and examined the issue within the scope of the right to respect for family life. In particular, the Constitutional Court evaluated whether the state authorities complied with their positive obligations set forth in Article 20 of the Constitution and concluded that the applicant's right to respect for family life, which is guaranteed by Article 20 of the Constitution, was violated.

Overall it is worth mentioning that the Constitutional Court examined the application in conformity with the case-law of the European Court of Human Rights and cited the relevant judgments of the European Court of Human Rights.

However, the assessment of the Constitutional Court that the administrative and judicial process regarding the return request of the child to his or her habitual residence which was concluded in one and half years was acceptable and reasonable[170] does not seem to be sufficient. It must be highlighted that according to Article 11 of the Convention all contracting States are expected to render their decisions within six weeks from the date of commencement of the proceedings. It is crystal clear that the duration of the administrative and judicial procedures far exceeded the time specified in the Convention leaving no room for discussion. In addition to such duration, it took two years more for the Constitutional Court to decide on the individual application in question, which in total came to three and a half years from the request for the return of the child to the moment when the violation of the rights of the applicant was accepted. Such a long period would in any case be incompatible with the purpose of the Convention.

Following the Judgment of the Constitutional Court, the applicant was not satisfied with the result and especially with the refusal of the retrial request. Therefore, he lodged an application with the European Court of Human Rights claiming that his right to demand respect for his family life, his right to a fair trial and his right to an effective remedy were violated. The applicant claimed that the Constitutional Court had not rendered an

170) Paragraph 86 of the Marcus Frank Cerny (Application Number 2013/5126) Judgment.

enforceable decision, thus depriving him of an effective remedy.

In its examination the European Court of Human Rights recalled that the applicant had not objected to the domestic court's decision regarding the granting of custody to the mother.

In addition the European Court of Human Rights highlighted that the issue of compensation was discussed by the Constitutional Court, but since the applicant did not claim compensation, the Constitutional Court did not decide on the issue due to *ultra petita* principle. Thus, the European Court of Human Rights concluded that, in view of the above mentioned, the applicant could no longer be claimed as a "victimn" within the meaning of Article 34 of the ECHR and the application was declared inadmissible[171].

It should be noted that the decision is in conformity with the case-law of the European Court of Human Rights. Since the applicant did not object to the domestic court's decision granting custody to the mother, it must be understood that the applicant agreed to such custody decision and did not use his right to challenge it. In other words, the applicant failed to use the appropriate and relevant domestic remedies. As stated in Slimani v. France (Application no.57671/00) an applicant who has failed to use the appropriate and relevant domestic remedies cannot rely on Article 13 (right to effective remedy)[172] of the ECHR separately or in conjunction with another Article[173].

4.2. Evaluation of the Ali Korkmaz Judgment of the Constitutional Court

In the Ali Korkmaz Judgment, it is observed that the Constitutional Court followed the approach of the European Court of Human Rights and also cited its own previous judgments. The Constitutional Court specified the general principles in detail and applied these principles to the present application and examined it accordingly. The Constitutional Court determined that the positive obligations imposed on the state authorities within the scope of the applicant's right to respect for family life were duly fulfilled and that the return order of the children to their habitual residence did not violate the applicant's right

171) Please see; Cerny v. Turkey (Application No.11379/16) Decision 24.01.2019 [Section II] of the European Court of Human Rights, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-201245%22]} (last visited on 09 November 2021).

172) Article 13 of the ECHR - Right to an effective remedy
"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".

173) Please see paragraphs 39-42 of the Slimani v. France (Application no.57671/00) Judgment of the European Court of Human Rights, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-61944%22]} (last visited on 09 November 2021).

to respect for family life.

The only thing that can be criticized about this judgment is that the administrative and judicial procedure regarding the return request taking a period of one and a half years was not evaluated in the judgment. However, it is also very promising that the Constitutional Court decided on the individual application within four months following the application was lodged.

CONCLUSION

The Convention, which was drawn up 40 years ago to find a solution to international child abduction cases, still performs its duty as the most important step taken to find a solution to this matter. At the beginning, the only and main aim was to ensure the prompt return of the child to his or her habitual residence. However, during these 40 years, many developments occurred. The point we have reached today within the scope of combating violations of human rights is very important. In these 40 years the concept of "the best interests of the child" has developed and "the right to respect for family life" has broadened. Within these 40 years we have managed to ensure that the state authorities have understood that they have positive obligations to effectively respect family life. Consequently, today we have gained more and more instruments to seek our rights compared to 40 years ago. Forty years ago, we had no chance to make an international application to an international judiciary body, i.e. the European Court of Human Rights, and we had no possibility to lodge an individual application with the Constitutional Court to seek protection or remedy for the violation of fundamental rights and freedoms.

When we examine the issue in terms of Turkish law, it is observed that the courts of instance have given more comprehensive and accurate decisions in return requests in recent years. Similarly, it is observed that the Constitutional Court has adopted the case law of the European Court of Human Rights in applications related to international child abduction cases. This situation shows us that courts in return requests in Turkey now consider the issue within the scope of the right to respect for family life and that the relevant state institutions act in accordance with their positive obligations in international child abduction cases.

However, in spite of all these positive developments, the delays of the administrative and judicial authorities in finalizing the return requests continue to be a chronic problem. The main reason for this delay is that family courts handle return cases. Considering the current workload of family courts, it is very clear that it is not realistic to finalize the return requests within the six week period specified in the Convention. In the judgment of the Angela Jane Kilkenny case, the Constitutional Court stated that the passage of 3 years

in the proceedings regarding the return of the child was contrary to the purpose of the Convention. The Constitutional Court further stated that this situation led to a violation of the right to respect for family life within the scope of the positive obligations of the state[174].

Unfortunately, in all of the cases brought before the Constitutional Court, the administrative and judicial process regarding the return request of the child exceeded the acceptable time limits.

It would be beneficial to establish specialized courts that will only deal with international child abduction disputes and return requests in order to prevent violations of further rights and to meet the demands for the prompt return of the child to his or her habitual residence.

The establishment of specialized courts would facilitate and expedite decisions regarding rights to family life and fair trials, thus protecting and fostering the best interests of the child in compliance with the Convention and international law.

174) Paragraph 83 of the Angela Jane Kilkenny (Application Number 2015/10826) Judgment.