



Trust and the law in international child abduction cases

OÑATI SOCIO-LEGAL SERIES VOLUME 14, ISSUE 1 (2024): DOSSIER ABOUT TRANSNATIONALISATION OF FAMILY LAW

DOI LINK: <https://doi.org/10.35295/osls.iisl/0000-0000-0000-1346>

RECEIVED 10 MARCH 2022, ACCEPTED 20 FEBRUARY 2023, VERSION OF RECORD PUBLISHED 1 FEBRUARY 2024

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Abstract

This article seeks to grasp the legal category of international child abduction through the conceptual lens of trust, from the standpoint of judges. In a more ambitious way, we delve into the relationship between law and trust in the context of the transnationalisation of family law. Going beyond the legal principle of mutual trust, we propose a concept of trust drawn from sociological theory and we analyse the issues that arises for judges both at the institutional and interactional levels. At the institutional level, we show how trust operates as a procedural mechanism that allows cooperation in the absence of explicit moral consensus, whilst at the interactional level, we demonstrate that trust is imbued with ethical value and pushes judges to be more open to foreign laws and culture.

Key words

Trust; transnationalisation; sociology of law; international child abduction

I would like to thank the reviewers for their insightful comments and I am grateful to the Belgian Fund for Scientific Research (F.R.S.–FNRS) for providing financial support for our research. I am also grateful to OSLS editor, Leire Kortabarria, for her meticulous work. Some of the developments in this article have previously been published in French: Struelens, O., 2020a. « Kafka n'est pas loin, sauf quand les juges se tiennent la main » : confiance institutionnelle et transnationalisation du droit familial. *Revue interdisciplinaire d'études juridiques*, 84 (1), 5–38.

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Resumen

Este artículo trata de comprender la categoría jurídica de la sustracción internacional de menores a través de la lente conceptual de la confianza, desde el punto de vista de los jueces. De forma más ambiciosa, profundizamos en la relación entre derecho y confianza en el contexto de la transnacionalización del derecho de familia. Más allá del principio jurídico de confianza mutua, proponemos un concepto de confianza extraído de la teoría sociológica y analizamos las cuestiones que se plantean a los jueces tanto a nivel institucional como interaccional. En el plano institucional, mostramos cómo la confianza funciona como un mecanismo procesal que permite la cooperación en ausencia de un consenso moral explícito, mientras que, en el plano interaccional, demostramos que la confianza está imbuida de valor ético y empuja a los jueces a estar más abiertos a las leyes y la cultura extranjeras.

Palabras clave

Confianza; transnacionalización; sociología jurídica; sustracción internacional de menores

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1. Introduction

The literature on the relationship between governance and trust has grown extensively over the last decade. These works can be roughly divided in two main areas of research, pertaining to different disciplines. On the one hand, transnational studies – located at the crossroads of political science and legal theory – which is particularly interested in the relationship between trust and cooperation and the role of trust in transnational regulation (Berman 2005, Cotterrell 2008, Zumbansen 2012, Whytock 2014). On the other hand, there is a body of doctrinal works dedicated to analysing the legal principle of mutual trust in the European integration process (Kramer 2011, Mitsilegas 2012, 2015, Sulima 2013, Vicini 2015, Anagnostaras 2016, Willems 2016, Wischmeyer 2016, Schwarz 2018). This literature on the transnationalization of law attests to the importance of the notion of trust in transcending national borders for regulatory processes, especially in the case of private international law. We identify two shortcomings that run through this literature, however: first, the notion of trust employed remains superficial in theoretical terms; second, the concept floats in relative abstraction, as if trust between states were produced without any link to the practices of social actors situated in specific social contexts.

In this article, we intend to take into account the first shortcoming by a brief detour into sociological studies on the notion of trust (3), while answering the second – reification of the state – through an empirical analysis of the practices of judges in charge of child abductions (4 and 5).¹ Indeed, focusing on the perspective of the judge, “active drivers of the transnationalization of law” (Allard and Garapon 2005), is particularly relevant for understanding the role of trust in this very process. In order to grasp what is at stake for judges in charge of child abduction cases, we shall first delve further into the legal framework of this legal matter (2).

Our contribution therefore seeks to broaden sociologically the doctrinal work carried out by S. Bartolini in this issue, focusing on the notion of trust in child abduction cases. Our general aim is twofold: first, understanding the role that trust plays at the institutional and interactional levels in child abduction cases; second, developing a sociolegal approach that uses trust as an analytical tool to understand child abduction cases and the regulation of transnational family matters from a sociological standpoint.

2. Conventional and regulatory instruments: the legal framework on international child abductions

The legal framework on and definition of child abduction began with the adoption of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter 1980 Hague Convention or HC 1980). Considered by some legal experts one of the greatest success stories in private international law (Schuz 2013), the 1980 Hague Convention currently has 103 Member States.² Developed by the Hague Conference on Private International Law (hereinafter HcCH), the HC 1980 is the only

¹ This article is based on a fieldwork of a doctoral thesis consisting, inter alia, of 9 semi-structured interviews with 6 Belgian judges specialized in child abduction cases and a focus group with 2 specialized judges, 3 attorneys, a prosecutor and 3 international family mediators. Even though the number of judges interviewed is relatively low, every Belgian judge specialized in child abduction matters identified has been interviewed.

² See the following table for a complete list of Member States of the 1980 Hague Convention: HcCH 2022.

instrument specifically tailored to regulate and deter the wrongful removal of children and is still the main legal regulation of the litigation today. Furthermore, there is a major additional instrument, grafted onto the HC 1980 in the European Union: the “Brussels II bis Regulation”,³ which shares a philosophy and mechanisms with the HC 1980, aside from a few exceptions to which we will return below.

International child abduction is defined as the unlawful removal or retention of children, i.e., violating the parental authority of a custodian, and the remedy is embodied in judicial cooperation between the Member States through the principle of the return of the child to his or her state of habitual residence (articles 1, 3, and 5).⁴ This convention stems from the deep conviction that constitutes its premise: the illicit removal of children is an act that produces harmful effects on the children victims and therefore clearly contravenes their best interests (Pérez-Vera 1980). The principle of immediate return is therefore not the 1980 Hague Convention’s aim in the strict sense of the term, but rather the means, the mechanism chosen to achieve the Convention’s explicit objectives: the protection of (the interests of) the child and the mitigation of the harmful effects of international child abduction. At the same time, this procedural mechanism for allocating judicial jurisdiction is also intended to address the issue of international “forum shopping” by litigants seeking to obtain a favourable judgment in the courts of the state to which the child has been removed, thereby legalizing a *de facto* situation.

The corollary of immediate return is that the judge of the requested state (i.e., the state to which the child has been removed) rules on the return or non-return of the child and not on the merits of the case – mainly custody and parental authority, on which only the judge of the state of habitual residence is entitled to rule. Indeed, these substantial issues fall within the competence of the authorities in the child’s habitual residence, which are considered, by virtue of the principle of proximity, to be in a better position to assess adequately the interests of the child in question. It is therefore a two-stage procedure, which requires: first the determination of the habitual residence by the judge of the state to which the child has been removed in order to rule on the return or non-return of the child; and, secondly, the determination of the parents’ custody and visiting rights by the judge whose international jurisdiction has previously been established. When returning the child, the judge has to trust that his foreign counterpart to adequately rule on the merits of the case and the HC 1980 sets thus trust as a default principle as we shall see in the next sections.

Nevertheless, this principle of immediate return is not systematic: the drafters of the HC 1980 devised exceptions in order to guarantee the interests of the child in all circumstances. Schematically, two main aspects can be identified: first, the child’s adaptation to his or her new environment, a situation in which a decision to return would imply a form of uprooting, going against the child’s best interests (article 12); second, the most notable exception and the most frequently used in litigation, the proven existence of a serious risk of physical or psychological harm to the child in the event of return, placing him or her in an unbearable situation (art. 13 (1) (b)). This second

³ Council Regulation (EC) No 2201/2003 of 27 November 2003. For an interesting argument on the issues of mutual trust in European integration, see S. Bartolini’s contributions in this issue, but also (Schwarz 2018, Rizcallah 2019a).

⁴ Judicial cooperation is carried out through central authorities established specifically for this purpose.

exception avoids qualifying flight from domestic violence as an international child abduction.

We can clearly see that the legal framework on child abduction relies on judicial cooperation between states while protecting the fundamental rights of the child and the parents involved in the dispute. Two other conventions are mobilized to materialize these guarantees of fundamental rights and structure the content and interpretation of the HC 1980: the European Convention on Human Rights of 4 November 1950 (ECHR) and the Convention on the Rights of the Child of 20 November 1989 (CRC). Without delving into too much detail about these instruments, let us nevertheless remember that the values defended by these conventions in family matters are to be found in particular in article 8 of the ECHR concerning the right to respect for private and family life, as well as in articles 3, 9, and 12 of the CRC concerning, respectively, the best interests of the child as a primary consideration in any judgement relating to him or her, the child's right to maintain contact with both parents (art. 9), and the child's right to be heard (art. 12).

3. Sociological insight into trust

Now that we have outlined the basic legal framework on child abduction, we can delve into the sociological works on the notion of trust, in order to explore such litigation from a novel standpoint later on.

3.1. Familiarity, confidence, and trust

The first analytical step one must take in order to grasp trust finely is not to confuse familiarity with trust. Familiarity is a primordial given of human life, a condition of human knowledge, a background that allows individuals' symbolic activity. It relates, according to N. Luhmann, to the very structure of existence, and not to action (Luhmann 2006, p. 21). Observation of distinctions, the basic logical operations of identity formation and form creation, operate by bringing the unfamiliar back to the realm of the familiar. In other words, all the distinctions an individual makes in order to locate, know, and act in his environment are made through inscribing the non-familiar in the domain of the familiar. Familiarity simplifies the world at the outset, as it is entirely based on the past, which prevails over the present and the future. As such, familiarity does not possess "anticipatory ordering" as trust does (Luhmann 2017, p. 22), and it is disconnected from action. It is, from a conceptual point of view, the condition of possibility of other, more complex forms of trust and distrust.

Beyond familiarity, we can identify the features of two distinct "types of trust": confidence and trust. These two types of trust have in common that they involve an expectation that can be disappointed, but they are different ways of holding expectations and assuring actions. To put it simply, what makes it possible to distinguish confidence from trust depends largely on one's awareness. We can argue that confidence is usually unconscious, outside of the realm of attention. Trust, on the other hand, requires a conscious commitment on the part of the person granting it. It presupposes a risk situation. The causal attribution is internal, and if you place your trust in something, you will potentially have to regret the choice.

Through this preliminary examination of the distinction between familiarity, confidence, and trust, a number of general considerations already emerge, allowing us better to

grasp the diversity of forms that these particular mechanisms of complexity reduction might take. Familiarity is a human given, the very structure of existence, whose creation of meaning proceeds by absorbing the foreign and unfamiliar into the realm of the familiar, quietly and non-reflexively extrapolating the past into the present. Confidence, on the other hand, remains mostly unproblematized, and constitutes a future-oriented expectation that involves an external attribution and the perception that no other alternative was within reach. Trust, in turn, requires awareness of risk-taking and a conscious commitment to a particular expectation in the face of another's freedom of action. It is therefore an action whose attribution is internal, and whose disappointment may lead to regret. Trust's temporal structure is entirely oriented towards the future and attempts to reduce its uncertainty, although it is only earned and maintained in the present. To trust is ultimately to bet on the future in order to face uncertainty, i.e., the unknowable character of the future, but also the complexity generated by others' freedom of action.

3.2. *Interpersonal trust, institutional trust, and trust devices*

We have begun a theoretical exploration of trust in general. While this is instructive to some extent, the term "trust" is so equivocal and elusive that we cannot be satisfied with such an all-encompassing approach of this "hyper-concept" (Mangematin and Thuderoz 2004, p. 20). For some, trust is only a cognitive category (Hardin 2002). For others, it is a form of action involving a commitment (Quéré 2001). For others still, it is an act (Nooteboom 2006), a social phenomenon (Watson 2009), a hypothesis (Simmel 2009, p. 23), or a symbolic system (Karpik 2006). In general, the answer to the question of the nature of trust is not univocal: trust is multiple and the situations of trust are so different that it is necessary to make room for various modalities of trust according to the situation, so much so that the institutional and historical contexts influence the characteristics that trust is likely to take on (Gambetta 1988). It is precisely to this ambition to clarify the conceptual uses of trust that this article responds. That is to say, first and foremost, concepts that allow us to take into consideration the version of trust developed in legal doctrine and legal theory, while going beyond this legal version by means of a sociological understanding of law as a social phenomenon in context.

So far, we have distinguished trust from confidence. To grasp trust adequately we must operate an additional analytic distinction between interpersonal trust and institutional trust.⁵ By interpersonal trust we refer to a kind of trust that involves a *personal relationship* between two individuals, based on *the evaluation of the trustworthiness* of others based on *experience*. It is therefore a matter of interaction in the classical sense of the term, of a "face in face work", in the words of A. Giddens. Interpersonal trust stems from intersubjective experience through a recurrence of interactions between two individuals, during which the stakes of self-presentation are essential in the mutual evaluation of trustworthiness (Luhmann 2006).

⁵ This distinction is essential even though in this paper we shall mainly focus on the former. Fostering interpersonal trust is however paramount in the work of mediators and a key feature of the parental conflict in child abduction cases. We proposed an in-depth study of interpersonal trust in relation to the role of international family mediators here: Struelens 2021.

On the other hand, institutional trust, which concerns us primarily, implies a form of commitment to a *stranger*, but *motivated indirectly by impersonal knowledge* derived from *belonging to a group or trust in an institution*. This kind of trust proceeds by “faceless commitments”, whose order of interaction is de-localized and mediated, a form of trust characteristic of modernity. In this perspective, judges and mediators can be conceived as “access points”, “points of contact between laymen, communities and representatives of abstract systems”, here the judicial and legal systems. Let us unfold this rather dense definition in several steps.

First of all, one of the most important characteristics of institutional trust compared to its interpersonal counterpart is that it tolerates indifference towards the individual motives that justify it. It is a trust detached from intersubjective, face-to-face interaction, but which also distances itself from trust as an expression of individual interest with a view to maximizing profits. This institutional trust is an indirect trust: if it is granted to an individual, it is not by virtue of his or her personal characteristics as presented in the course of interactions, but rather on the basis of impersonal knowledge that has been accumulated about the individual, the institution, or the system in which he or she is inserted.

To delve further into the motivational source of institutional trust, we argue that one can grant institutional trust to others because others share trust in the same institution. But, at an underlying level, we can decompose the motivational source of the trust in an institution by referring either to *group belonging* or to a *normative idea* that this institution is supposed to uphold. While these two motivational sources partially overlap, they are not identical. In the first case, the institutional trust in question here is based on a “categorical belonging” which “consists in regulating the agreement of trust on a knowledge of the properties generally attributed to the members of a given group or category, or on that of the values and norms deemed to regulate their behaviour” (Quéré 2001, p. 145). In the second case, it is necessary that a normative idea of the institution “is accepted as valid, or plausible, that it arouses the consent of all, that it gives rise to shared ‘committed beliefs’” (Quéré 2005, p. 202). To put it another way:

what replaces interpersonal knowledge (...) as a source of trust is the knowledge of the institutions ‘that motivate, guide and constrain’ all those who belong to the same institutional space, and more particularly that of their normative idea: citizens build trust not by taking into account what they know about the people they trust, but by taking into account what they know about the institutions under which they act and in which they are inserted. (Quéré 2005, pp. 199–200, our translation)

Finally, beyond categorical belonging and adherence to the normative idea of an institution, our definition also implies the need for some form of *commitment* on the part of the individual who grants institutional trust. In our case, judges may or may not contribute to the establishment and maintenance of institutional trust through particular forms of commitment. In this sense, trust is not simply a cognitive assessment, but a practical action. We understand the term commitment as a meaningful act that influences trust or distrust between partners. We argue that in the case of judges in charge of abductions under the conventional and regulatory regime, these significant acts are threefold: the return (or non-return) judgment; the foreign recognition of the judgment; and the enforcement of the judgment in a foreign jurisdiction. Our focus here will be mainly on the significant act of the return or non-return judgment, but it is

nevertheless essential to bear in mind that the issues of recognition and enforcement of decisions may also influence the maintenance or decline of institutional trust.

Institutional trust is not built in a vacuum, however. It requires material and symbolic support. Indeed, in order for trust not to be blind, it is necessary that the person who confers his trust exercises his judgment and remains informed, but also that he maintains an active vigilance over the beneficiary of his trust while respecting the delegation of power that is inherent to it. Given that “[i]t is unfortunately not in our power to exercise direct control over anything beyond the immediate sphere of our interactions” (Quére 2005, p. 207), and that institutional trust extends by definition beyond this sphere, *trust devices* are developed and implemented to address this inability to directly control other people’s action. One relies upon these devices to assess the trustworthiness of partners or institutions. Trust devices will inform us about strangers, guarantee the credibility of institutions’ commitment, and protect us from manipulation, opportunism, and deception by individuals.⁶

4. Revisiting the conventional and regulatory framework in the light of trust

We shall thus consider the HC 1980 and the Brussels II bis Regulation as legally organized trust devices. These legal instruments, entirely oriented towards fostering cooperation between states and protecting the best interests of the child, require judges in charge of abduction cases to place trust in foreign judges. In doing so, the judge trusts a stranger, of course, but not merely anyone: he or she trusts his or her foreign counterpart, that is, a member of the same group, which we will call a community of trust. Indeed, N. Luhmann pointed out the existence of communities of trust without dwelling on it, but we see it as an important concept and we propose to operationalize it further in our analysis. We argue that the 1980 Hague Convention is more than a mere instrument of dispute regulation; it institutes a community of trust beyond national borders, perpetuated through the legally framed trust mechanism it governs: the immediate return procedure and its exceptions.

We can elaborate a definition of this community of trust by successive distinctions, taking as reference points the community of interest, developed in the sociology of professions by M. Weber, and the community of values, a key legal notion in European integration. The notion of community of interest refers to the weakest form of community, which aims only to bring together individuals who share a common interest with respect to competition or the outside world. It is thus a simple association of individual interests aiming to protect the collective interest of these individuals by aggregation. The community of values, on the other hand, finds its origin in the law of the Union, and implies a *presumption of shared values* among its members. It is one of the cornerstones of European integration. By pushing the concept a little further, we argue that communities of trust are communities of values that imply a *presumption of mutual trust* between states, beyond a simple presumption of shared values. Let us bear in mind that it is the *presumption* of trust that constitutes the criterion for defining a community of trust, and not the existence of *actual* trust between Member States.

⁶ Examples of trust devices can be found in the EU regulation, such as the European Arrest Warrant (EAW) in criminal justice or the Dublin Regulation in European Asylum Law.

As mentioned above, although the founding act of the community of trust of the HC 1980 dates back to 1980, its institution *ex nihilo* cannot guarantee its continuous operation: each judgment of return or non-return, depending on the reasoning behind it, jeopardizes or reinforces this community of trust, reinstating it indefinitely. The same is true for each recognition and enforcement of foreign judgments.

We will now reconsider the instruments governing child abduction in the light of the concepts of trust developed above. We will focus on the 1980 Hague Convention by examining, on the one hand, the *foundation* of this community of trust and the issues at stake in the relative openness of the Convention regarding the acceptance of its new members (4.1); we will then examine the conditions for the proper *functioning* of judicial cooperation in child abduction matters (4.2). Finally, we will make some additional comments concerning the Brussels II bis Regulation, which embodies a high-intensity community of trust of a different nature, echoing the article by S. Bartolini in this issue (4.3).

4.1. The founding moment: the establishment of the 1980 Hague Convention as a community of trust

The Hague Convention 1980 is characterised by a semi-open mode of accession to the community (art. 38).⁷ This means that when accepting a state as part of the community, it is left to the discretion of each member state to agree or not to enter into bilateral relations with the newly acceding states. In other words, states already party to the Convention retain control over the establishment of bilateral relations, even if the new state is indeed part of the community.

Even though trust remains tacit in the Convention, the Explanatory report mentions confidence twice in regard to the mode of accession.⁸ It is not surprising to find the notion of “mutual confidence” mentioned here, instead of the usual “judicial cooperation”. The underlying idea is that, in order for judicial cooperation to be more than an empty word, more than an intention on paper, it is necessary that a minimum of mutual trust between the legal systems and judicial institutions of the member states of the Convention exists and is upheld. This trust is, however, conditioned by a minimum similarity and compatibility of legal systems and a minimum trustworthiness of judicial institutions. It is therefore the principle of mutual trust and the spirit of mutual confidence between states that interests us here and constitutes the real cement of the Convention, opening otherwise unavailable possibilities for action.

⁷ Point 41 of the explanatory report on the convention states this mode of accession as followed: “the Convention is shown to be one of co-operation. In principle, any State can accede to the Convention, but its accession ‘will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession’ (article 38). The Contracting States, by this means, sought to maintain the requisite balance between a desire for universality and the belief that a system based on co-operation could work only if there existed amongst the Contracting Parties a sufficient degree of mutual confidence” (Pérez-Vera 1980, p. 435).

⁸ This absence does not hinder the possibility of analysing HC 1980 child abductions in the light of trust from a sociological standpoint. Indeed, from the empirical perspective of judges, cases of child abductions falling under the HC1980 or EU regime both involve trust issues with their foreign counterparts, even though this is not mentioned as such in the legal text.

A closer look at the modes of membership in the HC 1980 is enlightening in this respect. Three subgroups can be identified within the community of trust, subject to different rules of membership depending on the similarity and compatibility of their legal systems, but also on the age of membership. The first, core group of the Convention consists of HccH Member States at the time the HC 1980 was ratified, based on a community of trust historically evidenced by the drafting and ratification of earlier conventions. The HC 1980 enters into force automatically between these states, with no possibility of bilateral relationship exceptions (states marked “R” in the first column of the status document – HccH 2023 – are the only ones authorized to “ratify” the Convention). A second sub-group consists of members that joined the HccH after adoption of the Convention, and are therefore able only to “accede” to the HC 1980 and not to ratify it as such. This is where the aforementioned semi-open nature of the mode of Convention membership applies, leaving it to each Member State to decide whether or not to enter into bilateral relations with the newcomer (the states marked with an “A” in the first column of the matrix). Finally, a third subgroup of the community of trust emerges at the bottom of the matrix, consisting of non-HccH Member States, subject to the same membership rules as the second subgroup, but with fewer inter-state trust relationships.

Various conclusions can be drawn from this matrix: first, that this community is organized according to distinct levels of intensity of trust relationships, and the rules that govern the initiation of a trust relationship between states vary according to the types of membership. Secondly, being an HccH member appears to be a guarantee of trust and a guarantee of minimal compatibility between national legal systems and trustworthiness of judicial institutions, since there are far more bilateral relationships on paper between HccH “adherents” than with HccH non-adherents. This clear break is visible in the lower part of the table. Third, it is clear that trust is earned over time and that the last states to have ratified the Convention are least likely to have bilateral relations with other states (with the exception of HccH Member States that joined the Convention late).

It is no coincidence then that the community of trust’s degree of openness lies at the heart of legally organized trust’s effectiveness: it springs from the need to share norms and values that are supposed to regulate community members’ behaviour as required by the “categorical membership” mentioned above. What are these norms and values? Concerning the norms, one can argue that the rules explicitly instituted by the 1980 Hague Convention and the criteria used to qualify litigation are presumed shared by all its members. It is at the level of values that the matter becomes complicated and cooperation may, in practice, become challenging. A complex of substantial, primordial, but vague values have to be put forward here, because it is essential for the foundation and functioning of the community of trust: the principle of the best interests of the child – we will come back to it later. Each adequately motivated judgment, and especially each return judgment, is evidence of a fair commitment between functional necessity (transnational cooperation) and respect for the values (best interests of the child) that bind the community together.

4.2. *The operation of the 1980 Hague Convention: trust by default, legitimate and illegitimate distrust*

One might think, as has been theorized by some, that the founding act establishing a community of trust would suffice for its generalization and that trust, a “self-driven” phenomenon (Cornu 2006, p. 181), could then self-propagate in a virtuous cycle. This overconfidence in trust, however, ignores the opposite of trust, distrust, which is of equal importance. Both the opposite and a functional equivalent of trust, distrust is also a self-perpetuating phenomenon, if not the self-verifying phenomenon *par excellence*, calling for its own confirmation:

Distrust has an inherent tendency to endorse and reinforce itself in social interaction – a good example, perhaps indeed the very kernel, of those processes to which Merton devoted a classic essay under the title of ‘self-fulfilling prophecy’. (Luhmann 2017, p. 82)

Although functionally equivalent, distrust is less efficient than trust because it leads to fewer opportunities for action. Indeed, “distrust also achieves simplification, often drastic simplification. A person who distrusts (...) becomes *more* dependent on *less* information” (Luhmann 2017, p. 80). Moreover, distrust is far from being a harmless phenomenon, since its generalization leads to a destructive dynamic that paralyzes action. In the words, once again, of N. Luhmann, “a social system which requires or cannot avoid distrusting behaviour among its members for certain functions, needs at the same time mechanisms which prevent distrust from gaining the upper hand, and, from being reciprocated by a process of reciprocal escalation, turned into a destructive force” (Luhmann 2017, p. 83). The challenge of establishing effective judicial cooperation within the community of trust instituted by the 1980 Hague Convention is therefore to allow distrustful behaviour but avoid its generalization, which would in fact amount to re-establishing the situation prior to the Convention’s adoption: enclosure within national spaces.

Let us not assume, however, that either trust or distrust can be generalized as a single principle: it is the binary alternative of trust and distrust that forms the rational basis at the system level. In other words, “system rationality cannot be attributed to trust alone. It lies rather on a level that encompasses both trust and distrust, namely in the *binary schematization* of a more elemental relation to the world into the structured *alternatives* of trust and distrust” (Luhmann 2017, p. 98). It will always be a question of relative trust, limited by justified distrust, distrust considered legitimate.

The 1980 Hague Convention establishes an institutional framework that effectively operates on the binary coupling of trust and distrust. In this sense, the HC 1980 establishes, by its principle of immediate return, trust as a default principle, a sort of “presumption of trust” framed by justified exceptions that could be described as legitimate distrust. Indeed, exceptions limit this principle of trust to avoid blindly trusting one another. In this respect, the philosophy of the 1980 Hague Convention corresponds quite well to the classical ethical virtues of trust as an obligation: “even if a general obligation to trust is formulated as a principle, the decision whether or not to follow it must be delegated to the situation”. Indeed, blind trust and generalized distrust lead to ineffectual regulation situations: systematic return jeopardizes the rights of the child, since it ignores any examination of the family situation; systematic refusal of

return jeopardizes international cooperation and institutional trust, since return is the very mechanisms by which trust proceeds.

When is a judge's distrust illegitimate? When he recurrently refuses to refer to the competent jurisdiction; legitimacy is therefore likely evaluated over the long term. A state's rate of return becomes an indicator of its reliability concerning institutional trust.⁹ Distrust is embodied in the term "protectionism of nationals", which is a kind of sovereigntist tension, a refusal to delegate, an unjustified or ill-founded detention. But what is contained in the idea of protectionism of nationals? By what means does it infiltrate the Convention's operation?

Illegitimate distrust is camouflaged as putting the protection of the child and his or her interests before the protection of the family values that his or her nationality would express. That is to say, for example, a preference for the parental role devolved exclusively to the mother, thus favouring presumed natural maternity to the detriment of the principle of parental equality.¹⁰ In other words, the aim is to make the best interests of the child coincide with the protection of national family values. This strategic use of the law is the means by which illegitimate distrust affects the functioning of the international cooperation system in child abduction cases.

The interpretative calibration of article 13 (1) (b) of the HC 1980, the exception *par excellence* whereby judges pass off distrust in a state as protecting the best interests of the child, rather than by questioning the fundamental legal principles of the state in question.¹¹ The twofold issue of how much space to give to examining the child's interest and the amount of latitude to give the judge (in interpreting child's best interests, prior to the return) is absolutely crucial: as jurists almost unanimously emphasize, it is a matter of the *raison d'être* of the treaty instrument – and of the continued existence of the community of trust (Pfeiff 2016).

In order to understand why the misuse of the letter of the law seems to be commonplace in child abduction cases, one must keep in mind that a presumption of shared values is not equal to the effectiveness of that sharing. Indeed, communities of trust, especially the HC 1980, bring together states whose national legislation on family law are hardly compatible with one another, or with the values advocated by the Convention.¹² In other

⁹ This rate varies greatly between Member States: in 2011 it was 88% in Canada and only 30% in Poland. The average is stable at 64% (McEleavy 2015, p. 369).

¹⁰ It is in this sense that two judges interviewed consider Poland always agrees with the mother: "As far as the country itself is concerned, I think that Poland does not understand the treaty: it is always the mothers who are within their rights and who are right. But for the rest, most countries respect the philosophy of the treaty" (J6, interview 1) and "At the level of the judges...Poland does not want to know about the International Conventions, that's clear. It is all power to the mother, period" (J1, interview 1).

¹¹ This is at least the assumption we make in order to understand the considerable divergence in return rates among the states party to the 1980 Hague Convention, which, as mentioned earlier, vary from only 30% to almost 90%. Such a discrepancy hardly seems to be attributable purely to the intrinsic and factual characteristics of the cases encountered by judges in the various states. The statistics also show that 64% of the refusals by Polish judges were made on the basis of the exception in Art. 13 (b) (well above the global average), which further strengthens this hypothesis (Lowe 2011, p. 36).

¹² To take just one example, Japan's recent accession to the HC 1980 is a delicate compromise between political and diplomatic necessity (there has been almost no return of children in 40 years) and legal

words, it is unlikely that a consensus on values will actually be reached among the community of trust's members.

We can therefore easily acknowledge the ambivalent character of the best interests of the child as a guiding principle in these conditions. It offers both a vector for cooperation at the systemic level and the opening through which legitimate distrust manifests itself, since it constitutes the discretionary power, the latitude left to the required state's judge. The semantic vagueness and indeterminate character of the principle is often criticized as arbitrary. But it is this very indeterminacy that makes it possible to perpetuate a consensus of values – albeit illusory – at the institutional level of the community of trust. In other words, the best interests of the child is a vague notion with a clear function: to allow the illusion of consensus in a community of trust characterized by strong legal pluralism. This does not mean denying or sacrificing the meaningful character of the principle of the best interests of the child: there is no doubt that, at the level of individual practice, it epitomizes a standard of justice that directs judges' actions and judgments. It represents a genuine attempt at justice, it embodies an ideal and therefore is a real force driving the actions of practitioners and litigants – both a resource and a reference. It is quite possible, thanks to the interpretative leeway and the delegation of power that the relationship of trust allows, to satisfy to a certain extent the meaning of the principle of justice at the individual level and the fulfilment of its function at the institutional level.

4.3. The European Union: A community of (too much) trust?

The considerations set out above concerning the HC 1980 are largely valid for the Brussels II bis Regulation, since the European instrument operates through the same immediate-return mechanism and has similar exceptions to return. But, even though the HC 1980 and the EU present legal instruments that differ only in degree, the communities of trust they embody are of different nature. Five major differences alone justify devoting an independent section to the European case: first, the European Union is a qualitatively different community of trust from those of the HccH or the HC 1980, with a distinct history and integration policies; second, the notion of "mutual trust" between states is an explicit referent of European law. Third, the existence of a common adjudicative body, the Court of Justice of the European Union (hereinafter CJEU), where mutual trust is much discussed. Fourth, there is a common fundamental rights standard set by the Charter of Fundamental Rights of the EU, and all (national) exceptions must be applied in accordance with all EU law, which takes precedence over national law. Fifth, the regulation of child abduction in the EU presents differences that indicate the existence of a community of greater trust than the HC 1980; indeed, the EU has a long judicial track record that has developed trust as a legal principle, which means that mutual trust is not only presupposed by judicial cooperation in the EU but also marks an explicit normative aspiration.

compatibility. Indeed, Japanese family law does not recognize the concept of joint parental authority after divorce, which in practice tends to undermine the right to maintain contact with both parents following separation or abduction. For more information on the difficulties of Japan's ratification of the HC 1980 see (Hanley 2016). For a detailed analysis of the incompatibilities between Japanese national law and private international law and more generally of the issues of legal pluralism in this case see Struelens 2020b.

Concerning the legal instrument itself, as explained in depth elsewhere in this special issue (cf. S. Bartolini), the Brussels II bis Regulation (hereinafter “The Regulation”) indeed differs from the HC 1980 in three notable ways: firstly, the abolition of the exequatur procedure for recognition of the enforceability of judgments abroad; secondly, article 11.4 of the Regulation, which establishes a greater burden of justification for the refusal of return (it must be established that the state of return is unable to protect the child upon return); thirdly, article 11.8 strengthens the power of the judge in the requesting state, since he or she has the final say concerning the return of the child.

The first point is pretty straightforward to interpret: the abolition of the exequatur procedure means that in cases of abduction, recognition of the foreign judgment is automatic (with the simple issuing of a certificate ensuring the right of defence and the hearing of the child) and there is thus no possibility of distrust in the recognition and enforcement of a judgment abroad. It is therefore a regime of trust without exception – and which reflects, especially on the matter of recognition, the existence of a high-intensity community of trust, since the enforceability of the judgment is applied extraterritorially in a quasi-automatic manner. The Zarraga judgment is particularly instructive in demonstrating both the automaticity of the recognition of a foreign judgment in an abduction case and the role of the CJEU in defending the principle of mutual trust. In this case, subject to the Brussels II bis Regulation, the CJEU held that a national authority could not verify whether the hearing of the child provided for by the Regulation in order to obtain the certificate necessary for the recognition of the foreign judgment without exequatur had been carried out – thus not allowing any control over the respect of his right to be heard. This is motivated by the fact that the national legal systems of the two states involved “are able to provide equivalent and effective protection of the fundamental rights recognized at Union level, in particular in the Charter of Fundamental Rights” (Zarraga 2010).

The second difference, article 11.4 of the Regulation, further reduces room for distrust by restricting legitimate exceptions to return. This is more difficult to interpret. Exception 13 (1) (b), which normally focuses on the individual child and his or her environment, is here extended directly to the state, in that the state’s ability to take measures to ensure the protection of the child becomes decisive. One cannot limit oneself to the assessment of a serious risk to the child: it must also be established that the state cannot ensure the protection of the minor. Since the object of distrust is also a state, a refusal of return subject to the Brussels II bis Regulation thus presents sensitive diplomatic issues.

Thirdly, it is possible for the judge in the state of origin, and therefore the requesting state, to ignore this justification and order the return without any means of appeal or room for the judge of the state to which the child has been displaced to manoeuvre. This restriction on the scope of legitimate justifications seems therefore to lose some of its meaning, since the judge of the state of origin may subsequently force a return, regardless of the justification proposed by his or her counterpart, if he or she decides on the merits that the child’s residence will be established in the state of origin. In practice, almost no judge establishes a state’s inability to protect a child, and the present balance of power between the two judges is therefore, in the opinion of some commentators, unsatisfactory (Bartolini 2019).

If these three provisions of the Brussels II bis Regulation are taken together, they seem to reveal that the European area constitutes a formally homogeneous and more intense community of trust than that embodied in the HC 1980. However, it would appear that the possibilities for distrust are so limited that mutual trust between states endangers both state sovereignty and individuals' fundamental rights. This point has not escaped the attention of legal scholars, whose questioning of the balance between mutual trust and the protection of fundamental rights has given rise to numerous debates beyond the sole issue of judicial cooperation in civil matters (Battjes *et al.* 2011, Brouwer 2013, Bartolini 2019, Rizcallah 2019a, 2019b).

Some researchers describe what appears to be a "forced ideological march" of trust within the European Union (Schwarz 2018), driven above all by the CJEU, which has officially constituted itself the guarantor of trust in the pursuit of European integration. In this context, the regulatory balance between trust and distrust seems to reach a point of dysfunction in favour of an almost compulsory trust whose safeguards become so weak that they run the great risk of making it blind.

In the case of international child abduction, it is the best interests of the child that are relegated to the background, in favour of the affirmation of the principle of mutual trust between states. In this configuration, the best interests of the child are preserved by mutual trust, but as a presumed and abstract interest, not as a concrete interest examined in substance (Maoli *et al.* 2020). In other words, European governance risks sacrificing its ethical aim on the altar of functional necessity. As the *Zarraga* judgment illustrates, reciprocal trust between Member States is justified, paradoxically, by the fact that they are signatories to the Charter of Fundamental Rights, and therefore presumed to share the same values. C. Rizcallah highlights in her work the circular relationship between presumption of shared values and presumption of mutual trust in this sense (Rizcallah 2019b, 2019a). This double presumption in fact leads to a situation of failed regulation that goes against the axiological ideal of the Union, hence its characterization as an "*utopie malheureuse*" (Rizcallah 2019a). The researcher concludes that "thus maintained, the principle of mutual trust constitutes, in our opinion, a danger for the construction of Europe. In addition to the concrete risks that it presents for the fundamental rights of individuals in the Union, the principle of mutual trust is likely to lead to a contagion effect of the disintegration of the founding values throughout the European space" (Rizcallah 2019a, p. 18, our translation).

We can argue that the specificity of European regulation problems arises from the existence of a formally homogeneous area with a presumption of shared values and trust and a single mode of belonging. Moreover, by attempting to reduce the opportunism of Member States through the limitation of legitimate distrust, trust becomes automatic and the Brussels II bis Regulation tends to endanger the axiological project that it seeks to defend. Improvements could then take the form of an adjustment of possible exceptions in order to transform a blind trust into a binding trust, for example by rebalancing the equilibrium through procedural safeguards guaranteeing the protection of fundamental rights, as advocated by S. Bartolini in this special issue.

5. The interactional side of institutional trust

Following our review of conventional and regulatory instruments through the lens of trust and the analysis of their operation at the systemic level, we can now focus on the interactional side of institutional trust. We will therefore attempt to examine trust at the micro level of empirical experiences of Belgian judges in charge of international child abductions rather than the meso and macro levels of the institution. As we investigate more thoroughly judges' role in practice, we must note that there are in fact two main roles that a judge is likely to play depending on his or her position in the procedure. On the one hand, there is the "requested judge", acting in the name of the requested state, whose main task is to order the return or non-return of the child; and, on the other hand, the requesting judge, who can, especially in the European Union, rule on the merits of the case *and* the return at the same time. In this paper, we will only focus on the requested judge, but we should always keep in mind there is more than one judge involved in the procedure. We shall thus first depict the three stages of the process of trust in the interaction to gain deeper insight into the interactional aspect of trust (5.1) before delving further into four attitudes of requested judges, ranging from national reflexes to ethical dilemmas (5.2).

5.1. A process in three stages

G. Möllering offers an interesting contribution to operationalizing trust in terms of research by considering trust as a process structured in three stages: interpretation, suspension, and expectation (Möllering 2001). Trust functions in such a way that an interpretation of the world leads to a risky "mental leap" (Karpik 2006) necessary to reach a state of expectation with respect to others. This necessary suspension of judgment and justification, this leap into uncertainty, refers to the "information paradox" specific to trust: "on the one hand, trust requires a lack of information (when a future behaviour is certain, it is useless to speak of trust); and on the other hand, it relies on information gathered, in the observation of the behaviours of others or in their reported description, about the motives for their actions or their competences" (Nooteboom 2006, p. 63).

It is thus necessary to revisit the relationship between trust and knowledge, that is to say to its incomplete motivational basis, since it is a situated interpretation. According to G. Möllering, fixing an interpretation of the world, albeit limited, is the first step in the process of trust, in combination with the suspension necessary for the risky cognitive leap:

It should be pointed out that – in trust – interpretation and suspension always combine. In other words, the leap of trust cannot be made from nowhere nor from anywhere, but needs to be made from one of the places where interpretation leads us but whose suitability cannot be entirely certain. Suspension can be defined as the mechanism that brackets out uncertainty and ignorance, thus making interpretative knowledge momentarily 'certain' and enabling the leap to favorable (or unfavorable) expectation. (Möllering 2001, p. 414)

In short, trust requires the suspension of interpretation, the characteristic risk-taking implied by the uncertain motivational basis of trust, a mixture of knowledge and belief, a risky enterprise of risk management. Trust thus begins with a stage of interpretation

of the world momentarily fixed by the acceptance of ignorance, concluding with a particular expectation of others (Möllering 2001).

Let us take an example to epitomize what we have underlined above. This structuring of the trust process is perceptible in the presentation given to us by the judge in charge of a child abduction case in which a mother abducted her two daughters from Morocco to Belgium, on which he was about to rule at the time of the interview:

They [the mother and her attorney] give me an absolutely apocalyptic picture of the situation in Morocco; I don't believe it. I don't have all the elements. And so, ideally, we should be able to get in touch with... my judicial counterparts [*"homologue étranger"*]. I am very, very confused, I don't know, I'm going round in circles. The circumstances of the children's arrival in Belgium are extremely suspicious. Can I then endorse the return, without all the elements... [pulls himself together] I mean you have to start from a presumption of trust, otherwise it falls apart completely. I know that there have been a lot of decisions that have undermined this. I believe that this is the first element to which one must pay attention, even if it means refining it later on. But here, you really need very special circumstances. The simple fact of starting from a petition of principle by saying, if it's a removal to a country with a Muslim background it won't happen, I find that extremely shocking. (J1, interview 2)

Initially, the judge relies on factual information as well as on his partial knowledge of and beliefs about Morocco. His initial interpretation is of Morocco as "a country where religious, cultural and educational conceptions are totally different from ours". Later, he describes being in a situation where he faces great uncertainty and a lack of information, which he would like to fill: "I don't have all the elements. And so, ideally, we should be able to get in touch with... my counterparts...". We can feel that the judge is struggling to make a decision, hesitating to take the leap of faith, he is "very confused", "going in circles". We can clearly see the passage from this initial interpretation to the suspension of the iterative dynamic of interpretation by a momentary acceptance of ignorance, and the decision to return, to trust, because he is the guarantor of the functioning of the community of trust as a whole: "Can I then endorse the return, without all the elements... [pulls himself together] I mean you have to start from a presumption of trust, otherwise it falls apart completely". If he wants to avoid trust "falling apart completely", it is then a question of putting institutional trust first to avoid undermining the legal framework by endangering the reciprocity of trust. The judge will therefore end up ordering the return, making, in his words, "the gamble of the return" (*"pari du retour"*). This reference to gambling is meaningful, since it is one of the recurring images used to characterize trust, emphasizing both the confrontation with others' freedom of action, with the aspect of incomplete information of trust, as well as the risky leap that implies a temporary suspension of uncertainty to make room for action (Quéré 2001, Cornu 2006, Ogien 2006, Frederiksen and Heinskou 2016). In this sense, gambling constitutes one of the *logical forms* to describe trust, which includes two elements: a clearly presented stake to which the request for trust applies; and a certain precision about the result to which it could lead (Ogien 2006). The issue here is the return of the child to Morocco and the outcome is a judgment on the merits of the case. More interestingly, the term "gamble" is used to describe trust when the request made to the grantor is of a *moral nature*, which undoubtedly applies to the case studied. This gamble of return will be experienced in the most vivid manner during an ethical dilemma, an attitude that we will detail in the next section.

Thirdly, it can be argued that this return order corresponds to expectations, expressed in the conditional tense: “If I were the judge weighing the merits of the case, I would grant this mother custody,” says the judge. The judge in charge of this case thus hopes that, following the ordered return, the Moroccan judge will grant the mother custody, and will perhaps also allow her to move with the children to Belgium.

Thus, when trust is granted, there is risk-taking absent from distrust and confidence. But risk comes into play for the judge of the requested state at two levels: on the one hand, there is a risk inherent in trusting, as we have shown above (disappointment of expectations, national judgment that does not correspond to the judge’s values, defective protection, corruption, etc.). On the other hand, risk assessment is crucial when deciding to trust his foreign counterpart: the law explicitly provides that it is indeed the existence of a “serious risk that the return of the child will expose him to physical or psychological danger, or in any other way place him in an intolerable situation” which justifies a legitimate distrust and therefore a refusal of return in the framework of the HC 1980.

5.2. Four attitudes between national reflex and ethical dilemma

If the role of the requested state’s judge is indeed to act as guarantor of a community of trust established on the basis of the HC 1980 or the Bxl II bis Regulation, the way in which this role is fulfilled can be a distinct, individual experience. Indeed, while confidence, trust, and distrust perform a similar contingency-management function, they do not produce the same lived experience for judges. As Frederiksen points out, “the phenomenological forms of trust and confidence may ‘functionally’ do somewhat similar things, but are phenomenologically distinct since one is intimately linked to agency and alterity and the other to naturalization and exteriority” (Frederiksen 2016, p. 52). Thus if, at the systemic level, it is above all the functional role of trust that has interested us, it is through an approach that is more attentive to the individual experience of trust that we can grasp the divergences between trust and confidence, according to the various *attitudes* that these “instituted practices of trust” (Quéré 2013) can entail.

In this sense, we have identified four distinct attitudes that return and non-return can involve from the point of view of the judge in the requested state.¹³ Non-return may take the form of a *national reflex* or *protectionism of nationals*, while return may take the form of a *confident return* or an *ethical dilemma*. These attitudes are distinguished by the moral problematization or non-problematization of the situation on the one hand, and by risk-taking (return) or absence of risk-taking (non-return) on the other, as we shall discuss below (cf. *infra*, this section).

In the experience of trust in a transnational context, the relationship to otherness, to the unknown, and to the foreigner structures the way in which a judge in charge of a case acts and the way in which he or she experiences trust or distrust vis-à-vis his or her foreign counterpart. The same case may be dealt with in a routine and unproblematic way by one judge or be the subject of an in-depth problematization for another judge if

¹³ We do not intend to provide an exhaustive list of judges’ possible attitudes, but to focus on four that are helpful for understanding the roles and stakes of trust, distrust, and familiarity in relation to the transnationalization of family law. Keep in mind that these attitudes concerns specifically the relationships between judges and the state they represent.

the case mobilizes, beyond the law, his personal values. Trust as an action and as a form of commitment becomes central here, particularized in specific attitudes. Indeed, where trust suspends uncertainty by a risky leap, confidence simply ignores contingency, sticks to the familiarity of the known world (in this case, that of the nation) without questioning its foundation, without particularly evaluating the scope of possibilities of action – in short: without problematizing the situation. Importantly, this problematization, in the case of requested judges, comes from an awareness of the non-congruence between morality and law, between personal ethics, national law, and international law.

The first attitude, which the judges call the “national reflex”, can be considered as an expression of familiarity with the national. One judge indicates that:

I don't have this reflex of protecting nationals at all. The rules are clear. Some have this reflex. And that's why Europe wanted to do something more restrictive, because they realized that otherwise we tended to have this national reflex. Maybe we still have it. I remember a case, it was not me who dealt with it, it was a colleague. She told me: 'I should send a child back to Thailand. But it's so far away!' (J2, interview 1).

Another judge agrees:

The tragedy is that if the problem starts, if we stop sending back, other states may follow and have a national reflex. Before, it was the policy of *fait accompli* [the parents made the states battling over jurisdiction by legalizing *de facto* abductions]. I fear that the policy of *fait accompli* will return, because if Poland is joined by other countries, the treaty will fail. (J6, interview 1)

The term “reflex” is evocative here: it is therefore a non-reflexive refusal to return, based on habit, on an incorporated, routinized morality of the national, which is not put to the test or in danger by the adjudication of the case. There is no problematization of the case that would imply a questioning of the action. It consists then in the expression of a quiet confidence in national law and its superiority, which lies in the familiarity of the known at the expense of the foreign. This can therefore be a way of reducing complexity by simply ignoring contingency. In other words, one does as he is accustomed, without questioning the decision-making framework in its transnational component, one persists with the familiarity and superiority of the national. J. Allard and A. Garapon, in a paragraph on cross-border family matters, indicate in the same sense:

Here [in family matters], it is no longer a question of policies but more simply of national reflex: one protects one's compatriots. By a sort of spontaneous patriotism, the national judge is tempted to trust in priority the institutions and educational methods with which he is familiar. (Allard and Garapon 2005, p. 389, the translation is ours)

Indeed, it seems that the national reflex, characterized by “spontaneous patriotism”, is “naturally” shared by judges who are not used to “thinking in a network”, among judges who, in the words of one judge interviewed, “are not yet sufficiently integrated into this trust” that transcends the national scale (J2). Going beyond the spontaneous posture of the national reflex actually implies becoming familiar with the transnational, learning to trust (the community of) trust, and relying on legally organized institutional trust. In this sense, it appears that a trusting perspective towards the foreigner is a “mindset” (J6) that is learned, both intellectually and practically. A judge indicates that he has modified his method of adjudication as he has practiced:

At first I must say that I had a bit of a national reflex. But in the European context it is easier, and I have evolved in such a way that today I have become very severe, I always order the return. In a European context, it works. Naturally, I understood the philosophy of the convention but it does take a little time to be really convinced, you have to experiment with it, to put it in practice. (...) For Europe, there is no longer any problem, I have the mindset in the right direction. But if I give the file to another colleague, at first he will do as I did and start by judging the merits of the case and refusing the return. (J6)

It is therefore through practice and use that this judge, who was initially suspicious, gradually adopted a confident perspective towards the foreigner: a certain amount of experimentation was necessary for him to implement what he had grasped intellectually. He was “convinced” through practice that “it works”: “you have to experiment with it, make use of it,” he says. It is thus a familiarization with the instrument, through its concrete implementation, which allowed this judge to order returns abroad in an almost systematic way, so that now, “there is no more problem”. In the course of the cases dealt with, he has thus adopted a perspective of quiet confidence towards the transnational on a European scale. This means that a new habit is formed, which tends to transform what was previously a considered trust on a state-to-state basis, into a quiet confidence in the community of trust and the law that organizes it. Another judge distinguished cases under the EU regulatory regime and HC 1980 cases: in the EU the judge is “at home”, he evolves “in a known framework” and when he is “in Europe, I feel more relaxed” (J3). This demonstrates the extension of the domain of the familiar from national to European. Indeed, what metaphor could be more evocative of familiarity than that of the home. We can therefore argue that, although the trust here remains decided because it is institutional, the judge’s attitude evolved towards a routinization of trust which is transformed into confidence in the institution: he applies the rules without questioning them. It is in this sense that we will call this second attitude “the confident return”.

However, the mindset of this judge, marked by a tacit confidence in the foreigner and the unknown, is highly dependent on the nature and type of community of trust in which the state in question is embedded. Indeed, this judge explicitly states his default trusting mindset, with which he is now familiar, applies only “for Europe”, in cases under the Brussels II bis Regulation. There is thus an *a priori* evaluation of the community of trust, of the values shared within it, and of the norms supposed to govern the behaviour of its members, that conditions the attitude adopted.

In clear contrast, this same judge states, regarding a case with Bolivia:

In another continent, it becomes more difficult. In most cases we have to face other cultures. The European values evolved nevertheless in the same direction and the conclusion is easier to make in this context than in South America, for example, which is very different from ours. [He adds concerning the Bolivian case] I decided to refuse the return: I am sure that legally it was not quite correct, but I was comfortable deciding like that. Bolivia is a very poor country. The children had been in Belgium for almost a year. The living conditions were basic, and well, the mother had come back here. Sometimes I am not very consistent in these cases, between different continents. (J6)

Here, we can see that the community of trust and the evaluation of the values supposedly shared within it are decisive to adopting a trusting attitude towards the

foreigner. If this judge has acquired the certainty that institutional trust-by-default, beyond individual cases, is necessary “for Europe” (as the same judge said elsewhere: “it is not the case that is important, it is Europe”), the same is not true for the HC 1980, of which Bolivia is a member. This judge therefore consciously judges differently according to the community of trust to which his decision contributes, a way of acting which, in his own words, “is not very consistent”, between a trusting European mindset and distrust of non-European treaty countries.

This posture can be distinguished from the attitude of national reflex, which, although leading to the same result (a non-return), is not a matter of quiet confidence in the familiarity of the national, but rather an active distrust expressed through an instrumental use of the law, passing off the superiority of the national for the best interest of the child (as when J6 admits, “I am sure that, legally, it was not quite right”), which is part of the protectionism of nationals that we mentioned earlier. This attitude does not have the “naive” and “natural” character that characterizes familiarity or confidence, since this judge is aware of what is expected of him by the legal framework in terms of institutional trust, but selectively refuses to grant it outside European cases. According to this hypothesis, distrust is then reflexive, in the same way as trust, but it expresses a refusal of contingency and a reduction of complexity without making the risky leap characteristic of trust. The situation is thus problematized and the non-congruence between the values that the judge intends to defend and legal prescriptions is perceived as such: there is a clear incompatibility between the child’s return and the respect of the values to which the judge adheres. In other words, in this case, the judge sees it as a matter of justified distrust because the community of trust in which he is involved does not endorse the values he defends. One can thus distinguish two ways of obtaining the same result: an unproblematic refusal to return based on the superiority of the familiarity of the national and a problematized refusal to return involving a distrust of the foreigner (motivated by the perception of a divergence of values). In the second case, it is no longer appropriate to speak of a reflex, since the attitude is in fact one of active distrust through a misuse of the letter of the law. In this sense, judges’ practices “are likely to result from a strategic vision where options are chosen according to the constraint of legal qualifications but also according to opportunities, political circumstances and aims to which they adhere”.

The fourth experience, the ethical dilemma, arises above all in “hard cases”, and particularly when the return involves a state that has recently become part of a community of trust, or a state about which beliefs or knowledge attest to a divergence in values. It is therefore a problematic case, in which the judge perceives the non-congruence between law and morality, but also a risky one, since it ends in a decision of return – and therefore of trust. Therefore, in these particularly painful and difficult cases – like the Moroccan case and the sleepless nights experienced by the judge – it would seem that trust makes it possible to cut short an ethical dilemma.

J. Zigon’s anthropology of moralities can help us analyse ethical dilemmas. We will not go into the details of the anthropologist’s undertaking, which is far from the considerations that interest us here, but certain aspects of his theoretical framework shed interesting light on the moral stakes of the judgment that the judge of the requested state may experience and provide an original motivation for judges’ actions. J. Zigon argues

that, in general, an individual's everyday life takes place in a familiar world and that morality is a non-reflexive and unproblematic way of being-in-the-world. The author's classical analytical starting point is that morality is not congruent with the social, which allows him to distinguish between morality and ethics: "morality as the unreflective mode of being-in-the-world and ethics as a tactic performed in the moment of the breakdown of the ethical dilemma". Each of us evolves in an unproblematic everyday world until a specific situation triggers a moral breakdown, which problematizes a particular situation and, therefore, puts the weight of what the Danish philosopher K. Løgstrup calls an ethical demand on the individual experiencing this breakdown.

In this sense, we can say that the judge of the requested state in the Moroccan case is experiencing an ethical dilemma, that he is faced with an ethical demand that calls into question the coordinates of his ordinary morality. Should he order the return of the child and therefore trust a state that has visions of the family that are incompatible with his own? Can the mother, perceived as manipulative, be trusted? Faced with this situation, the judge "goes round in circles", has a "*cas de conscience*", experiences "sleepless nights" and cannot immediately decide to order the return of the children. But, insists J. Zigon, it is impossible to live permanently in this state: "there is always a risk in performing ethics. But yet, one must act. One must respond to the ethical demand, for one cannot live (...) in a permanent state of moral breakdown. This inability to live in permanent moral breakdown, then, might be considered one of the fundamental motives for responding to the ethical demand". Here lies the originality of the ethical aspect of trust in this perspective. Could it not contribute to putting uncertainty in brackets and, ultimately, enable an ethical demand to be met? Trust would then have the function of suspending moral breakdown, allowing a return to the daily quietude of ordinary moral dispositions. This is an interesting answer, differing from the classical positions of moral philosophy, which answer the questions of motivation and the end of ethical action by postulating the good, the just, or the right. The function of trust or distrust could then be that of putting an end to an ethical dilemma. "For Badiou the maxim of the ethical moment is 'Keep Going!'. Similar to how I have described the stepping-away of the ethical moment, Badiou conceives of ethics as that which is required in response to certain situations, or what he calls singular events". Trust allows judges to respond to an ethical demand, to Keep Going!, by deciding in a procedural way, without entering into a substantial conflict of values, or risking a paternalistic approach to cultural difference. Indeed, as the judge in charge of the Moroccan case mentioned above indicates: "they are signatories to the Hague Convention, so I cannot impose my own scale of values on this kind of request" (J1, interview 2). He insists in another interview that he "starts from the principle that the framework is there so that we judges do not go off on our own scale of values. In family matters, this is extremely dangerous! I want to avoid any paternalism, in a much more general way. The legal framework is there precisely to avoid the excesses of paternalism" (J1, interview 1).

From then on, avoiding the excesses of paternalism ultimately consists of not imposing one's "own scale of values" on the demands of a foreign state, a posture which, according to a telling statement by an interviewed judge, implies "that we are not judgmental, even if we are judges". The law, here, serves as a means for the judge to avoid paternalism, an essential trait that constitutes the transnational mindset organized by mutual trust: relying on difference rather than imposing one's own convictions.

Nevertheless, on rereading these extracts and following the development of the ethical dilemma, one can conceive of protectionism of nationals as effectively belonging to paternalism and corresponding to the distrustful response that puts an end, if not to a dilemma, at least to an ethical incompatibility. The Keep Going! of trust is opposed to the Don't Go! of distrust, since if distrust puts an end to the problematization of the situation, it does not imply going ahead, taking the risky leap that is characteristic of trust. It is not then a matter of resolving an incompatibility of values by proceduralizing the action, but rather of resolving the conflict of values by affirming the superiority of one's own convictions.

Let us summarize what we have developed in the course of analysing these four attitudes. The attitudes can be distinguished by the presence or absence of a moral problematization of the situation. On the side of moral non-problematization, we observe, on the one hand, the confident return, which attests to confidence in the law and the community of trust, i.e., a kind of transnational confidence (marked by a particular mindset resulting from learning by experience); on the other hand, we observe the national reflex, which expresses an affirmation of national familiarity through the unproblematized superiority of national law – a spontaneous patriotism that expresses a form of “disconfidence” of the unfamiliar. In the event of the moral problematization of the situation, two attitudes also coexist: on the one hand, the non-return marked by the protectionism of nationals, here the judge perceives the non-congruence between law and morality, and distrusts the foreigner by imposing the superiority of the national in a reflexive manner; on the other hand, the return marked by an ethical dilemma, which seeks to deter paternalism by proceduralizing judgment, and to put an end to the dilemma by trust – the only attitude which therefore really implies risk-taking perceived as such by the judge. We have summarized these attitudes in the following table:

TABLE 1

	Return	Refusal to return
Moral problematization	Ethical dilemma	Protectionism of nationals
Moral Non-problematization	Confident return	National reflex

Table 1. Types of attitudes.

These different attitudes can be related to the various modes of complexity reduction that we explored earlier:

TABLE 2

	Return	Refusal to return
Moral problematization	Trust	Distrust
Moral Non-problematization	Confidence	Disconfidence

Table 2. Types of complexity reduction.

This raises the more general question of the relationship between familiarity, trust, and distrust on the transnational scene. It is essential for judges dealing with international

child abductions to move from a mindset based on the familiarity of the national to a posture welcoming transnational institutional trust. It appears that today the expression of a familiar attitude, strictly speaking, is only observed in the case of the nationalist reflex. In other words, the national remains the sole object of the expression of the familiar. This does not mean that nothing changes, however, that these cross-border linkage practices through forms of trust do not bring about shifts in the functions these different complexity-reduction mechanisms fulfil. In reality, what is at stake is the explicit organization of an institutional trust that integrates certain functions of familiarity. As N. Luhmann states:

All these reflections point to the conclusion that system trust has absorbed certain functions and attributes of familiarity (and therefore really stands beyond personally generated trust and distrust). (...) Although system trust is shown to be more or less absorbed, more or less latent, it is fundamentally different from the 'naïve' experience of familiarity with the everyday world. In system trust one is continually conscious that everything that is accomplished is being *produced*, that each action has been *decided on* after comparison with other possibilities. (Luhmann 2017, p. 64)

So it is not so much familiarity with the transnational but rather institutional trust in the transnational context that would functionally replace familiarity, with different characteristics, since never natural nor "naïve". In fact, although the confident return implies a form of familiarity with certain transnational constructions (the "home" that is Europe), this attitude cannot strictly speaking be considered natural or naïve, since it is the result of explicit learning. It is important to emphasize, however, that if the mutual trust between states organized by communities of trust implies institutional trust, it tends to become, from the subjective point of view, a confidence in the community of trust – expressed in the attitude of the confident return. This routinization of trust into confidence, if it is favourable to the maintenance of institutional trust, also seems to constitute the phenomenological counterpart of the systemic-level regulatory crisis, the deleterious effects of which in terms of the protection of fundamental rights are criticized by some ("the forced ideological march" leading to blind trust between states within the framework of the Brussels II bis Regulation).

One could say that two key features are missing in the strict typology of the attitudes that we have depicted here: first, the main protagonist of the litigation, the child, is too little discussed; second, our argument does not do justice to the moral component of trust by referring only to the procedural aspect of the ethical dilemma as a way to avoid ruling on conflicting substantial moral values. These two points are linked. We indeed focused mainly on the relation of trust/distrust between judges and the states they represent, as our paper aims to shed light on the transnationalisation of the law. The four attitudes we delineated concern the relation to the state and the judges. Yet, the protection of the child upon return is a major issue of the ruling process and it cannot be reduced to the misuse of the letter of the law: the social environment of the child depending on the case has to be included in the reflection. We can therefore add a layer of analysis by stating that these attitudes tend to orientate the general way in which a judge will deal with a case, his predisposition to trust or distrust. But this predisposition will in the end be confronted with the case at stake and a judge that tends to take on a confident attitude towards a state will rule on the non-return of a child on the basis of the assumed risks that poses his social environment upon return.

6. Conclusion

As the moral foundations of contemporary society and contemporary law cannot be found in a common substantial background, trust is bound to become a core feature of legal regulation, especially in transnational family matters. By providing a procedural standard of action, it allows cooperation to emerge beyond national boundaries even in the absence of unified moral consensus at the international level. But cooperation and trust are not easily established. Both at institutional and interactional levels, regulatory problems arise.

At the institutional level, cooperation can be achieved through the principle of mutual trust and the constitution of communities of trust that have specific features. As we have shown, the HC 1980 and the HcCH provide group belonging and presumed shared normative ideas that are the very cement of institutional trust. But this community is not homogenous and different strata of group-belonging safeguard the communities in terms of values and norms as well as judicial systems. In the EU, we are faced with a more intensive and formally homogenous community of trust which risks jeopardizing children's right on the altar of integration led by trust as an ideology – shifting it from a means to an end. But, as Luhmann points out, it is through the right balance in the binary alternative of trust and distrust that the transnational system can achieve a rational regulation at the institutional level. Through repetitive interactions, institutional trust assures the equality and respect of national cultures and legal systems while allowing judicial cooperation through the conventional game of reciprocity.

As it is an interaction, albeit a legally structured one, its constitutive practices – underpinned by Rawls (2012) and reported by De Munck in this issue – imbue trust relationships with immanent normativity: reciprocity, equality, and mutuality are necessary for trust to function. Indeed, trust effectively operates under these requirements as it is an interaction that implies recognition of the other partner as an equal; when the trusting partners return children, they do so expecting that the trusted judge will do the same when the situation is reversed. Nevertheless, in contrast to interpersonal trust, a core feature of institutional trust is that it can cope with a lack of reciprocity, as a betrayed trust has less personal implication than in a trusting interpersonal relationship (Luhmann 2017, p. 102). This point is of particular importance because trust and cooperation can then be maintained even though reciprocity and mutual commitment are not effectively established to a certain degree. Depending on judges and cases, the experience of trust and distrust vary greatly. From a national reflex to an ethical dilemma, trust takes on many forms and functions. As we have argued, however, a transnational mindset adopted through learning when confronted with real cases is likely to support the effective practice of trust beyond national borders in child abduction cases. Furthermore, we have shown that trust can play a quiet, unexpected role through the suspension of judgment it implies, putting an end to ethical dilemmas and the state of moral breakdown, leading the way back to everyday morality.

Going beyond the legal principle of mutual trust, we have shown in this article that sociological insights into trust, understood as a key regulation mechanism, can shed a new light on child abduction cases and on transnational family matters in general. The roles of judges at the forefront of the transnationalization of family law then become more apparent: guarantors of communities of trust and keepers of children's right, they

must recognize otherness through trust whilst being vigilant not to trust blindly. At the institutional level, trust is thus a procedural mechanism that allows cooperation in the absence of explicit moral consensus, whilst at the interactional level it is imbued with ethical value and pushes judges to be more open to foreign laws and culture. It seems obvious from this that trust will be a vital ingredient in managing legal pluralism and moral indeterminacy, two unavoidable features of our time.

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