

Contemporary Issues Relating to International Child Abduction in Contemplation of the Eighth Special Commission into the Operation of the 1980 Hague Child Abduction Convention (2023)

Edited by
Marilyn Freeman and Nicola Taylor

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1980 Hague Child Abduction
Convention (2023)**

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Editors

Marilyn Freeman

Nicola Taylor



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Editors

Marilyn Freeman
Westminster Law School,
University of Westminster
London, UK

Nicola Taylor
Faculty of Law,
University of Otago
Dunedin, New Zealand

Editorial Office

MDPI
St. Alban-Anlage 66
4052 Basel, Switzerland

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About the Editors

Marilyn Freeman

Marilyn Freeman is Principal Research Fellow at the Westminster Law School, University of Westminster, London, England; Co-Director of the International Centre of Family Law, Policy and Practice; and Chairperson of the International Association of Child Law Researchers. She is a qualified mediator, trained to undertake direct consultation with children, cases involving international child abduction, and other international family disputes. She also holds an academic door tenancy at 4PB, a renowned specialist family law set of barristers' chambers in London. Marilyn is widely acknowledged as a leading expert in the area of international child abduction and international children's law. Her research has been cited internationally, and its importance was recognized by the United Kingdom Supreme Court. Marilyn publishes widely in her areas of expertise. She has co-edited two recent publications: *International Handbook on Child Participation in Family Law* (Intersentia, 2021) with Wendy Schrama, Nicola Taylor, and Mariëlle Bruning and, with Nicola Taylor, the *Research Handbook on International Child Abduction: The 1980 Hague Convention* (Edward Elgar, 2023). Marilyn's current research focuses on identity for children and young people, domestic violence and international child abduction, child participation in the context of the 1980 Hague Abduction Convention, and child-friendly resources relating to international child abduction.

Nicola Taylor

Nicola Taylor is a Professor of Child and Family Law and Director of the Children's Issues Centre in the Faculty of Law at the University of Otago in New Zealand. She also holds the Alexander McMillan Leading Thinker Chair in Childhood Studies and is Secretary of the International Association of Child Law Researchers. Nicola has qualifications in law and social work, a Ph.D., has been admitted as a Barrister and Solicitor of the High Court of New Zealand, and is a qualified mediator. She is a leading socio-legal researcher and has undertaken many studies with children, parents, and professionals on family law and children's rights issues, including post-separation care arrangements, relocation, international child abduction, children's views and participation, child-inclusive practice, family dispute resolution, children's citizenship and nation-building, children's identity issues in international family law contexts, relationship property division, and succession law. Nicola's research findings have been invaluable in informing legislative, legal policy, and professional practice developments within New Zealand and internationally. She has recently co-edited two books, *International Handbook on Child Participation in Family Law* (Intersentia, 2021) with Wendy Schrama, Marilyn Freeman, and Mariëlle Bruning and, with Marilyn Freeman, the *Research Handbook on International Child Abduction: The 1980 Hague Convention* (Edward Elgar, 2023). In 2016, Nicola and Marilyn were jointly awarded the Association of Family and Conciliation Courts (AFCC) President's Award for their 'singular international work in promoting an empirically based approach in the field of child abduction and relocation.'

Preface

The Eighth Special Commission recently considered the implementation and operation of the 1980 Hague Convention on the Civil Aspects of International Child Abduction within and across the current 103 Contracting Parties. In 2022, we started planning this Special Issue as a means of taking stock of the 1980 Hague Convention in its 43rd year and offering specialist authors the opportunity to highlight cutting-edge issues in contemplation of the deliberations at the Special Commission, held in The Hague from 10–17 October 2023. This Special Issue is, thus, a collection of 12 articles that consider key issues on the Special Commission’s agenda and are also being discussed and litigated by practitioners, courts, scholars, and commentators concerning the Convention.

With the Convention having reached the milestone of its 40th anniversary in 2020, it has reached a time when the circumstances surrounding international child abduction are different in many ways from those that were common when it was promulgated. For example, the profile of abduction has changed, as has the way that parents divide childcare responsibilities between them, including the growth in shared parenting. Domestic violence has become much more widely recognized in the context of international child abduction as mothers flee abroad, often to return to their homeland, with their children to escape an abusive (ex-)partner. Other issues have gained additional prominence in the international family justice field because of the current global challenges and displacement caused by the COVID-19 pandemic, warfare, and family breakdown. In particular, the interrelationships between the 1980 Hague Convention and other Conventions and regional frameworks have never been more important regarding how they impact the 1980 Hague Convention’s operation. For example, the United Nations Convention on the Rights of the Child 1989 has promoted the right of the child to participate in ways not contemplated when the earlier 1980 Hague Convention was being developed and took effect. Societal understanding of, and attitudes towards, childhood and children’s rights have altered considerably since 1980. Furthermore, the interplay between abduction and migration, asylum and refugee issues is now increasingly coming to the fore in the courts of several Contracting Parties, including within the European Union, the United Kingdom, and the United States of America.

This Special Issue, therefore, draws on the expertise of 20 specialists from 10 jurisdictions (Australia, Brazil, Croatia, England and Wales, Israel, Italy, New Zealand, Scotland, South Africa, and the United States of America) to address how well the Convention’s current operation reflects contemporary thinking about international child abduction. The articles concern current global debates on important issues, such as habitual residence (Professor Rhona Schuz) and the child’s best interests (Professor Mark Henaghan, Christian Poland, and Clement Kong). Domestic violence issues feature prominently in the contributions by Professor Katarina Trimmings, Dr. Onyója Momoh, and Konstantina Kalaitoglou on the interplay between international parental child abduction, domestic violence, and international refugee law. Other articles include the intersection between domestic violence and the exception to return in Article 13(1)(b) (Professor Marilyn Freeman and Professor Nicola Taylor) and protecting mothers against domestic violence in the context of international child abduction (Professor Costanza Honorati). The consideration of the child’s participation and their rights in Hague Convention proceedings has been considered by several authors. Dr. Michelle Fernando and Dr. Jessica Mant have explored this topic concerning proceedings in England, Wales, Australia, and the United States. Melissa Kucinski has focused on the U.S. experience of drafting guidelines for judicial interviews of children and their application in global return proceedings under the 1980 Hague Convention. Additionally, Professor Marilyn Freeman and Professor Nicola Taylor have discussed the adoption of practices that enable abducted children’s access to information, as

well as their ability to express their views and be heard in Convention cases. The interaction of the 1980 Hague Convention with the Brussels II-ter Regulation is explored by Professor Maria Caterina Baruffi. Specific developments are also discussed in Convention jurisprudence in England and Wales (Professor Rob George and James Netto), South Africa (Zenobia Du Toit and Bia Van Heerden), Brazil (Lalisa Froeder Dittrich), and Croatia (Associate Professor Mirela Župan and Dr. Martina Drventić Barišić).

Finally, a key impetus for the implementation of the 1980 Hague Convention was the protection of children from the harmful effects of their wrongful removal or retention. As Co-Editors of this Special Issue, we have paid particular attention to how well the Convention is achieving this aim in light of the challenges it faces from a global society, which has changed significantly since its introduction. A central feature of this Special Issue is its focus on how the Convention can best be nurtured to meet these challenges. Our article, the first in this collection, discusses why, how, and to what extent the Convention needs to be nurtured to best position it for its demands, including the current global differences in interpretation and implementation. Suggestions are made to help futureproof the Convention so that children can best be protected as envisioned.

We are most grateful to the contributing authors, Loretta Chen, and the Editorial staff of the *Laws* journal for their role in assisting us with publishing this Special Issue on a timely topic of such great importance to the international family justice community.

Marilyn Freeman and Nicola Taylor

Editors

Article

Contemporary Nurturing of the 1980 Hague Convention

Marilyn Freeman ^{1,*} and Nicola Taylor ^{2,*}

¹ Westminster Law School, University of Westminster, London W1W 7BY, UK

² Faculty of Law, University of Otago, Dunedin 9016, New Zealand

* Correspondence: m.freeman@westminster.ac.uk (M.F.); nicola.taylor@otago.ac.nz (N.T.)

Abstract: A key impetus for the implementation of the 1980 Hague Convention on the Civil Aspects of International Child Abduction was the protection of children from the harmful effects of their wrongful removal or retention. This article considers how well the Convention is achieving this aim in light of the challenges it faces in a global society that has changed significantly since its introduction. Two key aspects of the Convention's operation are addressed in this regard: (i) The intersection between domestic violence and the exception to return in Article 13(1)(b); and (ii) the adoption of practices to enable abducted children to receive information about, and be given effective opportunities to express their views and be heard in, Convention cases. The article discusses why, how, and to what extent the Convention needs to be nurtured to best position it to meet current and future challenges and demands, including the current differences in interpretation and implementation globally. Suggestions are made to help future-proof the Convention so that children can be best protected in the way envisioned by the Convention.

Keywords: international child abduction; 1980 Hague Convention; Article 13(1)(b); grave risk; intolerable situation; domestic violence; UNCRC; child participation; children's views; hearing children in 1980 Hague Convention proceedings; nurturing the 1980 Hague Convention

1. Introduction

A key impetus for the implementation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereafter the Convention) was the desire “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” (Convention Preamble). The incidence of international child abduction has continued to increase, as has the overall number of applications made under the Convention “from 1062 applications in 1999, to 1610 in 2003, 2460 in 2008 and 2730 in 2015” (Lowe and Stephens 2023, p. 69). The detrimental impact of international child abduction on children's well-being and intrafamilial relationships is clearly documented in both the research literature and case law in this field (Freeman 2006, 2014; Taylor and Freeman 2018a). The role of the Convention in addressing this global phenomenon, by providing a mechanism for co-operation between its now 103 Contracting Parties, therefore remains as crucial today as it did when first promulgated in 1980 (Taylor and Freeman 2023a). However, in October 2023, the Convention will celebrate its 43rd anniversary, and this, inevitably, gives rise to legitimate debate about whether, and the extent to which, it remains fit for purpose in contemporary circumstances.

This article considers the Convention's continued efficacy. It examines why, how, and to what extent, in our view, the Convention needs to be nurtured to best position it to meet current and future challenges and demands. Two key aspects of the Convention's operation are addressed in particular—its responsiveness in the contexts of, firstly, domestic violence and, secondly, children's participation rights.

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2. Why Is Nurturing of the Convention Required?

There is broad agreement that the Convention is an extremely successful international instrument and has done much to improve the situation for children and families involved in abduction events (Taylor and Freeman 2023b). However, there is also considerable valid concern about the need for it to respond adequately and appropriately to the ongoing challenges presented by new demographic and social trends (Bryant 2020; Kruger 2011; Schuz 2013, 2018; Trimmings and Momoh 2021; Weiner 2021). Many societal changes impact international child abduction and the operation of the Convention, including those relating to fiscal pressures in the provision of key services in global economies. For example, we have recently addressed the Convention’s uneven playing field internationally, part of which arises due to the variability across Contracting Parties in the availability of public funding for legal representation in applications made under the Convention (Freeman and Taylor 2023a). This resourcing issue and other critical societal changes—including the growing awareness of domestic violence against women globally and the greater respect accorded to children’s right to express their views in legal and judicial proceedings—impact materially on the field of international child abduction and the operation of the Convention. We should be clear, however. These changes, as significant as they are, do not mean that the Convention should be abandoned—far from it. A return to the chaos of pre-Convention days must be avoided at all costs. What we have in mind instead is the prescient observation of Adair Dyer, one of the “fathers” of the Convention, who highlighted the need for continuous nurturing of a law-making treaty so that its useful life may extend beyond at least 30 years (Dyer 2000, p. 16 at n. 60).

We find further support for the concept of nurturing the Convention in the emphasis placed by The Honourable Mr. Alistair MacDonald (2023) on the need for adjustments to be made from time to time in any dynamic system in order to maintain equilibrium. In relation to the Convention, this is required so that an instrument designed to secure the protection of children from the harmful effects of international child abduction should not itself be turned into an instrument of harm (MacDonald 2023, p. 312). This last point is extremely important. It cannot be imagined that the framers of the Convention meant for it to be anything other than a benefit to the children it was designed to protect (Pérez-Vera 1980). It must not, therefore, be allowed to work against their interests today, in a changed society, because the international family justice community shies away from the need to address those changes in a way that allows the Convention to honour its conviction that the interests of children are of paramount importance in matters relating to their custody, and that they should be protected internationally from the harmful effects of their wrongful removal or retention (Pérez-Vera 1980, p. 431 at para 23; Convention Preamble).

The Convention, of course, is now considerably past the 30-year threshold suggested by Dyer. Its longevity is a testament to its resilience and bodes well for its continued applicability in the years ahead. However, to protect its ongoing utility, we believe that it is both necessary and timely to consider how it may best be nurtured as we move towards, and beyond, the Eighth Special Commission taking place at The Hague in October 2023.

3. What Is the Nature of the Nurturing That Is Required?

For the purposes of this article, we have identified two specific areas of concern for which the marked changes in societal approach and understanding since the Convention’s introduction require urgent consideration in the context of its operation: (i) The intersection between domestic/familial violence and the exception to return in cases of international child abduction in Article 13(1)(b); and (ii) the adoption of practices to enable abducted children and young people to receive information about, and be given effective opportunities to express their views and be heard in, Convention cases (Freeman and Taylor 2020). It is to these issues that we now turn.

3.1. Article 13(1)(b)

A contentious issue in the way the Convention is interpreted concerns Article 13(1)(b) which provides for the non-return of the child “if the person, institution or other body which opposes its return establishes that . . . 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”.

Some commentators are deeply concerned that this provision should not become a loophole through which the Convention’s aim to restore the status quo is frustrated (see, for example, [Sobal and Hilton 2001](#)).¹ They advocate a narrow interpretation of Article 13(1)(b) to avoid such an outcome. Conversely, others strongly argue that children’s safety and well-being are at risk when they are returned to their state of habitual residence despite their primary carer parent having fled with them to avoid continuing exposure to domestic/familial violence, and where further violence may occur on return. These commentators, in turn, advocate for a broader interpretation of Article 13(1)(b) (see, for example, [Edleson et al. 2023](#)).²

The trends that make this issue particularly pertinent to our discussion on nurturing the Convention have been well documented in the longitudinal data generated from the four statistical surveys to inform the 2001, 2006, 2011/2012, and 2017 Special Commissions held into the operation of the Convention ([Lowe and Stephens 2023](#)).³ The first of these trends concerns the identity of the adoptive parent. While the Convention’s drafters contemplated the identity of abductors as either mothers or fathers ([Baruffi and Holliday 2022](#)), it was nonetheless assumed that abductors would generally be non-custodial fathers. However, [Lowe \(2023\)](#) states:

Statistical surveys have consistently found that the majority of abductions are by mothers who are normally the child’s sole or joint primary carer and commonly return to their jurisdiction of nationality (i.e., “going home”). In other words, the abductions were generally not aimed, as another study ([Greif and Hager 1993](#)), termed it at “throwing off pursuers by escaping abroad”, but of abductors “returning to a culturally familiar country where family and legal support may be available”. (p. 395)

[Lowe \(2023\)](#), p. 396) acknowledged that one of the reasons that primary carer mothers may be returning “home” is because they are escaping violent or abusive relationships, and there are many commentators who recognise that this can be common in Hague Convention cases. In research by [Lindhorst and Edlesen](#) on 22 cases where return proceedings occurred due to children’s wrongful removal, all the women reported their situation as involving domestic violence ([Lindhorst and Edleson 2012](#)). [Shetty and Edleson \(2005\)](#) had also earlier found adult domestic violence to be a significant issue in parental abductions (p. 117).

It is to be welcomed that the prevalence and impacts of domestic violence are now generally better understood than previously, but some of its various forms have taken longer to recognise. This is especially true of controlling or coercive behaviour ([Home Office 2022](#)).

¹ [Sobal and Hilton \(2001\)](#) state: “Once a court gives significant weight to the child’s wishes or desires, especially a child whom the court opines has obtained an age and degree of maturity, article 13(b) becomes diluted, and a loophole for PAS is created” (p. 1025). However, [King \(2013\)](#) addresses concerns about weakening the Convention if domestic violence is used as a “defence” against returning an abducted child to the state of habitual residence by cautioning against favouring this policy over the perils of exposing children to domestic violence because of the severe impact this has on women and children who flee abuse (p. 103).

² [Edleson et al. \(2023\)](#) support the focus on domestic violence and its relationship to grave risk to children being added to existing or future implementing legislation for Contracting Parties, citing the example of Japan which did so in 2014. [Nishitani \(2023\)](#) considers that the Japanese Implementation Act has generally enabled the Convention to be implemented successfully in Japan as this has allowed for a flexible approach tailored to the domestic legal system and cultural norms (pp. 207–9). However, [Morley \(2023\)](#) considers that the Japanese approach is not working as well as Nishitani indicates and that Japan should comply fully with its obligations under the European Parliament Resolution 2020 (p. 256).

³ A fifth statistical survey is currently being undertaken to help inform the Eighth Special Commission in October 2023.

Although now more readily acknowledged as an issue of concern for police and criminal justice institutions, its keen relevance in terms of Article 13(1)(b) may be less well recognised. Recently, Mr. Alistair MacDonald (2023) specifically addressed the way in which disputed allegations of coercive and/or controlling behaviour are handled by the courts in the context of the Article 13(1)(b) exception to return. He emphasised the importance of judicial training for those deciding applications under the Convention so they are able to identify the existence and impact of domestic abuse, including its specific form of coercive and/or controlling behaviour. Critically, Mr. Alistair MacDonald (2023) also considers the valid concern about delay in these cases:

Once again, it would not be appropriate for me to express a conclusion on the questions raised in this chapter, and I do not do so. However, in the exceptional circumstances of a case in which disputed allegations of coercive and/or controlling behaviour have been levelled as the basis for the application of the exception under Article 13(1)(b), it might be argued that the need for a more involved examination of the facts constitutes a proper explanation for any consequential delay. That delay is caused, in short, by the need to establish, within a *particularly* challenging forensic context, that the child will not be subjected to a grave risk of physical or psychological harm or otherwise placed in an intolerable situation on return with a degree of rigour that ensures an instrument designed to secure the protection of children from the harmful effects of international child abduction is not itself turned into an instrument of harm (pp. 311–12).

The only way in which the Convention is currently structured to enable such domestic violence or abuse against the taking parent to be taken into account is through the operation of the exception to return in Article 13(1)(b). There is no separate domestic violence “exception” or “defence” to return within the Convention’s provisions. The difficulty with this, in terms of domestic violence against the taking parent, is that the requirement within Article 13(1)(b) for there to be a grave risk of being exposed to physical or psychological harm or being placed in an intolerable situation, as a result of being returned relates to the child, not the taking parent. It is, therefore, a matter of interpretation and application of the Convention’s terms by the courts of the country of refuge as to whether such harm to the taking parent will be sufficient to trigger the Article 13(1)(b) exception to return. There is much variation on this matter across the legal systems of the 103 Contracting Parties (see, for example, the [Best Practice Guide Executive Summary on the Protection of Abducting Mothers in Return Proceedings](#) 2020).⁴ Weiner (2002) notes that “the Convention was not drafted with this fact pattern in mind, and it often works unjustly in these cases” (p. 278).

When considering the best way forward, it is timely to remember the comments by Brenda Hale (2017) regarding the run-up to the Sixth Special Commission, held in two parts (June 2011 and January 2012), when many States had been pressing for a Protocol to the Convention that, amongst other things, would cater for the problems posed by domestic violence, while other States were completely opposed to such a Protocol. She stated that “without doing something, there was a very real risk that some countries would pull out of the Convention altogether” (Hale 2017, p. 11). Clearly, that was not an outcome that would have been in the best interests of the abducted children. In the event, the “something” that occurred was the publication of the HCCH (2020) Guide to Good Practice in Article 13(1)(b). This, however, is advisory only and took many years to complete—a possible

⁴ The [Best Practice Guide Executive Summary on the Protection of Abducting Mothers in Return Proceedings](#) (2020) refers to English caselaw *In the Matter of E (Children)* [2011] UKSC 27 and *In the Matter of S (a Child)* [2012] UKSC 12 and states: “It has therefore been recognized that the circumstances of the abducting mother and the child may be intertwined to the extent that domestic violence perpetrated solely against the mother may justify the finding that the return would expose the child to a grave risk of “psychological harm or other intolerable situation” pursuant to Article 13(1)(b)” (p. 4). See also [Trimming and Momoh \(2021\)](#) on the protective measures vs assessment of allegations approach taken by the UK courts. They favour the latter approach. Note also that the [Guide to Good Practice HCCH \(2020\)](#) states that “Evidence of the existence of a situation of domestic violence, in and of itself, is therefore not sufficient to establish the existence of a grave risk to the child” (para 58).

indication of the difficulty in achieving agreement internationally on the issues it addresses (Freeman and Taylor 2020).⁵ More recently, calls have been made to strengthen the Guide to Good Practice because of its overreliance on protective measures (Hague Mothers 2023).

Other organisations and scholars have also examined the intersection between domestic violence and the exception to return in Article 13(1)(b) and expressed their anxieties about how the Convention works in this regard. For example, the European Union Rights, Equality, and Citizenship Programme funded a dedicated research project on the *Protection of Abducting Mothers in Return Proceedings: Intersection between Domestic Violence and Parental Child Abduction* (POAM) (Trimmings et al. 2022). In 2017, a specialist one-day Experts' Meeting on Issues of Domestic/Family Violence and the Operation of the 1980 Hague Child Abduction Convention was convened by Professor Marilyn Freeman at The University of Westminster (London) in collaboration with The Hague Conference on Private International Law (HCCH) to address these issues directly. Fifty-seven specialist abduction researchers from nineteen jurisdictions—judges, legal practitioners, policymakers and NGO staff—attended this high-level networking and information exchange event, either in an official or personal capacity.⁶ The concluding session, co-chaired by Lady Justice Jill Black, as she then was, Head of International Family Justice for England and Wales, and a member of the Court of Appeal, London, and Philippe Lortie, First Secretary at the Permanent Bureau of the HCCH, focused on the challenge of striking the correct balance between resolving and properly investigating cases involving domestic and family violence (to the extent required by the grave risk exception under the Convention) whilst maintaining the expedition necessary to return abducted children without undue delay (Experts' Meeting 2017). This remains a challenge that still needs to be met today.

The possibility of differing regional approaches already exists. Henaghan et al. (2023) highlight the need to understand the true impact of returning a child to a grave risk or intolerable situation and caution against specific children being allowed to suffer from the application of Convention principles that relate to “the theoretical child” (p. 190). Addressing the situation in the Australasian region, they state that, as a general rule, abducted children at risk of harm on return are not, in fact, returned to their state of habitual residence as their individual interests take precedence over the more classic Convention position of returning children based on the belief that they will be protected appropriately in the state of habitual residence. This type of individual treatment is correct, in the view of these authors, where the child's primary caregiver has experienced domestic violence so that the particular child in these circumstances is not placed at risk of any further harm occurring following return. The authors highlight both the need for the Convention to remain fit for purpose and the need for practice to evolve in response to changing circumstances and the nature of abductions (Henaghan et al. 2023, p. 190).

All of this work has been useful, but the difficulties identified in the final session of the Experts' Meeting (2017) remain. The significant negative long-term effects of

⁵ Freeman and Taylor (2022, pp. 51–52) outline the lengthy process: “The Sixth Special Commission, prompted by concerns about jurisdictional differences of approach, particularly where there were allegations of domestic violence, recommended the establishment of a Working Group to develop a Guide to Good Practice on the implementation and application of Article 13(1)(b). The Working Group commenced in 2013 and encountered many challenges during its seven-year role. For example, the 2017 draft of the Guide was criticised by prominent academics, domestic violence service providers and a taking (protective) parent for failing to give sufficient weight to domestic violence and for setting the threshold to successfully trigger Article 13(1)(b) too high. Similarly, a petition crafted in January 2020 by Professors Rhona Schuz and Merle Weiner, and signed by 150 law professors, family justice professionals and other concerned individuals, asked the Council on General Affairs of the Hague Conference and the Hague Permanent Bureau “to make a small but crucial change before the Guide is released, although the finalized version has been silently approved by the Member States. The amendment attempts to clarify language in the proposed Guide which, as it stands, undermines the scientifically supported proposition that domestic violence perpetrated against a parent can harm that parent's child, even when the child is not a direct target of the violence. The Guide to Good Practice was published, unchanged, shortly thereafter in March 2020 to provide practical guidance to judges, Central Authorities, lawyers and other practitioners faced with the application of Article 13(1)(b)”.

⁶ Australia, Belgium, Brazil, Canada, England and Wales, Finland, France, Germany, India, Italy, Japan, New Zealand, Northern Ireland, Norway, Scotland, South Africa, Switzerland, the Netherlands and USA.

abduction identified in prior research mean it is critical that the effectiveness of the Convention is not undermined (Freeman 2006, 2014; Freeman and Taylor 2023a, 2023b; Van Hoorde et al. 2017). However, as we have argued previously, this is unlikely to be achieved without constructively addressing the issue of domestic violence (Freeman and Taylor 2020, p. 159). The question is, how best to do this?

While we work on possible solutions, continued awareness-raising about the risk posed by domestic violence for its adult victims, the children who witness or directly experience it, and the dangers they face if returned together or separately, can provide a helpful incentive for a supportive interpretation of Article 13(1)(b) and the Convention in appropriate cases (Freeman and Taylor 2020, p. 168).

3.2. *The Provision of Information and Hearing the Child*

The right of a child to express their views freely in all matters affecting them and for those views to be given due weight in accordance with the age and maturity of the child, enshrined in Article 12 of the United Nations Convention on the Rights of the Child (UNCRC) and supported by [General Comment No. 12 \(2009\)](#), is not limited to circumstances where the child only proffers an objection to return. However, the principal opportunity for child participation in the 1980 Hague Convention proceedings, set out in Article 13, states that:

The judicial or administrative authority may also refuse to order the return of the child if it finds that **the child objects to being returned** and has attained an age and degree of maturity at which it is appropriate to take account of its views. In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence (emphasis added).

It is questionable whether, and how far, the child objection exception in Article 13 can be said to fulfil the requirement in Article 12 of the UNCRC relating to the child's right to participate in decisions concerning them (Schuz 2013). Practice surrounding even this limited form of hearing the child in international child abduction proceedings varies dramatically among the 103 Contracting Parties to the Convention (Freeman and Taylor 2020; Schuz 2023; Taylor and Freeman 2018b). Thus, the question of whether, and to what extent, the Convention is, in fact, compatible with the UNCRC remains unclear (Skelton 2023)⁷ notwithstanding pronouncements to the contrary by some courts.⁸ Even the VOICE research project, which analysed the reasoning of judges regarding the hearing of children in international child abduction proceedings in Europe, concluded that a tension exists between the exceptions on the right of the child to be heard provided for in their legal framework (which includes the UNCRC) and the arguments that judges rely on to decide not to hear a child in cases of international child abduction (Van Hof et al. 2020, p. 350).

In the US, the child's objection exception in Article 13 "is still very much a developing area of the law ... and, in contrast to other recent developments, there is little to cheer" (Cullen and Powers 2023, p. 199). There has been no resolution on how the tribunal of fact is to determine the child's opinions, and there is no agreed-upon approach in US courts. Cullen and Powers (2023) consider there is an urgent need for this exception to return

⁷ Skelton (2023) notes that there are clear differences of opinion regarding whether or not the Convention and the UNCRC are compatible or divergent. She considers that a constructive approach is required to discern the CRC perspective to this issue because there is no clear statement, such as a General Comment, that presents an official position.

⁸ Stephens and Lowe (2012) discuss the Supreme Court's decision in *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27; [2011] 2 WLR 1326 and its analysis of the interrelationship between the Convention, the UNCRC, and the European Convention on Human Rights: "The importance of the case lies primarily in its discussion of the European Court of Human Rights (Grand Chamber) decision *Neulinger and Shuruk v. Switzerland* [2011] 1 FLR 122 but also as the first Supreme Court decision to consider the interpretation of Article 13(b) of the 1980 Convention and as a useful confirmation of the Convention's compatibility with Article 3.1 of the UNCRC" (p. 125).

in Article 13(1)(b) to be clarified by the courts of appeal as there continues to be no clear mechanism for children’s voices to be heard in US Convention cases, and the US remains out of step with the rest of the world on this important exception to the obligation to return the child. However, the narrow application of the child objection exception by courts in the Australasian region perhaps indicates that, although this does not reflect current thinking on child participation, the US approach is not a complete outlier in this regard (Henaghan et al. 2023).

Other Convention jurisdictions have made greater progress in this matter. The Netherlands, for example, has introduced what is commonly known as the “pressure cooker model” or “the Dutch model” in Convention return proceedings (Olland 2018, p. 54). Their pilot in the District Court of The Hague has become common practice since 2018 (Bruning and Schrama 2021, p. 240). All children from the age of three are being heard (in two meetings) by a guardian ad litem, who subsequently informs the court about the child’s views before the hearing. From the age of six, children are invited to be heard directly by the judge after the interview with the guardian ad litem. The guardian ad litem will also support children who wish to be heard in court and will explain the court’s judgment to the child.

The Brussels II-bis Recast (now known as Brussels II-ter)⁹ which came into operation on 1 August 2022 is another key development providing significantly greater opportunities for children to be heard in courts within the European Union:

Article 21 of Brussels 11 bis Recast introduces an obligation for Member States to provide a subject child, who is capable of forming their own views, with **a genuine and effective opportunity to express their views**, either directly or through a representative or an appropriate body and this obligation extends to all proceedings concerned with matters of parental responsibility. Further, the courts in the Member States are required to give due weight to the views of the child in accordance with their age and maturity. (Blackburn and Michaelides 2019, p. 2) (emphasis added)

Importantly, this obligation is extended specifically to the sphere of child abduction proceedings in Article 26. However, Member States are left to implement these provisions in line with their domestic practices:

... recital 39 specifies that to whom and how the child’s voice will be heard will be left to Member States to determine in accordance with national law and procedure. Therefore, it is open to individual Member States to determine whether a child’s views are obtained by a judge or by a specially trained expert (such as a Children and Family Court Advisory and Support Services officer or a child psychologist). It is also not an absolute obligation and it is an issue that will still have to be assessed by the court considering the best interests of the child (Blackburn and Michaelides 2019, p. 2).

Of course, these provisions only apply to intra-EU abductions (except for Denmark). Hence, abductions between countries not bound by the Brussels Regulation will continue to apply the traditional approach of the Convention in respect of abductions between their jurisdictions, and this will impact the degree of uniformity in Convention practice between Contracting Parties.

Hearing children in Convention proceedings is, however, only one critical part of child participatory practice in this field. We have long argued that without appropriate information being made available to children and young people involved in international child abduction cases, their right to express their views remains largely illusory:

⁹ Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast). This replaced the Brussels 11-bis [Council Regulation \(2019\) \(EC\) No 2201/2003](#).

Family justice professionals should also ensure that the method by which the child is heard does actually provide an effective opportunity for the child to express their views within the limitations of national laws. This will include providing the child with age-appropriate information about the nature and scope of the proceedings and their participation in them (Freeman et al. 2019, p. 11).

Children and young people need to know what their rights are in the context of Convention proceedings and how to exercise them. This is fully acknowledged in [General Comment No. 12 \(2009\)](#) on the right of the child to be heard, as participation involves not only being permitted to express views on any decision that will affect the child but also entails providing the child with information that is necessary for the choices that need to be made. We have previously commented on this issue as follows:

Decisions made in the 1980 Hague Convention return proceedings are not infrequently definitive in that further proceedings in the State of habitual residence do not always take place following a child's return. It is, therefore, imperative that children have an opportunity to be properly heard and involved in these decision-making processes, whether or not what they had to say amounts to an objection to return. They must not be side-lined from their own lives and well-being. If the 1980 Convention is to apply in a truly child-centric way it is fundamental that children are aware of the Convention, how it applies to them, and the opportunities it provides for their participation. (Freeman et al. 2019, p. 10)

Furthermore, we have recently worked with other international specialist researchers and practitioners to address a key gap in children's access to justice and legal literacy by developing a website in a child-friendly format to provide information about international child abduction and the Convention. The FindingHome website—<https://findinghome.world/> (accessed on 20 July 2023)—was launched in December 2022 following extensive consultation with a Young People's Advisory Group. It is set within the context of Article 12 of the UNCRC, and key content has already been translated from English into French and Spanish. It is hoped that further translations into additional languages will enable many more children and young people globally to be able to access and utilise the information on the website for their own benefit and that of their families, friends, and peers. The project team is currently disseminating information about the website and is appreciative of the many practitioners and organisations featuring it on their websites and resources.

We are aware of the necessity for Convention proceedings to be speedy to avoid abducted children languishing in the refuge State for longer than necessary. Uncertainty militates against the ability to settle, which is usually not in a child's best interests. However, what is right should not be sacrificed on the altar of expediency. Children should be able to have their views taken into account if they choose to do so in Convention proceedings, and this should not be limited to just those children expressing an objection to return. This does, without doubt, involve a more extensive enquiry in international child abduction proceedings than is currently the case in many Contracting Parties. While this would likely lengthen, if not delay, proceedings, the apparent straightforward and streamlined mechanism of the Convention has already had to take into account the increasing complexity of abduction subject matter, and the process may, as a result, be fairer to children (Setright and Gratton 2023). We agree that this observation is both persuasive and realistic.

4. How Much Nurturing Is Required?

Over the decades since the Convention's introduction, various initiatives have been undertaken to enable it to remain fit for purpose in our changing world. The "soft law" options currently in use, for example, the Guides to Good Practice, provide guidance to Contracting Parties on key issues, but their lack of enforcement mechanisms weakens their ability to make the kind of practical differences required. Other types of "soft law" are possible, such as guidelines and declarations, but their effectiveness in achieving the necessary degree of global "buy-in" is doubtful.

The creation of a Protocol to the Convention has long been mooted (McEavey 2010). Momentum had built towards this in advance of the Sixth Special Commission in 2011/2012 when the HCCH Council on General Affairs and Policy (31 March–2 April 2009) authorised the Permanent Bureau to engage in preliminary consultations concerning the desirability and feasibility of a Protocol to the Convention. However, McEavey (2010) correctly anticipated that “a review of its history to date makes clear that it would be wrong to presume the realisation of the initiative to be inevitable” (McEavey 2010, p. 59). In fact, as Brenda Hale (2017) noted, “discussion of a Protocol was abandoned at the last minute” (Hale 2017, p. 9). While many states had been pressing for a Protocol to the Convention that, among other things, might do more to protect children and cater for the problems posed by domestic violence, other states were adamantly opposed to such a Protocol (Hale 2017; HCCH 2011). Given this background, it seems extremely unlikely that the development of a Protocol will now come about.

The Convention’s operation currently evolves through the ways that the many jurisdictions interpret, apply, or operationalise it based on their own needs, requirements, and resources. This does, however, lead to differences emerging between Contracting Parties globally (Freeman and Taylor 2023b). To some extent, differing interpretations and implementations of the Convention’s provisions are inevitable given the level of diversity between the social and economic demographics of the countries involved (Henaghan et al. 2023). Differences will occur due to jurisdictional practice and regional obligations, as well as the inclusion of terms that are not part of the Convention in the implementing legislation of newly Contracting Parties. However, what this means in terms of the Convention’s future remains uncertain—does, for example, the extent of this diversity undermine the efficacy of the Convention in its global operation? In relation to the Brussels 11-ter Regulation, Lowe (2023) certainly sounds a cautionary, but realistic, warning about the imbalances that may result in the Convention’s operation from non-uniform approaches to its provisions:

Laudable though its attempts to “improve” the Convention may be, Brussels II-ter puts a serious dent in the uniformity of approach under the Convention. In that sense it is a real challenge to the Convention (p. 402).

The question therefore arises as to how fit for purpose the Convention remains, and whether, if it requires support to do so, there are other effective ways in which this may be achieved. We are very conscious of the challenges that further nurturing of the Convention will entail. It may well be difficult to achieve consensus across the Contracting Parties as the various other options attempted to date have yet to yield effective global outcomes.

We do not believe that the Convention is not fit for purpose, but we do consider that it requires some degree of realistic nurturing to enable it to respond more appropriately to contemporary circumstances. We agree with Lowe (2023) that the Convention does not require a radical overhaul and is fortified by his comment that this “does not mean it should be immune to some change” (p. 402). Domestic violence and child participation, as we have argued in this article, are two such issues on which change is urgently needed in the approach of the Convention’s Contracting Parties to help ensure the Convention’s operation evolves appropriately in response to identified global trends. There are, of course, several other important concerns regarding the Convention’s operation that also need to be addressed in a similarly purposive way (Freeman and Taylor 2023b).

These are issues that must be addressed by the international child abduction community working together to support and nurture the Convention. We have already argued elsewhere that, in furtherance of the aim of working collectively to support and nurture the Convention, and in light of the Eighth Special Commission being held in October 2023, we consider it timely to suggest that the themes and issues identified in this article, together with others who represent specialist current thinking about international child abduction and the operation of the Convention, should form the basis of further work to be undertaken, or commissioned, by the HCCH in one of the various ways available to them (Freeman and Taylor 2023a). This would be a pragmatic and progressive means of facilitating the much-needed deliberation by the international community on the gaps

and challenges in the Convention's operation and how best to address them. In our view, thought should also be given, perhaps following the further work undertaken in the first instance by the HCCH, to the establishment of an international, interdisciplinary experts' or working group to discuss, develop, and take forward the identified themes and issues. We recognise such initiatives must be achieved by working within the Hague Conference on Private International Law (HCCH) and Permanent Bureau mandate and are delighted that immediately following the 2023 Special Commission in The Hague, an international, interdisciplinary Experts' Meeting will take place at the University of Westminster in London, England. This is an independent initiative that is not within the administration or under the auspices of the HCCH; however, the interest and support demonstrated by the chairmanship of the Experts' Meeting by Philippe Lortie, First Secretary at the Permanent Bureau of the HCCH, are acknowledged and greatly appreciated. The following three topics will be discussed at the Experts' Meeting: (i) Abduction and asylum issues; (ii) abduction and domestic violence issues; and (iii) abduction and child participation issues. Two of those topics correspond with the specific themes in this article, but all three should be seen as part of the broad category of issues that require the nurturing of the Convention for which we are advocating.

5. Conclusions

There are now key opportunities to nurture and future-proof the Convention, and they must not be squandered. The suggestions made above regarding further work by the HCCH, and the possible appointment of an experts' group/working group within its auspices, may provide a route to progress. We cannot close our eyes to the obstacles that the Convention faces, nor must we undermine the advances for abducted children that the Convention has achieved. These are undeniable challenges that we must meet together, as a community. We can preserve the integrity of the Convention while addressing these issues. We can nurture the Convention so that it is able to continue in contemporary society to fulfil its desire to protect children internationally from the harmful effects of abduction. We accept that this is, in common parlance, "a big ask", but this challenge to the Convention can, and must, be met, as with the other identified challenges, by the combined efforts of the international child abduction community, which is dedicated to doing its best for abducted children in contemporary society.

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References

- Baruffi, Maria Cristina, and Jayne Holliday. 2022. Child Abduction. In *A Guide to Global Private International Law*. Edited by Paul Beaumont and Jayne Holliday. Oxford: Hart Publishing Studies in Private International Law, chp. 34.
- Best Practice Guide Executive Summary on the Protection of Abducting Mothers in Return Proceedings. 2020. Available online: <https://research.abdn.ac.uk/wp-content/uploads/sites/15/2020/11/POAM-Executive-Summary.pdf> (accessed on 14 June 2023).
- Blackburn, Helen, and Marianna Michaelides. 2019. *The Advent of Brussels II bis Recast*. England and Wales: LexisPSL News—News Analysis.
- Bruning, Mariëlle, and Wendy Schrama. 2021. The Netherlands. In *International Handbook on Child Participation in Family Law*. Edited by Wendy Schrama, Marilyn Freeman, Nicola Taylor and Mariëlle Bruning. Cambridge: Intersentia Ltd., pp. 231–44.
- Bryant, Diana. 2020. The 1980 Child Abduction Convention—The status quo and future challenges. In *The Elgar Companion to the Hague Conference on Private International Law*. Edited by Thomas John, Rishi Gulati and Ben Köhler. Cheltenham: Edward Elgar, pp. 181–95.

- Council Regulation (EU) 2019/1111 of 25 June 2019 on Jurisdiction, the Recognition and Enforcement of Decisions in Matrimonial Matters and the Matters of Parental Responsibility, and on International Child Abduction (Recast). 2019. New York: LexisNexis PSL Family.
- Cullen, Stephen, and Kelly Powers. 2023. The 1980 Convention comes of age in the United States. In *Research Handbook on International Child Abduction: The 1980 Hague Convention*. Edited by Marilyn Freeman and Nicola Taylor. Research Handbooks in Family Law Series. Cheltenham: Edward Elgar, pp. 191–99.
- Dyer, Adair. 2000. To Celebrate a Score of Years! *NYU Journal of International Law and Policy* 33: 1.
- Edleson, Jeffrey, Sudha Shetty, and Mary Fata. 2023. Fleeing for safety: Helping battered mothers and their children using Article 13(1)(b). In *Research Handbook on International Child Abduction: The 1980 Hague Convention*. Edited by Marilyn Freeman and Nicola Taylor. Research Handbooks in Family Law Series. Cheltenham: Edward Elgar, pp. 96–114.
- Experts' Meeting Report on Issues of Domestic/Family Violence and the 1980 Hague Child Abduction Convention. 2017. Co-Hosted by the Permanent Bureau of the HCCH and University of Westminster, London, England and published as Information Document No. 6 for the Seventh Special Commission. The Hague: HCCH.
- Freeman, Marilyn, and Nicola Taylor. 2020. Domestic Violence and child participation: Contemporary challenges for the 1980 Hague Child Abduction Convention. *Journal of Social Welfare and Family Law* 42: 154–75. [CrossRef]
- Freeman, Marilyn, and Nicola Taylor. 2022. Domestic violence as an aspect of 1980 Hague Child Abduction Convention return proceedings. In *Domestic Violence and Parental Child Abduction: The Protection of Abducting Mothers in Return Proceedings*. Edited by Katarina Trimmings, Anatol Dutta, Costanza Honorati and Mirela Župan. Cambridge: Intersentia Ltd., pp. 39–65.
- Freeman, Marilyn, and Nicola Taylor. 2023a. Nurturing the 1980 Hague Convention. In *Research Handbook on International Child Abduction: The 1980 Hague Convention*. Edited by Marilyn Freeman and Nicola Taylor. Research Handbooks in Family Law Series. Cheltenham: Edward Elgar, pp. 403–29.
- Freeman, Marilyn, and Nicola Taylor, eds. 2023b. *Research Handbook on International Child Abduction: The 1980 Hague Convention*. Research Handbooks in Family Law Series. Cheltenham: Edward Elgar.
- Freeman, Marilyn, Nicola Taylor, and Rhona Schuz. 2019. *The Voice of the Child in International Child Abduction Proceedings under the 1980 Hague Convention: Project Report*. London: University of Westminster.
- Freeman, Marilyn. 2006. *International Child Abduction: The Effects*. Leicester: Reunite International Child Abduction Centre Research Report.
- Freeman, Marilyn. 2014. *Parental Child Abduction: The Long-Term Effects*. London: International Centre for Family Law, Policy and Practice. General Comment No. 12. 2009. *The Right of the Child to Be Heard*. (CRC/C/GC/12). Geneva: UN Committee on the Rights of the Child.
- Greif, Geoffrey, and Rebecca Hager. 1993. *When Parents Kidnap*. New York: Free Press.
- Hague Mothers. 2023. *The Hague Abduction Convention: What Needs to Change?* Available online: <https://www.hague-mothers.org.uk/wp-content/uploads/2023/02/HM-What-needs-to-change-02-23-1.pdf> (accessed on 14 June 2023).
- Hale, Brenda. 2017. Taking flight—Domestic violence and child abduction. *Current Legal Problems* 70: 3–16. [CrossRef]
- HCCH. 2011. *Guide to Part II of the Sixth Meeting of the Special Commission and Consideration of the Desirability and Feasibility of Further Work in Connection with the 1980 and 1996 Conventions*. HCCH Permanent Bureau Preliminary Document No 13. Available online: https://assets.hcch.net/upload/wop/abduct2012pd13_e.pdf (accessed on 14 June 2023).
- HCCH. 2020. *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part VI, Article 13(1)(b)*. The Hague: HCCH Permanent Bureau.
- Henaghan, Mark, Christian Poland, and Clement Kong. 2023. International child abduction in Aotearoa New Zealand, Australia and the Pacific: Similarities and differences. In *Research Handbook on International Child Abduction: The 1980 Hague Convention*. Edited by Marilyn Freeman and Nicola Taylor. Research Handbooks in Family Law Series. Cheltenham: Edward Elgar, pp. 179–90.
- Home Office. 2022. *Controlling or Coercive Behaviour: Statutory Guidance—What the Police and Organisations Should Do to Keep Victims Safe*. Available online: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1071211/ContCoerBehavStatGuid_V3-_10-04-22_.pdf (accessed on 14 June 2023).
- King, Shani. 2013. The Hague Convention and domestic violence: Proposals for balancing the policies of discouraging child abduction and protecting children from domestic violence. *Family Law Quarterly* 47: 299–310.
- Kruger, Thalia. 2011. *International Child Abduction: The Inadequacies of the Law*. Oxford: Hart Publishing.
- Lindhorst, Taryn, and Jeffrey Edleson. 2012. *Battered Women, Their Children, and International Law: The Unintended Consequences of the Hague Child Abduction Convention*. Boston: Northeastern University Press.
- Lowe, Nigel. 2023. Whither the 1980 Hague Convention? In *Research Handbook on International Child Abduction: The 1980 Hague Convention*. Edited by Marilyn Freeman and Nicola Taylor. Research Handbooks in Family Law Series. Cheltenham: Edward Elgar, pp. 387–402.
- Lowe, Nigel, and Victoria Stephens. 2023. The value and challenges of statistical studies looking at the operation of the 1980 Hague Convention on the Civil Aspects of International Child Abduction. In *Research Handbook on International Child Abduction: The 1980 Hague Convention*. Edited by Marilyn Freeman and Nicola Taylor. Research Handbooks in Family Law Series. Cheltenham: Edward Elgar, pp. 63–77.
- MacDonald, Alistair. 2023. The Continuing Challenge of the 1980 Hague Convention—A Judicial Perspective. In *Research Handbook on International Child Abduction: The 1980 Hague Convention*. Edited by Marilyn Freeman and Nicola Taylor. Research Handbooks in Family Law Series. Cheltenham: Edward Elgar, pp. 298–312.
- McEleavy, Peter. 2010. A protocol for the 1980 Hague Convention? *International Family Law* 59–65.

- Morley, Jeremy. 2023. International child abduction and non-Hague Convention countries. In *Research Handbook on International Child Abduction: The 1980 Hague Convention*. Edited by Marilyn Freeman and Nicola Taylor. Research Handbooks in Family Law Series. Cheltenham: Edward Elgar, pp. 244–63.
- Nishitani, Yuko. 2023. International child abduction in Asia. In *Research Handbook on International Child Abduction: The 1980 Hague Convention*. Edited by Marilyn Freeman and Nicola Taylor. Research Handbooks in Family Law Series. Cheltenham: Edward Elgar, pp. 200–17.
- Olland, Annette. 2018. The voice of the child in 1980 Hague return procedures in the Netherlands. In *The Judges' Newsletter on International Child Protection*. Summer-Fall, Special Focus: The Child's Voice—15 Years Later. The Hague: HCCH Permanent Bureau, vol. XXII, pp. 54–55.
- Pérez-Vera, Elisa. 1980. *Explanatory Report on the 1980 HCCH Child Abduction Convention*. HCCH Acts and Documents of the Fourteenth Session, Child Abduction, 431. The Hague: HCCH.
- Schuz, Rhona. 2013. *The Hague Child Abduction Convention: A Critical Analysis*. Oxford: Hart Publishing.
- Schuz, Rhona. 2018. The Hague Child Abduction Convention in a changing world. In *International and National Perspectives on Child and Family Law: Essays in Honour of Nigel Lowe*. Edited by Gillian Douglas, Mervyn Murch and Victoria Stephens. Cambridge: Intersentia Ltd., pp. 315–28.
- Schuz, Rhona. 2023. Child participation and the child objection exception. In *Research Handbook on International Child Abduction: The 1980 Hague Convention*. Edited by Marilyn Freeman and Nicola Taylor. Research Handbooks in Family Law Series. Cheltenham: Edward Elgar, pp. 115–30.
- Setright, Henry, and Michael Gratton. 2023. Legal Perspective: Remediating International Child Abduction—The Impact of International Developments Upon the English Legal Approach. In *Research Handbook on International Child Abduction: The 1980 Hague Convention*. Edited by Marilyn Freeman and Nicola Taylor. Research Handbooks in Family Law Series. Cheltenham: Edward Elgar, pp. 313–30.
- Shetty, Sudha, and Jeffrey Edleson. 2005. Adult domestic violence in cases of international parental child abduction. *Violence Against Women* 11: 115–38. [[CrossRef](#)] [[PubMed](#)]
- Skelton, Ann. 2023. The CRC perspective in the context of international child abduction and the 1980 Hague Convention. In *Research Handbook on International Child Abduction: The 1980 Hague Convention*. Edited by Marilyn Freeman and Nicola Taylor. Research Handbooks in Family Law Series. Cheltenham: Edward Elgar, pp. 279–97.
- Sobal, Barbara, and William Hilton. 2001. Article 13(b) of the Hague Convention Treaty: Does It Create a Loophole for Parental Alienation Syndrome—An Insidious Abduction? *The International Lawyer* 35: 997–1025.
- Stephens, Victoria, and Nigel Lowe. 2012. Children's welfare and human rights under the 1980 Hague Abduction Convention—The ruling in Re E. *Journal of Social Welfare and Family Law* 34: 125–35. [[CrossRef](#)]
- Taylor, Nicola, and Marilyn Freeman. 2018a. Using research to improve outcomes for abducted children. In *International and National Perspectives on Child and Family Law: Essays in Honour of Nigel Lowe*. Edited by Gillian Douglas, Mervyn Murch and Victoria Stephens. Cambridge: Intersentia Ltd., pp. 329–42.
- Taylor, Nicola, and Marilyn Freeman. 2018b. Outcomes for objecting children under the 1980 Hague Convention on the Civil Aspects of International Child Abduction. In *The Judges' Newsletter on International Child Protection*. Summer-Fall, Special Focus: The Child's Voice—15 Years Later. The Hague: HCCH Permanent Bureau, vol. XXII, pp. 8–12.
- Taylor, Nicola, and Marilyn Freeman. 2023a. International child abduction. In *Handbook on Family Justice Systems*. Edited by Mavis Maclean and Rachel Treloar. Research Handbooks in Law and Society Series. Cheltenham: Edward Elgar, pp. 64–83.
- Taylor, Nicola, and Marilyn Freeman. 2023b. Introduction and key research, policy and practice themes on international child abduction. In *Research Handbook on International Child Abduction: The 1980 Hague Convention*. Edited by Marilyn Freeman and Nicola Taylor. Research Handbooks in Family Law Series. Cheltenham: Edward Elgar, pp. 2–17.
- Trimmings, Katarina, Anatol Dutta, Costanza Honorati, and Mirela Župan, eds. 2022. *Domestic Violence and Parental Child Abduction: The Protection of Abducting Mothers in Return Proceedings*. Cambridge: Intersentia Ltd.
- Trimmings, Katarina, and Onyoja Momoh. 2021. Intersection between domestic violence and international parental child abduction: Protection of abducting mothers in return proceedings. *International Journal of Law, Policy and the Family* 35: 1–19.
- Van Hof, Tine, Sara Lembrechts, Francesca Maoli, Giovanni Siacaluga, Thalia Kruger Wouter Vandenhole, and Laura Carpaneto. 2020. To hear or not to hear: Reasoning of judges regarding the hearing of the child in international child abduction proceedings. *Family Law Quarterly* 53: 327–51.
- Van Hoorde, Kim, Marieke Putterts, Gwenaëlle Buser, Sara Lembrechts, Koen Ponnet, Thalia Kruger, Wouter Vandenhole, Hilde Demarré, Nel Broothaerts, Coskun Coruz, and et al. 2017. *Bouncing Back: The Wellbeing of Children in International Child Abduction Cases*. EWELL, with the support of the European Union. Antwerp: University of Antwerp.
- Weiner, Merle. 2002. Navigating the road between uniformity and progress: The need for purposive analysis of the Hague Convention on the civil aspects of international child abduction. *Columbia Human Rights Law Review* XXXIII 33: 275.
- Weiner, Merle. 2021. You Can and You Should: How Judges Can Apply the Hague Abduction Convention to Protect Victims of Domestic Violence. *UCLA Women's Law Journal* 28: 223–332. [[CrossRef](#)]

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Article

Habitual Residence: Review of Developments and Proposed Guidelines

Rhona Schuz

Academic College of Law and Science, Sha'arei Mishpat Law School, Hod Hasharon 4510201, Israel; rhona@mishpat.ac.il

Abstract: Habitual residence is a key concept in the scheme of the Hague Child Abduction Convention because it determines the applicability of the mandatory return mechanism. However, the concept is not defined, and over the years there have developed different approaches thereto. In recent years, there has been increasing doctrinal uniformity as a result of wide adoption of the hybrid approach. However, there are real disparities in the way in which this approach is applied by different judges and the question of habitual residence remains one of the most litigated issues under the Convention. This article reviews recent case law developments and explains the disparities. It then proceeds to propose guidelines that might assist in increasing uniformity and ensuring that findings of habitual residence promote the objectives of the Convention.

Keywords: Hague Convention; child abduction; habitual residence

1. Introduction

Perusal of the reports and relevant preliminary documents of the various Special Commissions in relation to the Operation of the 1980 Convention on the Civil Aspects of International Child Abduction (hereinafter: “the Abduction Convention”) over the years reveals that little attention has been paid to the issue of determining habitual residence.¹ In particular, whilst calls to provide a definition or guidance in relation to the concept of habitual residence were documented in the context of discussions for a protocol in preparation for the 1st part of the 6th Commission meeting in June 2011 (Prel doc 7 2011, para. 9.2), there is no record of further consideration of this issue² following the decision not to continue work on a protocol later that year (Prel doc 13 2012).

However, habitual residence is one of the most litigated issues under the Abduction Convention. In 2015, 21% of judicial refusals were based on a finding that the child was not habitually resident in the requesting state (Lowe and Stephens 2017), an increase on the figure in previous surveys.³ Whilst this figure of course does not reflect the number of cases in which the dispute about habitual residence was resolved in favor of the applicant, perusal of case law in leading jurisdictions shows that habitual residence is a real issue in a significant number of cases.⁴ Disputes about habitual residence are likely to be more

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¹ Prel doc 1. 2022. For the Upcoming Eight Special Commission Meeting, Draft Table of Conclusions and Recommendations from Previous Special Commission Meetings on the Operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention. Available online: <https://assets.hcch.net/docs/7f3076c4-b17a-49b3-a07b-09fe431525f7.pdf> (accessed on 7 June 2023) does not mention the issue at all.

² Other than in the context of coercion, Conclusions and Recommendations of 6th Special Commission at para. 58.

³ Figures of 18% (2008); 15% (2003) and 12% (1999).

⁴ A Lexis search carried out a few years ago (on 27 July 2017) of Abduction Convention decisions by US federal appeal courts within the previous 12 months revealed that out of 14 cases, in 8 the only or main issue was habitual residence. A similar search carried out on 29 June 2020 revealed that out of 13 cases, in 5 habitual residence was the main issue. A similar search carried out on 19 April 2023 of decisions after 1 January 2022 revealed that in 5 out of 11 cases, the only or main issue was habitual residence. It should be noted that we might have expected to see fewer appeals in relation to habitual residence in the US following the Supreme

common as widespread international travel and relocation, inter alia for purposes of work and study, increase the number of families who have real connections with more than one jurisdiction (Hodson 2018), making it more difficult to pinpoint the child's habitual residence at any given date. Indeed, one of the most common scenarios in habitual residence disputes is where—following a temporary move to another State—one parent refuses to return to the State where the parties lived previously. In such cases, the question of whether the child has become habitually resident in the new State will invariably be determinative of the return application.

The purpose of this article is to explain why there is a need for guidance in relation to determination of habitual residence in Abduction Convention cases and to provide suggestions that might form the basis of a discussion at the upcoming Eighth Special Commission meeting.⁵ Section 2 of the article briefly sets out the development of the concept of habitual residence in the case law of leading jurisdictions. In Section 3, I give examples of disparities that still exist in the way in which habitual residence is determined in borderline cases, despite greater doctrinal consensus in relation to the concept. In Section 4, I propose that the problem might be tackled by the adoption of guidelines in relation to the determination of habitual residence and set out draft guidelines.

2. Habitual Residence in Abduction Convention Cases

2.1. The Role of Habitual Residence

Habitual residence is a key concept in the Convention scheme⁶ because it determines the applicability of the mandatory return mechanism in two ways. Firstly, the applicant has to show that the child was habitually resident in another Contracting State immediately before the wrongful removal or retention.⁷ Whilst the date of removal will not usually be disputed, in cases of retention after an agreed stay in the requested State, the retention may occur before the date scheduled for return where the taking parent has previously manifested an intention not to return the child.⁸ In such cases, after determining the date of the retention, it will be necessary to determine whether the child's habitual residence had changed prior to that date. If the answer to this question is positive, the threshold conditions for engaging the return mechanism are not met, and so return will not be ordered under the Convention.

Secondly, the removal or retention will only be wrongful where it was in breach of rights of custody accorded under the law of the State where the child was habitually resident immediately before the removal or retention.⁹ This will only be relevant in the relatively few cases where there are differences between the laws of different States in relation to rights of custody.

Court holding that the standard for review is clear error—*Monasky v. Targlieri*, 140 S. Ct. 719, 723, (2020). In the UK and Israel, most of the Abduction Conventions cases that have reached the Supreme Court over the years have involved a dispute about habitual residence.

⁵ Habitual residence is also the main connecting factor in the 1996 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, which will also be discussed at the upcoming Special Commission Meeting. However, there are few reported cases concerning determination of habitual residence for the purposes of this Convention. Whilst much of the discussion in this article is also relevant to determination of habitual residence under the 1996 Convention, the need for purposive interpretation means that there may be differences. For consideration of some of these differences, see Schuz (2001b).

⁶ For the origin of the concept of habitual residence and the background to its adoption in the Abduction Convention, see Schuz (2013, pp. 174–77). For a general discussion of the use of habitual residence as a global connecting factor, see Gossel and Lamont (2021).

⁷ Art 4. In most cases in which habitual residence is in dispute, the abductor argues that the child was habitually resident in the requested State at the relevant date.

⁸ Referred to in the UK as “repudiatory breach,” *Re C and another* [2018] UKSC 8, and in the US as “anticipatory retention,” *Abou-Haidar v. Vazquez*, 945 F.3d 1208.

⁹ Art 3.

2.2. Developing Models of Habitual Residence in the Case Law

Despite the critical importance of the concept of habitual residence, the Convention does not define it. The reason given for this is that it is a question of fact and should not be treated as a technical legal term (Perez-Vera 1982, para. 66). However, reality has shown that this assumption is naïve, and over the years it became possible to discern different approaches in relation to this concept (Schuz 2001a). Originally, the prevalent model in the common law world treated the intention of the parent or parents who has/have the right to decide where the child lived as determinative. The other model, prevalent in civil law jurisdictions, focused primarily on the length of the child’s residence in the State in question and other objective factors. Moreover, even within the parental intention model, there were different approaches in relation to the content of those intentions. Under the UK version, it was sufficient that the parents were living in the new country with a settled, albeit temporary, purpose, such as employment or studies (Schuz 2013, p. 187). In contrast, under the US version, a child’s habitual residence would not change unless both parents had the intention of abandoning the habitual residence in the base country (Schuz 2013, pp. 189–92).

Since the second decade of the current century, many jurisdictions have adopted a combined approach, which I have referred to as a hybrid model (Schuz 2013, pp. 192–95). These jurisdictions include the European Union,¹⁰ UK,¹¹ Canada,¹² US,¹³ Israel,¹⁴ South Africa,¹⁵ Australia,¹⁶ New Zealand, Argentina,¹⁷ Japan,¹⁸ and Jamaica.¹⁹ The hybrid model takes a factual child-centered approach, but treats the intention of the parents as a relevant factor (Schuz 2013, pp. 192–95). The Supreme Court of Canada has held that the hybrid approach best conforms to the text, structure, and purpose of the Convention *inter alia* because it recognizes that the child is the focus of the analysis but acknowledges that it may be necessary to consider parental intention in order to assess properly the child’s connections to a country.²⁰

Subtle differences can be found between the various formulations of the hybrid approach, although it is not clear that they are significant. For example, the Supreme Court of Canada states that the court has to determine “the focal point of the child’s life.”²¹ The CJEU describes the concept of habitual residence as “the place which reflects some degree of integration by the child in a social and family environment,”²² and the US Supreme Court takes the view that habitual residence is the child’s home or the place where the child is “at home.”²³ More significantly, whilst in most jurisdictions, the formulation includes a

¹⁰ *Proceedings in Re A C-523/07* [2010] Fam. 42, 69.

¹¹ *A v A (Children: Habitual Residence)* [2013] UKSC 60.

¹² *OCJ v Balev*, [2018] S.C.J. No. 16 (2018).

¹³ *Monasky v Taglieri* 140 S.Ct. 719 (2020). This case resolved the split between those circuits that had adopted the objective approach and those that had adopted the parental intention approach.

¹⁴ *RFamA 7784/12 Plonit v Ploni* (28.7.13, Israeli Supreme Court).

¹⁵ *CB v. LC 20/18381*, High Court of South Africa Gauteng Local Division, Johannesburg, 15 September 2020 (incadat ref: HC/E/ZA 1504) [63].

¹⁶ *LK v. D-G*, Department of Community Services, [2009] HCA 9 [25].

¹⁷ *K. K. J C/P. C.S.S/RESTITUCIÓN INTERNACIONAL* 13.2.20 (Incadat ref: HC/E/AR 1520).

¹⁸ 2019 (Ra) No. 636 Appeal case against an order to return the child (Incadat ref: HC/E/JP 1527).

¹⁹ *DW v MB*—[2020] JMSC Civ 230 (Incadat ref: HC/E/JM 1497).

²⁰ *OCJ v Balev*, [2018] S.C.J. No. 16 (2018), [68].

²¹ *Id* at [43]. However, later case law has understood the decision in *Balev* as meaning that the “focal point of the child’s life” does not end the analysis and that it is still necessary to consider the entirety of the circumstances. See e.g., *A.M. v. A.K.* 2020 ONSC 3422 [35].

²² *Proceedings in Re A* above n. 11.

²³ *Monasky* above n. 14 at 726–727. Justice Alito gives a more precise definition: “The place where the child in fact has been living for an extended period—unless that place was never regarded as more than temporary or there is another place to which the child has a strong attachment, *id* at 734. Subsequent case law applies the “at home” test. See e.g., *Rosasen v. Rosasen*, 2023 US App. LEXIS 408.

list of factors to be taken into account,²⁴ the US Supreme Court simply refers to the “totality of the circumstances” standard.²⁵ The implications of this generality will be seen below.

The widespread adoption of the hybrid approach is a positive development, and it is gratifying to see that some judges have internalized the need to conduct the enquiry from the perspective of the child. Nonetheless, perusal of case law from a number of jurisdictions reveals disparities in the way in which the approach is implemented by different courts. These will be discussed in the next section.

3. Disparities

Four main issues can be identified in relation to which there is lack of uniformity in applying the hybrid approach. The first and perhaps most significant of these relates to the relative weight to be placed on parental intentions. The second relates to the assessment of the factual connections with the States in question and in particular the length of residence required for a change in habitual residence. The third is whether a child can be habitually resident in a place without ever having been physically present there (new baby problem), and the fourth is whether a child can have more than one habitual residence at any given time. I will consider each of these issues in turn, giving examples from the case law.

3.1. Parental Intention

The hybrid approach recognizes, on the one hand, that habitual residence should not be determined purely by parental intentions, and on the other hand, that these intentions cannot be ignored in assessing the quality of the child’s connections with the State that is claimed to be his or her habitual residence. However, the approach leaves a considerable amount of leeway in relation to the weight that is given to those intentions, where they appear to point in a different direction than the factual connections. The most common scenario in which this issue has arisen is where at the date of removal or retention, the child has been living on a temporary basis in the requested State with the consent of both parents and one parent then refuses to return to the State where the family had previously been living.

The variations in relation to the weight to be attached to parental intentions in such a situation can be illustrated by comparing UK and Israeli case law. Since the adoption of the hybrid approach by the UK Supreme Court in 2013, there have been a number of cases in which fathers gave consent for mothers to spend a limited time in the UK with their children and in which it was held that the children had become habitually resident in the UK after a few months, despite the undisputed intentions of the parents that the stay was temporary.²⁶ Take, for example, the case of *AR v RN*,²⁷ which concerned a French father and Canadian mother who lived together in France. After the birth of their second child, the father agreed that the mother could spend her one-year maternity leave with her family in Scotland. After four months, the mother discovered infidelity on the part of the father and applied for a residence order. The father then applied under the Convention, claiming unlawful retention, as the children were still habitually resident in France. The UK Supreme Court dismissed the application on the basis that that the children had already become habitually resident in Scotland because their lives there had the requisite degree of

²⁴ The CJEU’s list in *Proceedings in Re A* above n. 12 at [39] is particularly helpful: “To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family’s move to that State, the child’s nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration.” In UK case law, the applicable principles have been distilled into twelve propositions, *Re M (Children) (Return Order: Habitual Residence)* [2020] EWCA Civ 1105 [63], approving most of the propositions set out by Hayden J in *Re B (Habitual Residence)* [2016] EWHC 2174. However, perhaps ironically, at the end of the day, Heyden J explains his decision on the basis that the child would clearly think that her home was in London with her father, *id* at [32].

²⁵ *Monasky* above n. 14 at 722.

²⁶ See e.g., *Re G-E (children)* (Hague Convention 1980: repudiatory retention and habitual residence), [2019] EWCA Civ 283 (holding the habitual residence had changes after 5 months in the UK).

²⁷ *AR v RN* [2015] UKSC 35.

stability. The reasoning does not seem to give any weight at all to the parental intentions²⁸ or the temporary nature of the stay in Scotland.²⁹ This is particularly surprising, since generally, more weight is given to parental intentions where the children are young.³⁰

This case can be contrasted with a number of Israeli cases in which it was held that children’s habitual residence had not changed after a period of more than six months in Israel, primarily because of the parental intentions.³¹ Take, for example, the Supreme Court case of *Plonit* (2019),³² which concerned an Israeli lesbian couple who traveled to California for the purpose of Y’s post-doctoral studies. Each then got pregnant from the same Israeli sperm donor and gave birth in California—Y to twins—and each adopted the other’s child(ren). The post-doctorate took much longer than the two years originally expected, but C stayed and worked for an additional four years in order to enable Y to finish, even after the relationship between them broke down. Just before the scheduled return to Israel, Y told C that she wanted to stay in the US. In the end, Y agreed to return to Israel if C would sign an agreement (drafted by Y’s lawyer), providing inter alia that the move to Israel was for a trial period of nine months and that the habitual residence of the children would remain in the US. A few months before the end of the trial period, Y stated that she wanted to return with the children to the US at the end of that period. When C refused to agree to this, Y applied for a return order on the basis of C’s wrongful retention. The Israeli Supreme Court upheld the finding that the children were still habitually resident in the US, in light of the fact that they had lived there most of their lives and the trial nature of the return to Israel. Whilst paying lip service to the hybrid approach, in practice, conclusive weight was given to the agreement between the mothers that the return to Israel was for a trial period of nine months, and little account seems to have been taken of the fact that the children (aged five to six) had been led to believe that the move was permanent, had become fully integrated in Israel where all their extended family lived, and had severed all connections with the US. It is difficult to avoid the conclusion that this case would have been decided differently by an English court, in the light of integration and stability of the children’s lives in Israel, where they were living with both parents.

An additional example of divergent approaches to parental intention can be found in an Irish case,³³ in relation to which a reference was made to the CJEU.³⁴ The case concerned a child born in France to a British mother and French father. When the child was four, the parents divorced and the French court held that the child’s residence should be with the mother. The mother then moved with the child to Ireland, but seven months later the French court allowed the father’s appeal and held that the child’s residence should be with the father. When the latter applied to the Irish court for return of the child under the Hague Abduction Convention, that court held that the child was already habitually resident in Ireland at the date of the alleged wrongful retention (i.e., the day on which the appeal judgment was given), because the reality of her day-to-day life was centered

²⁸ In the case of *Re G-E (Children)* [2019] EWCA Civ 283 at [70], Moylan LJ does recognize the force of the argument that insufficient weight was given to the parental intentions, but holds that the finding of the first-instance judge was open to her in the light of the particular facts of the case.

²⁹ And thus seems inconsistent with the CJEU’s comment that the presence should not be temporary, *Re A* above n. 11 at [38].

³⁰ See e.g., *Monasky* above n. 14 at 727; *Balev* above n. 21 at [45]; Order issued by Koblenz Higher Regional Court—13 UF 67/20 Incadat ref. HC/E/DE 1491). See also US case of *Kenny v. Davis*, 2021 US Dist. LEXIS 88556 (upheld on appeal, *Kenny v. Davies* (9th Cir) 2022 US App. LEXIS 4466) in which the court, whilst referring to the “totality of circumstances” standard, largely based its decision that the one-year-old child had acquired a habitual residence in Alaska after four months on the parents’ shared intent to live there indefinitely.

³¹ See, e.g., FamC 15-07-17354 *Ploni v Plonit* (Jerusalem Family Court, 11.10.15), (children’s habitual residence held to be US, even though they had been living with their mother in Israel for three years pursuant to a rotating custody agreement); *P.A. v P.A.* (Jerusalem Family Court, 16 December 2019) (children who had been living in New Jersey with their parents for three years were held not to have become habitually resident there inter alia because the move had been for a trial period for the purpose of solving the marital problems).

³² RFamA 5041/19 *Plonit v Plonit* (Supreme Court, 8 August 2019).

³³ *G v G* [2015] IESC 12.

³⁴ Case C-376/14 *PPU*.

in Ireland and her mother was habitually resident there.³⁵ The Irish courts then referred questions to the CJEU concerning the finding of habitual residence in these circumstances. In their response, the CJEU held that in assessing the reasons for the child's stay in Ireland, it was important to take into account the existence of the appeal, because this impacted on the mother's intention that the stay be permanent and so was not conducive to a finding that habitual residence had changed.³⁶ Nonetheless, the Irish Supreme Court upheld the finding that the child had already become habitually resident in Ireland at the date of the appeal judgment on the basis "that there was sufficient evidence before the High Court concerning integration, family environment and the nature of the relationship between the child, H, and her parents, such as to allow the High Court judge to come to the conclusion she did." In my view, the Irish courts correctly understood that the emphasis has to be on the child's perspective, which was not affected by the existence of the appeal proceedings. In any event, the case highlights the scope for disparities in relation to the assessment of parental intention and the weight to be placed thereon under the hybrid approach, even where exactly the same formulation for determining habitual residence is being used.

Finally, Australian research provides evidence of divergent approaches within a single jurisdiction (Easteal et al. 2016). An analysis of all reported cases on habitual residence since adoption of the hybrid approach in *LK v D-G of Community Services*³⁷ reveals that most focused on the intention of the parents. Only in a minority of cases did courts undertake a broader factual enquiry, as required by that case, and consider the child's perspective.

3.2. Assessment of Factual Connections

The different approaches in relation to the degree of factual connection and in particular the length of residence required to acquire habitual residence in relation to both adults and children have been well documented (e.g., *Beaumont and McElevy 1999*, pp. 106–10). Whilst some judges have taken the view that a new habitual residence can be acquired in a day,³⁸ others have required "an appreciable period of time,"³⁹ an inherently uncertain concept. Adoption of the hybrid approach does little to clarify the issue.

Even where both parents intend a move to be permanent, it should still be necessary to assess the degree of integration of the child. However, perusal of the case law suggests that in such cases (which are relatively rare), the factual threshold for acquisition of habitual residence is low,⁴⁰ and the CJEU has held that provided that the parents are sufficiently integrated, a young child may acquire a new habitual residence within a few days.⁴¹ This approach can perhaps be justified on the basis of the undesirability of holding that a child's habitual residence is different from that of both parents.

In contrast, where there is no joint intention that the move is permanent, the assessment of the factual connections become a corollary of the weight to be attached to the parental intentions. The more weight attached to those intentions, the higher will be the threshold for length of residence and degree of integration. Thus, in the Israeli Supreme Court case of *C v Y*,⁴² the considerable emphasis placed on the fact that the children had only been in Israel for six months at the time of the alleged wrongful retention reflects the weight given to the parental agreement that the stay was temporary, even though this agreement was

³⁵ *G v G* above n. 34 at [48].

³⁶ Case C-376/14 *PPU* at [55].

³⁷ *LK v D-G for Community Services* above n. 17.

³⁸ E.g., *A v A and Another (Children: Habitual Residence) (Reunite International Child Abduction Centre and Others Intervening)* [2013] UKSC 60, [44] per Lady Hale.

³⁹ See e.g., *Re J (A Minor)(Abduction: Custody Rights)* [1990] 2 AC 562, 579 per Lord Brandon. In civil law jurisdictions, six months residence was usually required. See sources cited in *Schuz 2013*, p192 (fn 125).

⁴⁰ See, e.g., *Kenny v Davies* above n. 31. Similarly, in *TY v HY* [2019] EWHC 1310, it seems that six weeks would have been considered sufficient time for acquisition of habitual residence in England and Wales by a two-year-old, but for the fact that the parents' relationship was disintegrating during this time (id at [57]).

⁴¹ *Mercredi v Claffe* Case C-497q10 PU [2011] 1 FLR 1293. In this case, the taking mother had sole parental rights. It would not have been possible to rely solely on the mother's integration if the father had also had parental rights, as can be seen from the later case of Case C-512/17, *In Proceedings brought by HR*.

⁴² *Plonit* (2019) above n. 33.

not in any way reflected in the daily lives of the children. If there had not been any such agreement,⁴³ it seems inconceivable that the court would not have held that their habitual residence had changed, given the integration of the whole family, their deep cultural and family connections with Israel and the severing of connections with the US. In contrast, in the case of *AR v RN*,⁴⁴ the UK Supreme Court's holding that the children's habitual residence had changed after only four months in Scotland with the mother indicates a low threshold for factual connections as well as little regard for parental intentions.

3.3. Need for Physical Presence

The question arises whether a child can be habitually resident in a place without ever having lived there. This issue has usually arisen in cases involving babies who were born during a stay abroad.⁴⁵ Under the parental intention model, it was possible for the child's habitual residence to be in the State where the parents had previously been habitually resident together (*Schuz 2013*, p. 201).⁴⁶ However, the factual element in the hybrid model would seem to make it impossible for a child to be habitually resident in a place without ever having set foot there, as explained by Lady Hale in *A v A (Children: Habitual Residence)*.⁴⁷ Whilst this view has now been confirmed by the CJEU,⁴⁸ it does not seem to be universally held (see, e.g., *Beaumont and Halliday 2021*). In *A v A* itself, Lord Hughes did not agree with Lady Hale's view (*Schuz 2014*, pp. 350–51). It also appears that under the "totality of circumstances" approach adopted by the US Supreme Court in *Monasky*,⁴⁹ physical presence is not a prerequisite. Indeed, in that case, the US Supreme Court stated that an infant's "mere physical presence is not a dispositive indicator of an infant's habitual residence."⁵⁰ Moreover, the reason for the rejection of the mother's argument that the eight-week-old child who had been born in Italy was habitually resident in the US was not simply lack of physical presence there, but rather because the mother failed to show that there had been an intention that the child would be raised in the US.

More recently, relying on *Monasky*, the Texas Court of Appeals, overturning the decision of the first-instance court, held that twins who were born in Israel and brought by their American mother to the US when they were twenty months old were habitually resident in the US.⁵¹ The court, applying the "totality of circumstances test," took into account the fact that when the mother went into labor two weeks after arriving in Israel, she was in the process of seeking medical permission to fly back to the US. In addition, the court took the view that since throughout the time they lived in Israel, they had been in the mother's care, with limited contact with the Israeli father, they had no real integration into a social or family environment in Israel.⁵² With respect, this conclusion is untenable, *inter alia* because the court does not explain how the twins could have any real integration into

⁴³ Especially in view of the fact that the mothers declared that they were returning residents and obtained tax benefits on the basis thereof.

⁴⁴ *AR v RN* above n. 28.

⁴⁵ For more details see (*Fiorni 2021*).

2012 in which the court ordered return of a child who had been born in France during a temporary stay there by the mother to the US, where the mother had lived previously with the father.

⁴⁶ However, some courts were reluctant to take this approach. See, e.g., *W and B v H (Child Abduction: Surrogacy)* [2002] 1 FLR 1008W (holding that children born to an English surrogate mother were not habitually resident in California, where the intended parents lived, because they had never been there).

⁴⁷ *A v A (Children: Habitual Residence)* [2013] UKSC 60.

⁴⁸ Case C-111/17 PPU OL v PQ; *Proceedings in Re A* above n. 11 [38]. However, it should be noted that neither of these cases involved the 1980 Abduction Convention.

⁴⁹ *Monasky* above n. 14.

⁵⁰ *Monasky* *id* at 729, *cf* the view of Boggis J in the District Court en banc decision 907 F.3d at 411, in that case holding that "absent unusual circumstances, where a child has lived exclusively in a single country, especially with both parents, that country is the child's habitual residence."

⁵¹ *In the Int. of A.Y.S.*, 2022 Tex. App. LEXIS 1925. Petition for Review against this decision was denied by the Supreme Court of Texas on 14.10.22.

⁵² *Id* at 32.

a social or family environment in the US, when they had lived in Israel for all their lives.⁵³ In my view, this case illustrates the problematic nature of the “totality of circumstances” standard. Whilst this standard seems to have been intended to represent a combination of the parental intention and objective approaches that had been adopted by different circuits, it does not adequately convey that the emphasis has to be on circumstances relating to the child’s connections with the countries in question. It is noteworthy that under neither of these previous approaches would the child’s habitual residence in this case have been in the US.⁵⁴ The aftermath of this case also illustrates the consequences of lack of uniformity. The twins had actually been returned to Israel following the first-instance decision, and so after winning the appeal, the mother applied to the Israeli court requesting their return, claiming that the father was now unlawfully retaining them in Israel in breach of the decision of the Texas Court of Appeal. The Israeli Supreme Court rejected her request,⁵⁵ inter alia on the basis that it could not simply adopt the finding of the Texas Court of Appeal in relation to habitual residence and advised her to bring custody proceedings in Israel.⁵⁶

It has been argued that it is necessary to amend the Convention in order to resolve the problem of habitual residence of newborn children (Lowe 2019, p. 218). Whilst indeed there are cases in which a rigid rule requiring physical presence is likely to cause undesirable results, in many it will be possible to avoid them by other means. In cases where the child was abducted from the place of birth to the intended State of residence shortly after birth, an application for return to the place of birth can be resisted on the basis that the child does not have any habitual residence yet, since the connections with the place of birth are not sufficient, bearing in mind the temporary nature of the stay there and the lack of integration of the mother in that State (Schuz 2013, p. 202).⁵⁷ Thus, in the case of A.Y.S., if the mother had brought the children to the US a couple of months after they were born, it would have been reasonable to hold that they had no habitual residence and so the Convention did not apply.⁵⁸

Another example would be where a family moves to a new country for a temporary purpose and an additional child is born after the move. The baby will be habitually resident in the new State, but the older children might remain habitually resident in the State where they lived previously. This means that if one parent unilaterally returns to the original place of residence, the Convention would apply to the baby, but not to the older children. However, the court could avoid ordering return on the basis that separating the baby from her older siblings would create a grave risk of harm (Schuz 2014, pp. 355–58).

It should be noted that in the case of A.Y.S. itself, it appears that return could have been prevented without an absurd finding about habitual residence on the basis of the exception in Art 12(2), since the father’s Convention application was submitted two years after the abduction.⁵⁹ It is not clear why the Texas Court of Appeals chose to deal with her

⁵³ The mother had applied for permission for immigration status in Israel in order to convert, but this request was refused.

⁵⁴ The trial court’s decision that the children were habitually resident in Israel was based on shared parental intent because the father never agreed to them being habitually resident in the US.

⁵⁵ RFamA 6762/22 *Plonit v Ploni* (17 November 2022). The mother’s request for a further hearing was denied, ACH 8020/22 *Plonit v Ploni* (29 January 2023).

⁵⁶ I would suggest that the US courts take note of this decision when considering whether to grant a stay of return in cases where there is an appeal against habitual residence, as it belies their assumption that other Member States will return children if an appeal is allowed (see e.g., *Argueta v. Argueta-Ugalde* 2023 US App. LEXIS 6221, 5–6).

⁵⁷ See e.g., *Delouye v Lee* 329b F3d 330 (3rd Cir 2003). The disadvantage of this approach is that it would leave the child “unprotected” in the case of abduction to a third State.

⁵⁸ The period of time during which it might be reasonable to hold that the newborn has no habitual residence because he or she is not integrated in the environment in the country of birth is dependent not only on the lack of integration of the mother in that country where the child was born, but also on the degree of connection of the child with the father and the latter’s integration there. See, e.g., *Michnea v Romania* (Application No. 10395/19) in which the ECtHR held that the Romanian court’s finding that a 5-month-old child born in Italy to Romanian parents was habitually resident in Romania was a breach of the father’s right to family life because it did not take into account that the child had been living with both parents in Italy, where the father was working, and so had to some degree been integrated into a social and family environment there.

⁵⁹ Re A.Y.S. above n.52 at 4. The mother also relied on the grave-risk exception, id at 5.

appeal against the finding of habitual residence rather than to address her claim that this exception was established.⁶⁰

3.4. More Than One Habitual Residence

Whilst it seems to be widely accepted that it is possible for a child to have no habitual residence at a given point in time, the prevailing view is that it is not possible to have more than one habitual residence concurrently. This is no doubt the reason why only rarely has it been argued that a child has dual habitual residence. The main argument in favor of this view is that the Abduction Convention and the Preamble refer to the State of the child's habitual residence in the singular rather than the plural, and so clearly envisage that a child will only have one habitual residence at any one time. In addition, it is claimed that the concept of habitual residence is simply not compatible with the notion that there may be two or more such residences.⁶¹

However, some support for the possibility of two habitual residences can be found in the literature (Beaumont and McElevy 1999, p. 91; Lowe et al. 2004, p. 72)⁶² and case law.⁶³ As I have argued in the past (Schuz 2013, pp. 178–79), the arguments against the possibility of dual habitual residence are not convincing. Some people do genuinely live in more than one country, moving on a regular basis between their two homes, and this phenomenon has become more widespread in recent years (Hodson 2018). Artificially finding that only one of those countries is the habitual residence is inconsistent with the factual nature of habitual residence (Lowe et al. 2004, p. 72). Indeed, case law in other areas of law has recognized the possibility that a person may have more than one habitual residence.⁶⁴ Furthermore, where the child does genuinely have a home in more than one country, it is inappropriate for the Convention to apply to removals or retentions between those two countries. Since the child is now in one of his or her “homes,” this is not an emergency situation requiring a first-aid remedy.⁶⁵ Where the removal or retention is to a third country, the operative habitual residence for the purposes of the Convention will be the State that is requesting return of the child, and so it is irrelevant that there might also be another habitual residence.

4. Proposed Guidelines

The disparities illustrated above create considerable uncertainty, which discourages parents from resolving disputes without litigation. This is unfortunate, because litigation often intensifies the dispute in a way that is harmful to children. In addition, the lack of certainty may impact on decisions that parents make in relation to foreign travel (Schuz 2021, p. 29) and is liable to reduce the deterrent effect of the Convention (Easteal et al. 2016, p. 207). Whilst the fact-intensive nature of the determination of habitual residence and the infinite number of possible factual matrices make it difficult to provide clear-cut guidance, the prevailing view is that the determination of habitual residence is a mixed question of fact and law (Schuz 2013, pp. 179–80; Beaumont and Halliday 2021, p. 32).⁶⁶ Thus, it is possible to formulate general principles that will inform courts' assessment of the facts when making determinations in relation to habitual residence. Such principles should increase uniformity and certainty. Whilst perhaps ideally such principles should be contained in a

⁶⁰ Id at 33 (fn. 7).

⁶¹ *SS-C v GC* [2003] RDF 845 (SC).

⁶² In the second edition of their book, Lowe and Nicholls (2016, p. 33) do not express a view about the possibility of a dual habitual residence, but state that it is an unresolved question.

⁶³ See, e.g., *Sec Depart of Family and Community Services v. Padwa*, [2016] Fam AFC 57; *LK v. D-G, Department of Community Services* above n. 15.

⁶⁴ E.g., *Ikmi v Ikmi* [2001] EWCA Civ 875, relying on the dictum of Lord Scarman in *R v Barnet London Borough Council, Ex p Nilish Shah* [1983] 2 AC 309, but cf case law from CJEU, Case C-289/21 IB (Habitual residence of a spouse—Divorce).

⁶⁵ For the same reasons that the Convention does not apply where the removal or retention is to a single habitual residence, see *Re C and another* above n. 9.

⁶⁶ See also *Monasky* above n. 14.

Good Practice Guide (Beaumont and Halliday 2021, p. 36), if the guidelines are relatively simple and short, they could be adopted in the Conclusions and Recommendations of a Special Commission meeting. Accordingly, I set out below some draft guidelines, with a brief explanation, in the hope that they might provide a starting point for discussion at the upcoming Eighth Special Commission meeting. The guidelines do not attempt to define habitual residence or to set out a list of factors so as not to give preference to the case law of any one jurisdiction. Rather, they set out general principles that can be applied in implementing any of the formulations. Whilst designed with the Abduction Convention in mind, the proposed guidelines can also be used for determining habitual residence of children in the context of other instruments, both international and domestic, provided that appropriate adjustments are made. In particular, the impact of purposive interpretation, the implications of a child not having a habitual residence or having dual habitual residence, and the burden of proof may vary from instrument to instrument (Schuz 2001b).

4.1. Proposed Guideline 1—Canons of Interpretation

Courts should ensure that findings of habitual residence are consistent with the ordinary meaning of the words “habitual” and “residence.” In cases where it is not clear whether the child’s habitual residence has changed, in making their decision, courts should take into account the purpose of the Convention, and primarily the objective of protecting children from the harmful effects of international child abduction.

Explanation

This guideline accords with Article 31 of the Vienna Convention on the Law of Treaties,⁶⁷ which states: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” One of the implications of the draft guideline is that physical presence is a prerequisite for habitual residence, because it is an abuse of language to hold that a child is resident in a State where he or she has never set foot.

Where a finding that a child is habitually resident in either of two States is a reasonable use of language, the court should decide between them by reference to the object and purpose of the Convention. The draft guideline does not purport to set out exhaustively the objectives of the Convention⁶⁸ and refers only to the main objective, viz protection of child from the harmful effect of international child abduction, as provided for in the Preamble to the Convention. The US Supreme Court recently gave a much-needed reminder that this objective does not require pursuit of return at all costs.⁶⁹

The normative premise underlying the Convention’s mechanism is that the best way to protect children who have been uprooted from their habitual environment is by returning them as soon as possible to that environment (Perez-Vera 1982, para. 12, 25). This premise does not apply where the child was not uprooted from his or her habitual environment, and this is why removal of a child to or retention in such an environment is not treated as abduction. In such a case, there is no need for a summary return procedure to protect the child and the courts of the requested State can resolve the substantive dispute on the basis of the child’s best interests.⁷⁰ Accordingly, in borderline cases, where the requested State might equally well be seen as the child’s habitual environment at the time of the removal or retention, the normative premise does not apply, and on the contrary, invoking the return mechanism might cause the very harm that the Convention was designed to prevent. Thus,

⁶⁷ Drafted in Vienna on 23 May 1969. Entered into force on 27 January 1980. United Nations, Treaty Series, vol. 1155, p. 331.

⁶⁸ For discussion of other relevant policy considerations, see Schuz (2001b).

⁶⁹ “The Second Circuit’s rule, by instructing District Courts to order return “if at all possible” improperly elevated return over the Convention’s other objectives. The Convention does not pursue return exclusively or at all costs. Rather, the Convention is designed to protect the interests of children and their parents . . . and children’s interests may point against return in some circumstances. Courts must remain conscious of this purpose . . . ” (Golan v Saada 569 US (2022)).

⁷⁰ *Re C and another*, above n. 9.

the main objectives of the Convention are more likely to be realized by a finding that the child was not habitually resident in the requesting State.⁷¹

4.2. Proposed Guideline 2—Burden of Proof

The applicant has to prove on a balance of probabilities that the child's habitual residence was in a Member State, other than the requested State, immediately before the unlawful removal or retention. Accordingly, in cases of doubt, the applicant will not be able to satisfy the burden of proof and so return will not be ordered under the Convention.

Explanation

The applicant has to prove the threshold conditions for triggering the mandatory return mechanism, and one of these is that the child was habitually resident in a Member State other than the requested State. Thus, in cases where it is not clear where the child was habitually resident at the relevant date—typically whether the child was habitually resident in the requested State or the requesting State—the court will have to dismiss the application for return under the Convention. However, some courts have largely neutralized the burden of proof by relying on a presumption that the Convention should apply, so as to ensure that the child is protected from abduction, and so in borderline cases find that the child's habitual residence was in the requesting State at the date of the wrongful removal or retention (Schuz 2021, p. 23). This approach is misconceived (Beaumont and McElevay 1999, p. 90; Schuz 2013, pp. 207–8).

As explained above, the inclusion of the requirement of habitual residence as a threshold condition reflects the limits of the basic premise underpinning the Convention mechanism and so effectively restricts the concept of abduction as understood by the Convention to cases where at the time of the wrongful removal or retention the child was habitually resident in the requesting State.⁷² Thus, in borderline cases in which it is not clear where the child was habitually resident, the very question to be determined is whether this is a case in which there is considered to be an abduction and so whether there is indeed a need to protect the child therefrom. Accordingly, reliance on a presumption that the Convention should apply, so as to protect the child, for the purposes of determining habitual residence is illogical and circular reasoning.⁷³

It should be remembered that the Convention mechanism is an exception to the usual principle that issues concerning children should be determined according to their individual best interests. The basis for this exception is the assumption that the interests of children will usually be best served by returning them promptly to their social and family environment. However, where that environment was in the requested State at the time of the abduction, this justification for departure from the best-interests standard disappears. On the contrary, a return order will inevitably cause the child upheaval, and where there is a real doubt in relation to the child's habitual residence, his or her interests are likely to be best served⁷⁴ by staying in the requested State until there has been adjudication on the merits of the dispute or an agreement is reached between the parties. Thus, in such cases, courts should be prepared to hold that the applicant has not satisfied the burden of proving

⁷¹ In such a case, return is not required in order to restore the status quo, and the requested State is often an equally convenient forum for adjudication on the merits.

⁷² Whilst the word "abduction" does not appear in the text itself, the Preamble specifically refers to the objective of protecting children from the harmful effects of international child abduction.

⁷³ Such a presumption also means that the finding of habitual residence might depend on whether the child is removed or retained. Assume, for example, that at the end of an agreed stay abroad for work or study, the father refuses to allow the children to return to the State where they were living before. If the mother unilaterally takes them back to that State, applying the presumption will result in a finding that the children have become habitually resident in the new State. However, if instead, she applies to the court in the new State alleging wrongful retention, then the presumption will result in a finding that the children are still habitually resident in the old State. See also example at Schuz (2013), p. 206.

⁷⁴ It might be noted that the ECtHR envisaged that best interests of the child should be taken into account when determining habitual residence. *Michnea v Romania* above n. 59 at [51].

that the habitual residence is in another Member State⁷⁵ and expedite the hearing on the substantive dispute.

4.3. Proposed Guideline 3—Child’s Perspective

The child’s habitual residence should be determined by a comparative evaluation of the child’s connections with the States in question, on the basis of the relevant facts, including parental intentions. This evaluation should be undertaken from the child’s perspective.

Explanation

As already explained, the purpose of the Abduction Convention is to protect a child who has been removed “from the social and family environment in which his life has developed” (Perez-Vera 1982, para. 11). Only if this is determined from the perspective of the child can we legitimately assume that return is in the child’s best interests, and it is this assumption that forms the basis for the Convention’s mandatory return mechanism (Schuz 2013, p. 97). Thus, as one US Court has said in the context of habitual residence, “the child’s perspective should be paramount in construing this Convention whose very purpose is to protect children.”⁷⁶ Similarly, Lady Hale reminds us that the reality is that of the child and not of the parents and that this child-centric approach accords with “our increasing recognition of children as people with a part to play in their own lives, rather than as passive recipients of their parents’ decisions.”⁷⁷ This reasoning is not limited to adolescent children, but applies to all children who are capable of forming independent contacts with the environment in which they live.⁷⁸ Even young children develop meaningful ties with the family and community in which they are living that deserve to be protected, and so account should be taken of the meaning children give to the relationships and events in their life, which may be different from that which adults might expect (Ronen 2004, pp. 158–63). Nonetheless, age and maturity will usually be relevant in determining the weight to be given to their perceptions.

A good example of reference to the child’s perspective can be found in the decision of the US Court of Appeals for the Eighth Circuit in the case of *Silverman v Silverman*,⁷⁹ where the majority, in overruling the District Court’s decision, which had given weight to the mother’s unexpressed reservation, stated:

The court should have determined the degree of settled purpose **from the children’s perspective**, including the family’s change in geography along with their personal possession and pets, the passage of time, the family abandoning its prior residence and selling the house, the application for and securing of benefits only available to Israeli immigrants, the children’s enrolment in school and, to some degree, both parent’s intentions at the time of the move to Israel. (my emphasis, R.S.)

The Israeli Supreme Court has also referred expressly to the requirement to conduct the examination of the facts from the viewpoint of the child. Justice Hendel suggests that when the court places its finger on the map of the world in order to point to the country that is the place of habitual residence of the child, it should have in mind the child’s world map, with the mosaic of facts of which it is composed.⁸⁰ Moreover, Justice Hendel expressly states that whilst parental intentions are part of the factual picture, courts should make sure to keep their focus on the child and not the parents.⁸¹ In other words, at least in relation

⁷⁵ As in, e.g., *CB v. LC* above n 16 (father did not prove integration of children during their 13/14 months in Canada).

⁷⁶ *Stern v Stern* 639 F.3d 449. (8th Cir 2001) 452.

⁷⁷ *Re LC (Reunite: International Child Abduction Centre Intervening)* [2014] UKSC 1, [87]. See also comment of Heyden J in *Re B (a minor (habitual residence))* [2016] EWHC 2174 (Fam) [18] that habitual residence of a child is all about his or her life and not about the parental dispute.

⁷⁸ Lady Hale in *Re LC* *ibid* at [62].

⁷⁹ *Silverman v Silverman* 338 F3d 886 (8th Cir 2003).

⁸⁰ *Plonit* 2013 above n. 15 at [9].

⁸¹ *Id.*

to older children, what is important is how the child would have understood the parents' intentions, based on their actions and conversations with them.

It is worth emphasizing that evaluation of habitual residence from the child's perspective is not inconsistent with the summary nature of Convention proceedings. On the contrary, it is likely to be easier to ascertain the child's perspective than to decide between the parents' conflicting versions as to their intentions (Schuz 2013, p. 212). Ideally, children's perspectives should be presented by an independent lawyer who represents them (Schuz 2013, chp. 15).⁸² Also, children should be given an opportunity to be heard directly or indirectly (Schuz 2013, chp. 14), and in the course of such hearing should be asked questions that shed light on their perspective in relation to their connections with the relevant States. Even where the child is not represented or heard, the judge can consider from an objective point of view on the basis of the evidence available how a child is likely to have perceived his or her connections with the States in question.⁸³ There is no need for any expert evidence about the welfare of the child.

The reference to a comparative assessment recognizes that the speed with which children become integrated into a new environment is invariably connected to the depth of their connections with their previous environment.⁸⁴

4.4. Proposed Guideline 4—Parental Agreements

Whilst parents do not have the power to create a habitual residence that does not match the factual situation of the child,⁸⁵ significant weight should be given to parental agreements as to their intentions in relation to the child's habitual residence in cases where these intentions are not inconsistent with the factual situation from the child's perspective.

Explanation

The Report of the Third Special Commission (1997, para. 16) expressly rejected the power of agreements or court orders (for example, in cases involving shuttle custody arrangement) to determine a habitual residence that differs from the factual habitual residence of the child, and this approach has been adopted in most of the few cases in which such agreements have been considered. For example, in the case of *Barzilay*, the Court of Appeals for the 8th Circuit said:

[D]etermination of habitual residence under the Hague Convention is a fact intensive inquiry particularly sensitive to the perspective and circumstances of the child Perez-Vera Report at 445 (habitual residence is "a question of pure fact"). To allow parents simply to stipulate to any habitual residence they choose would render these factual considerations irrelevant. Moreover, while our cases recognize parental intent as "relevant," . . . to enforce the agreements in this case would render it dispositive Any idea that parents could contractually determine their children's habitual residence is also at odds with the basic purposes of the Hague Convention.⁸⁶

⁸² As in the case of *Re LC* above n. 78.

⁸³ Justice Hendel in *Plonit* 2013 above n. 15 expressly referred to this objective assessment of the child's perspective.

⁸⁴ As expressed in Lord Wilson's seesaw analogy, in *Re B (A Child) (Habitual Residence: Inherent jurisdiction)* [2016] 1 FLR 561, [45]. See also McDonald J's helpful explanation in *E v D* [2022] EWHC 1216 (Fam) [21] ("The deeper the child's integration in the old state, probably the less fast his or her achievement of the requisite degree of integration in the new state. Likewise, the greater the amount of adult preplanning of the move, including pre-arrangements for the child's day-to-day life in the new state, probably the faster his or her achievement of that requisite degree. In circumstances where all of the central members of the child's life in the old state to have moved with him or her, probably the faster his or her achievement of habitual residence. Conversely, where any of the central family members have remained behind and thus represent for the child a continuing link with the old state, probably the less fast his or her achievement of habitual residence").

⁸⁵ Third Special Commission Report at para. 16.

⁸⁶ *Barzilay* 600 F3d 912 (8th Cir, 2010), 920 approved in *Cohen v Cohen* 858 3d 1150 (8th. Cir, 2017) (also concerning an Israeli couple who had signed an agreement requiring the mother to return to Israel on the occurrence of a specific event) cf *Johnson v Johnson* 26 Va App 135, 493 SE2d 668, 672 (1997) (upholding an agreement that

This approach is clearly correct, but it does not mean that no effect should be given to agreements between parents recording their intentions in relation to habitual residence of children. As we saw above, parental intentions are a relevant factor in determining habitual residence under the now widely adopted hybrid approach, and as I will explain below, there are advantages in recording these intentions in an agreement.⁸⁷ Thus, it is appropriate to refer to such agreements in the proposed guidelines.

The main advantage of an agreement is that it spells out clearly the intentions of the parties and so prevents a dispute as to those intentions. Moreover, courts can be expected to try to honor agreements (Schuz 2001b, pp. 135–38)⁸⁸ provided that they were made voluntarily (Schuz 2021, p. 34). Accordingly, an agreement stating the parties' intention that the child's habitual residence should not change following a temporary relocation should increase the weight given to those intentions in determining the habitual residence of the child (HCCH Revised Draft Practical Guide 2019, Explanatory Note 27) as long as it is not clearly inconsistent with the child's reality at the relevant date.⁸⁹

Peter McEleavy (2010) has proposed that agreements preserving habitual residence should be effective for a period of up to 12 or 18 months, in order to promote certainty for families who are traveling abroad for a temporary period. Clearly, this suggestion cannot be adopted without an amendment to the Convention, but the suggested guideline might be seen as a soft-law way of partially implementing this idea. The drawback from the parents' perspective is that they cannot know in advance whether effect will be given to their intentions, since they cannot foresee what the factual situation from the child's perspective at a future date will be. However, they can be advised as to steps they can take in order to increase the chance that the child's perspective will not be inconsistent with their agreement, at least for a certain period of time, for example, by ensuring that the child is aware of the temporary nature of the move and that he or she retains meaningful connections with the country of habitual residence. In addition, financial sanctions, such as undertakings to pay for legal costs, can be inserted into agreements between parties in order to create a disincentive to unilateral removal or retention of the child or alleging change of habitual residence in breach of the agreement.

5. Summary

This article has shown how in some ways, the concept of habitual residence might be seen as the "Achilles' heel" of the Convention. Whilst the drafters seemed to have assumed that there would be no difficulty in determining habitual residence, which they saw as a pure question of fact, this expectation has proven to be unrealistic, and different approaches to the concept soon developed. Whilst today there is greater doctrinal uniformity as a result of widespread adoption of the hybrid approach, there are still real disparities in implementing this approach. Moreover, the very general tests that have been formulated by some courts in order to give effect to this hybrid approach, such as "totality of the circumstances,"⁹⁰ and "global analysis,"⁹¹ give very broad discretion to courts, and so may have expanded the scope for uncertainty, which is liable to increase litigation (Kucinski 2020, p. 38). The problems inherent in the concept of habitual residence are exacerbated by the impact of globalization and the growing number of transnational families. Indeed, this phenomenon would seem to challenge the traditional assumption that each family fits

US courts had exclusive jurisdiction and that children's place of residence for purpose of adjudication would remain in Virginia, despite fact that children had lived for two years with mother in Sweden, but the Swedish court held that the children were now habitually resident in Sweden and so there was no wrongful retention). See also *Rifkin (Central Authority for) v. Peled-Rifkin* [2016] N.B.J. No. 256).

⁸⁷ For more detailed discussion, see Schuz (2021), pp. 31–33).

⁸⁸ See also e.g., *A v T* [2012] EWHC 3882; *Wilson v Huntley* (2005) ACWSJ 7084 [58].

⁸⁹ As in *AM v AK* 2020 ONSC 3422, in which the agreement to return to Australia after the mother finished her training was outweighed by the length of the children's residence in Canada (6 years) and their full integration there.

⁹⁰ See note 25.

⁹¹ CJEU Case C-512/17, *Proceedings brought by HR with the participation of KO* [2018] 3 WLR 1139 [54].

into one geopolitical unit, on which the Abduction Convention is premised (Hacker 2017; Hodson 2018).

It is clearly not possible to solve all these problems by soft-law means within the framework of the existing Convention. Moreover, the fact-intensive nature of the habitual residence enquiry limits the scope for concrete rules. Nonetheless, formulation of general guidelines should go some way to increasing uniformity and ensuring that determinations of habitual residence promote the objectives of the Convention. I would suggest that the Special Commission is the appropriate body to adopt these guidelines. Accordingly, in this article, I have suggested some draft guidelines that might be used as a starting point for discussion of the topic, in the hope that it will be placed on the agenda at the upcoming Eighth Special Commission meeting.

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References

- Beaumont, Paul, and Jayne Halliday. 2021. Habitual Residence. In *Child Abduction Cases: Hybrid Approach Is Now the Norm But How Much Weight Should Be Given to Parental Intention?* Liber Amicorum Monika Pauknerová 27. Alphen aan den Rijn: Kluwer.
- Beaumont, Paul, and Peter McElevay. 1999. *The Hague Convention on International Child Abduction*. Oxford: OUP.
- Easteal, Patricia L., Joshua Favaloro, and Fanny Thornton. 2016. Hague Convention on the Civil Aspects of International Child Abduction: The Consideration of Habitual Residence in Australian Courts. *Family Law Review* 6: 195.
- Fiorni, Aude. 2021. Habitual Residence and the New Born—A French Perspective. *International and Comparative Law Quarterly* 61: 530. [CrossRef]
- Gossel, Susanne, and Ruth Lamont. 2021. Connecting Factors. In *A Guide to Global Private International Law* 47. Edited by Paul Beaumont and Jayne Halliday. Oxford: Hart.
- Hacker, Daphna. 2017. *Legalized Families in the Era of Bordered Globalization*. Cambridge: Cambridge University Press.
- Hodson, David. 2018. Globalisation of Adjudication in International Family Law: Serving International Families by Producing International Solutions. In *International and National Perspectives on Child and Family Law, Essays in Honour of Nigel Lowe*. Edited by Gillian Douglas, Mervyn Murch and Victoria Stephens. Cambridge: Intersentia.
- Kucinski, Melissa. 2020. The Future of Litigating an International Child Abduction Case in the United States. *Journal of the Academy of Matrimonial Lawyers* 33: 31.
- Lowe, Nigel. 2019. 'The UK Senior Courts' Contribution to the Global Jurisprudence on International Child Abduction. *Law Quarterly Review* 135: 114.
- Lowe, Nigel, and Michael Nicholls. 2016. *International Movement of Children: Law, Practice and Procedure*, 2nd ed. Bristol: LexisNexis.
- Lowe, Nigel, and Victoria Stephens. 2017. Part I: A Statistical Analysis of Applications Made in 2015 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction—Global Report. Available online: <https://assets.hcch.net/docs/d0b285f1-5f59-41a6-ad83-8b5cf7a784ce.pdf> (accessed on 7 June 2023).
- Lowe, Nigel, Mark Everall, and Michael Nicholls. 2004. *International Movement of Children: Law, Practice and Procedure*. Bristol: Jordans.
- McElevay, Peter. 2010. A Protocol for the 1980 Hague Convention. *International Family Law* 2010: 59.
- Perez-Vera, Eliza. 1982. Explanatory Report. *Acts and Documents of the Fourteenth Session of the Hague Conference on Private International Law* 3: 426. Available online: <http://www.hcch.net/upload/expl28.pdf> (accessed on 7 June 2023).
- Prel doc 7. 2011. Consultations on the Desirability and Feasibility of a Protocol to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, A Preliminary Report. Available online: <https://assets.hcch.net/upload/wop/abduct2011pd07e.pdf> (accessed on 7 June 2023).
- Prel doc 13. 2012. Guide To Part II of The Sixth Meeting of The Special Commission and Consideration of the Desirability and Feasibility of Further Work in Connection with the 1980 and 1996 Conventions. Available online: https://assets.hcch.net/upload/wop/abduct2012pd13_e.pdf (accessed on 7 June 2023).
- Report of the Third Special Commission Meeting to Review the Operation of the 1980 Hague Child Abduction Convention. 1997. Available online: www.hcch.net/index_en.php?act=publications.details&pid=2271&tid=2 (accessed on 7 June 2023).
- Revised Draft Practical Guide: Cross-Border Recognition and Enforcement of Agreements Reached in the Course of Family Matters Involving Children, Preliminary Document No 4. 2019. Available online: <https://assets.hcch.net/docs/97681b48-86bb-4af4-9ced-a42f58380f82.pdf> (accessed on 7 June 2023).
- Ronen, Ya'ir. 2004. Redefining the Child's Right to Identity. *International Journal of Law, Policy and the Family* 18: 147. [CrossRef]
- Schuz, Rhona. 2001a. Habitual Residence of Children under the Hague Child Abduction Convention—Theory and Practice. *Family and Child Law Quarterly* 13: 1.
- Schuz, Rhona. 2001b. Policy Considerations in Determining the Habitual Residence of a Child and the Relevance of Context. *Journal of Transnational Law and Policy* 11: 101. [CrossRef]
- Schuz, Rhona. 2013. *The Hague Child Abduction Convention: A Critical Analysis*. Oxford: Hart.

Schuz, Rhona. 2014. Habitual Residence of the Child Revisited: A Trilogy of Cases in the UK Supreme Court. *Child and Family Law Quarterly* 26: 342.

Schuz, Rhona. 2021. The Hague Child Abduction Convention and Re-Relocation Disputes. *International Journal Of Law, Policy And The Family* 35: 1. [[CrossRef](#)]

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Article

The Interaction of the 1980 Child Abduction Convention with the Brussels II-ter Regulation: A Focus on the Regime of Recognition and Enforcement

Maria Caterina Baruffi

Department of Law, University of Bergamo, 24127 Bergamo, Italy; mariacaterina.baruffi@unibg.it

Abstract: The paper addresses the interplay between the 1980 Child Abduction Convention and the Regulation (EU) 2019/1111, briefly presenting the main novelties contained in Chapter III of the Regulation devoted to international child abduction, and then focusing on the provisions concerning the peculiar regime of recognition and enforcement of decisions on this subject matter. Final considerations are drawn with a view to determining whether the Regulation is able to streamline the most critical issues arising from the practical application of the predecessor Regulation (EC) No 2201/2003 and, more broadly, to cope with evolving and challenging cases of child abduction.

Keywords: 1980 Child Abduction Convention; Regulation (EU) 2019/1111; recognition and enforcement; best interests of the child

1. Introduction: The Brussels II-ter Regulation and Its Novelties

In child abduction cases involving Member States of the European Union (EU), Regulation (EU) 2019/1111 (hereinafter also ‘Brussels II-ter Regulation’ or ‘Regulation’) complements, within its scope of application, the legal framework established by the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 (hereinafter also ‘Child Abduction Convention’, or ‘1980 Hague Convention’) for the purposes of enhancing its functioning, considering the common objectives shared by the two instruments¹.

The recast of the previous Regulation (EC) No 2201/2003, more than ten years after its entry into force, was precisely aimed at addressing the critical issues that had arisen in its practical application in the Member States (in general, on the recast procedure: [Honorati 2017](#); [Kruger 2017](#); [Carpaneto 2018](#)). The amendments introduced by the Brussels II-ter Regulation insisted mainly—if not exclusively—on the provisions relating to children, whose rights must always be protected with a view to pursuing their best interests. As the free movement of persons has been the means by which the Union, since the Treaty of Amsterdam, has been able to enact secondary legislation in a field of traditional competence of the Member States such as family matters in cases having cross-border implications, the principle of the best interests of the child has become the instrument allowing an increasingly significant intervention in this area.

Among the shortcomings that were identified in the Explanatory Memorandum of the European Commission to the recast proposal², child abduction and the regime of recognition and enforcement of decisions on parental responsibility were probably the most crucial. Indeed, the provisions of the previous Regulation No 2201/2003 were not well-equipped, for instance, to secure rights of access to the child following the parents’ divorce or separation, nor to effectively prevent cases of child abduction. The main challenges in

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¹ In the extensive case law of the CJEU, see e.g., opinion 1/13 of 14 October 2014, ECLI:EU:C:2014:2303, para. 78; judgment of 8 June 2017, case C-111/17 PPU, *OL v PQ*, ECLI:EU:C:2017:436, para. 61.

² COM(2016) 411 final of 30 June 2016.

this regard were encountered in relation to the circulation of decisions, rather than the prior allocation of jurisdiction, because the recognition and enforcement procedural rules are essentially within the remit of the Member States. Therefore, the paper focuses on the above-mentioned aspects, analyzing the interaction of the Child Abduction Convention with the procedural regime of the Brussels II-ter Regulation. Following a preliminary presentation of the revised and improved framework for international child abduction laid down in the Regulation, and specifying at the outset that Article 9 on the special jurisdiction will not be dealt with here, nor the provisions concerning the cooperation of Central Authorities (on which, respectively, [Garber 2023](#); [Knöfel 2023](#)), the main issues concerning the application of the relevant rules on recognition and enforcement are discussed with a view to drawing some reflections as to whether the Regulation is indeed able to cope—or at least, to do so more effectively than its predecessor, Regulation No 2201/2003—with the developments occurring in increasingly challenging child abduction cases.

2. A General Overview of the New Chapter Devoted to International Child Abduction in the Brussels II-ter Regulation: A Revised Framework for the Coordination with the 1980 Hague Convention

Already from the choice of inserting a direct reference in the title and dedicating a separate chapter of the Brussels II-ter Regulation to international child abduction, it is clear that this subject matter has “acquired an autonomous relevance” ([Biagioni 2023](#), p. 1078) within the revised legal instrument (for a general overview, see [Martiny 2021](#)). The current provisions indeed combine substantive and procedural aspects that give rise to a comprehensive regime as opposed to the single uniform rule previously contained in Article 11 of Regulation No 2201/2003.

From a general standpoint, it is worth mentioning that the relation between the 1980 Hague Convention and the Brussels II-ter Regulation is set out in Article 96 of the latter instrument. It specifies, on the one hand, the changes in the application of the rules of the Convention when the child has been wrongfully removed or retained in a EU Member State other than the EU Member State of previous habitual residence, and, on the other hand, the supplementary role of the Regulation rules on recognition and enforcement of return orders given in a EU Member State—this being a matter not governed by the Convention. As it has been underlined ([Biagioni 2023](#), p. 1082; [Calvo Caravaca and Cebrián Salvat 2023](#), p. 633), the policy choice of clarifying the relation between the two legal sources does not impact on the principle of primacy of EU law but emphasizes the “parallel path” to be followed in intra-EU child abduction cases.

Moving to the actual contents of Chapter III of the Regulation, measures to improve the efficiency of the procedure for the return of the child were introduced with a view to addressing the sensitivity of the interests at stake and the possible risks related to the consolidation of the situation of wrongful removal or retention. In particular, Article 24 provides that the maximum time limit of six weeks from the receipt of the return application for the issuing of the relevant decision is to be understood as referring to the individual instance, with the clarification that it runs from the moment that the court of first instance is seized, and from the moment when the appeal can be examined for the higher court, except in both cases when it is impossible due to exceptional circumstances. Moreover, the Regulation now specifically regulates, in its Article 23, the time limit within which the Central Authority of a Member State is obliged to acknowledge receipt of an application for return of an abducted child, set at five working days from the date of receipt of the application, as well as, in its Article 28, the time limit within which the decision ordering return must be enforced, also set at six weeks from the date of commencement of enforcement proceedings. In the latter instance, the party seeking enforcement can additionally request a statement from the competent authority detailing the reasons for the delay whenever this six-week limit is not complied with.

A proper innovation of the Brussels II-ter Regulation, as compared to previous instruments of EU civil judicial cooperation, concerns the rule dedicated to alternative dispute resolution mechanisms (in the different framework of the Hague Conference of Private

International Law, see the [Guide to Good Practice on Mediation 2012](#)). Pursuant to Article 25, the competent court is obliged to invite the parties to consider whether they are willing to make recourse to mediation or other means of alternative dispute resolution, and this must be ensured “as soon as possible and at any stage of the proceedings”. However, this obligation is subject to certain limits: firstly, it must not be contrary to the best interests of the child and, secondly, it must not be inappropriate in the case at issue, nor should it unjustifiably delay the proceedings. Mediation has thus become a systematic consideration in child abduction cases, and this can be seen as a consequence of the need to prevent highly conflictual disputes between the parties, which may not be properly ensured through the involvement of qualified experts in the context of court litigation due to time and procedural constraints. At the same time, significant costs upon the parties are usually associated with mediation and other mechanisms of alternative dispute resolution, which represent a practical issue that cannot be underestimated either.

Article 25 of the Regulation is supplemented by Recitals 22 and 43, which both draw attention to the further aspect related to reaching, in the context of return proceedings, an agreement that also regulates the exercise of parental responsibility, and the subsequent attribution of binding legal effects to that agreement. In this regard, parties should be enabled to confer jurisdiction in matters of parental responsibility, in accordance with the provisions of the Regulation laid down in Article 10 thereof, to the same court seized under the 1980 Hague Convention, so that the court may provide for the agreement to take binding effect on the basis of the procedures regulated at national level (for a practical outlook on the use of mediated agreements also involving children in child abduction cases, see the [Hirsch 2020](#), elaborated within the framework of the EU co-funded project “AMICABLE”).

As to the procedural rules incorporating the relevant provisions of the 1980 Hague Convention, significant changes were brought in order to devolve more powers to the court of the Member State of refuge and, furthermore, certain existing rules were better detailed to clarify their scope and application. The previous regime was enshrined in Article 11 of Regulation No 2201/2003, already introducing innovative aspects that nonetheless posed several challenges in their practical implementation, such as the excessively short deadlines to issue a judgment on return, or the limitation on the use of the “grave risk” exception provided in Article 13(1)(b) of the 1980 Hague Convention. As a result, the corrective mechanisms envisaged by the Regulation were often overlooked and the courts of the Member State of refuge decided on the return application relying exclusively on the Convention provisions.

Considering the first objective of attributing a strengthened role to the courts of the Member State of refuge, Article 27 of the Brussels II-ter Regulation provides that such courts may take provisional measures, pursuant to Article 15 of the same instrument, in two situations: at any stage of the proceedings, to ensure contact between the left-behind parent and the child, taking into account his or her best interests (Para. 2), as well as, at the time of ordering return, to protect the child from the grave risk referred to in Article 13(1)(b) of the 1980 Hague Convention, provided that the proceedings are not unduly delayed (Para. 5). Moreover, Article 15(2) on provisional measures in general applies to both cases governed by Article 27(2) and 27(5), thus imposing on the court that has taken the measure a duty to inform the court having jurisdiction as to the substance of the matter, where this is necessary to protect the best interests of the child.

A further new element is found in Article 27(6) establishing a uniform procedural rule under which the decision ordering the return may be declared provisionally enforceable, again upon the condition that it is in the best interests of the child.

As to the changes made to the rules already found in the previous Regulation, Article 27(3) of the Brussels II-ter Regulation stipulates that the court of the Member State of refuge, when evaluating the exception to return pursuant to Article 13(1)(b) of the 1980 Hague Convention, may not refuse to return the child if it considers that “appropriate measures will be taken to ensure the protection of the child after his or her return”. The

court's finding in this regard may be based on "sufficient evidence" provided by the party seeking the child's return, or on evidence otherwise obtained. Also, Article 27(4) underlines the desirability of establishing communication between the authorities of the Member State of refuge and the Member State of former habitual residence (either directly or through Central Authorities) for the purposes of identifying such appropriate measures. In this regard, Recital 45 is particularly illustrative as it gives examples of measures that can ensure the safe return of the child and further reference is made to the forms of cooperation between authorities already operating within the European Judicial Network in civil and commercial matters (EJN) and the International Hague Network of Judges (IHNJ).

The Brussels II-ter Regulation has also substantially intervened on one of the aspects supplementing the application of the 1980 Hague Convention that had caused the most critical problems in practice, namely the so-called 'overriding mechanism' (which some scholars have actually proposed to remove in its entirety from the recast Regulation: [Lazić and Pretelli 2020/2021](#), pp. 178, 181; [González Marimón 2022](#), p. 281; for a broader analysis of the issues stemming from the application of the previous Article 11(6)–(8) of Regulation No 2201/2003, see [Beaumont et al. 2016](#); in the Italian legal order, [Honorati 2015](#)). As is well known, this provision allows the court of the Member State of former habitual residence to issue a decision ordering the return of the child that is capable of prevailing over the contrary decision of the court of the Member State of refuge, and this decision will further benefit from a special enforcement regime.

With a view of enhancing the effectiveness of such a mechanism, Article 29 of the Brussels II-ter Regulation limits its application to two specific exceptions to refuse the return the child provided in the 1980 Hague Convention: one referring to the already mentioned grave risk of physical or psychological harm to the child (Article 13(1)(b)), and the other referring to the opposition of the child who has reached such an age and maturity that it is appropriate to take his or her views into account (Article 13(2)). In these cases, the Regulation introduces provisions aimed at strengthening coordination between the courts of the Member State of refuge and the Member State of former habitual residence, as well as between those courts and the parties involved. First, the court that refused return is required to issue ex officio a certificate, drawn up in the form of Annex I, summarizing the essential information relating to the decision taken (Article 29(2)). If that court is aware of proceedings on the substance of rights of custody that have already been instituted in the State of former habitual residence, it is also required to send to the competent authority a copy of the judgment refusing return accompanied by that certificate and, if it considers it useful, transcripts or summaries of the minutes of the hearings (Para. 3). Conversely, if there are no pending proceedings on the merits and one of the parties brings an application for custody of the child before the courts of the State of former habitual residence within three months of the notification of the refusal, the same party is required to submit the above-mentioned documents to the court (Para. 5). Consequently, any judgment on the substance of rights of custody entailing the return of the child, which is intended to override the earlier negative judgment (the so-called 'trumping order'), is necessarily linked to the commencement, or prior commencement, of proceedings on the merits before the court having jurisdiction in matters of parental responsibility under the Regulation. In the context of these proceedings, moreover, Recital 48 draws attention to the need to examine "all the circumstances thoroughly", considering the best interests of the child.

A final mention can be made of another important innovation of the Brussels II-ter Regulation, which also has an impact on child abduction cases. Article 21 contains a general provision on the right of the child to express his or her views, to be granted to those who are "capable of discernment" and in accordance with "national law and procedures" (for a broader assessment, see [Biagioni and Carpaneto 2020/2021](#), pp. 146–50). Any court exercising jurisdiction under the Regulation is obliged to give due weight to the opinion expressed by the child considering "his or her age and degree of maturity". However, there are no rules specifying common minimum standards as to the procedure for hearing the child, which are left to the procedural law of the Member State of the forum or, if applicable,

to other EU instruments on judicial cooperation, as also confirmed by Recitals 39 and 57. Pursuant to 26 of the Regulation, these general provisions on the child's participation also apply in return proceedings, governed by the 1980 Hague Convention, that are instituted before courts of Member States. The extension of the application also in child abduction matters is particularly welcome as these cases often present the most sensitive proceedings in which the child's participation can take place (for instance, considering that the hearing may be conducted by a mediator, or due to the accelerated timeframe of return proceedings, or further to the emotional distress and subsequent loyalty conflicts that the abducted child may face).

3. The Brussels II-ter Regulation Provisions on Recognition and Enforcement That Are Relevant in Child Abduction Cases

Bearing in mind the main features of the revised framework on child abduction proceedings laid down in Chapter III of the Brussels II-ter Regulation, the analysis moves forward to consider the provisions on recognition and enforcement of decisions, found in Chapter IV of the Regulation, that are applicable in these particular cases. As will be pointed out, some of them are specific to the subject matter under discussion, while others have a general scope and therefore apply to decisions in parental responsibility matters, including those rendered in abduction proceedings.

The recast of the Regulation No 2201/2003 introduced a significant change in the regime applicable to decisions on parental responsibility by extending the rule of direct enforcement without exequatur (amplius, see [Lazić and Pretelli 2020/2021](#)). Nonetheless, certain categories of decisions, namely those on rights of access and the return of the child, are defined as “privileged” and retain a differentiated treatment (set out in Section 2 of Chapter IV, Articles 42–50), in keeping with a policy choice already made in the predecessor Regulation. Insofar as it is relevant in this paper, the scope of the privileged regime will be considered in connection with child abduction matters as specified in Article 42(1)(b) of the Regulation, thus covering decisions taken pursuant to the already illustrated Article 29(6) that concern the custody of the child and entail his or her return, notwithstanding the previous decision refusing the return rendered by the court of the Member State of refuge exclusively on the basis of Article 13(1)(b) or Article 13(2) of the 1980 Hague Convention. A much welcome clarification was provided in this regard, given that Article 29(6) now requires that the decision prescribing the return be granted in custody proceedings, which must be brought before the courts of the Member State of previous habitual residence of the child. This allows to be overcome a shortcoming of the overriding mechanism as governed in the Regulation No 2201/2003 and interpreted by the CJEU in its *Povse* judgment³, whereby any decision entailing the return of the child that was taken by the court of the Member State from which the child was abducted (even isolated and not rendered in custody proceedings) could have prevailed over the non-return order (on the negative consequences of the previous wording of the rule, see [Lazić and Pretelli 2020/2021](#), p. 177). Consequently, under the Brussels II-ter Regulation, a return decision given independently of custody proceedings falls outside the scope of the privileged regime.

For the purposes of the automatic recognition and enforcement of a return decision within the meaning of Article 42(1)(b), an essential role is played by the accompanying certificate, issued by the court of the Member State of origin using the standard form of Annex VI to the Regulation. This document must be produced together with the judgment and, where necessary, a translation may be requested by the receiving court or authority. Among the requirements for issuing this certificate, the court of the Member State of origin shall state to have “taken into account (...) the reasons for and the facts” underlying the prior refusal of return by the court of the Member State of refuge, otherwise the decision cannot benefit from the privileged regime and the recognition would follow the general provisions instead (including the use of the certificate found in Annex III). Therefore,

³ CJEU, judgment of 1 July 2010, case C-211/10 PPU, *Povse v Alpaço*, ECLI:EU:C:2010:400.

the certificate takes the place of any exequatur procedure, and the court of the requested Member State will need to treat the certified decision as a domestic decision (see Article 51(1) of the Regulation).

The actual innovations as compared to the predecessor Regulation reside in the provisions that allow the softening of the rigidity of the previous certified decisions: the rectification and withdrawal of the certificate, on the one hand, and the refusal of recognition and enforcement of a privileged decision, on the other hand. With regard to the available remedies against an issued certificate, according to Article 48 of the Brussels II-ter Regulation the court of the Member State of origin may, upon request or of its own motion, rectify it where there are material errors or withdraw it where it was wrongly granted in the absence of the necessary conditions. It should be also specified that the two remedies are governed by the procedural laws of the Member State of origin (Para. 3). The possibility of withdrawal was precisely introduced to overcome another negative consequence of Regulation No 2201/2003 (as emerged in the *Aguirre Zarraga* case⁴), allowing for an indirect reassessment of the fundamental grounds on which the underlying decision was taken, especially concerning the principles of procedural fairness (in the literature, see *Magnus 2023a*, p. 447).

Article 50 of the Brussels II-ter Regulation lays down an exceptional rule that better defines the possibility of refusing recognition and enforcement of a return decision in the sense of Article 42(1)(b), providing for a sole ground based on the irreconcilability with a later decision on parental responsibility concerning the same child, which may be given (i) in the Member State in which recognition is sought, (ii) in another Member State, or (iii) in the third country of habitual residence of the child, upon condition that it satisfies the conditions necessary for its recognition in the Member State in which recognition is sought. Under this respect, the 'special' position of these return decisions thus lies in the exclusion of the applicability of the general grounds for refusal of recognition and enforcement of decisions on parental responsibility (Article 39), and, when compared to the predecessor Regulation No 2201/2003, the final decision on the opposition to the recognition and enforcement is no longer attributed to the courts of the Member State of origin, but rather to those of the Member State of enforcement, being better placed to assess the best interests of the child concerned. This is aimed at ensuring that a possible conflict between subsequent decisions can be resolved by giving prevalence to the most recent one, in accordance with the principle *rebus sic stantibus* that governs the evaluation of child-related matters.

Another novelty in comparison with the Regulation No 2201/2003 regards the procedure to seek the suspension, and even the subsequent refusal, of the enforcement of judgments in matters of parental responsibility, which has been introduced to balance the abolition of exequatur and the immediate enforceability of such decisions in other Member States (in keeping with the model of Regulation (EU) No 1215/2012 in civil and commercial matters). In particular, it is worth discussing the ground for suspending enforcement in the event that "enforcement would expose the child to a grave risk of physical or psychological harm due to temporary impediments which have arisen after the decision was given, or by virtue of any other significant change of circumstances" (Article 56(4) of the Brussels II-ter Regulation). Should the grave risk for the child further be of a lasting nature, the court of the requested Member State may also refuse the enforcement (Article 56(6)). These rules bring forward an apparent friction to the extent that they enable to take into account substantive interests in a scenario that is generally inspired by the principle of automatic enforcement based on mutual trust, but again they can be explained by the concurring need to serve the best interests of the child, which in such cases would require protecting him or her from the grave risk of harm, or other significant changes of circumstances. It was discussed whether these additional grounds for suspension and refusal of enforcement apply to privileged return decisions, or whether the special ground of Article 50 of the Regulation, previously illustrated, amounts to a special provision prevailing over

⁴ CJEU, judgment of 22 December 2010, case C-491/10 PPU, *Aguirre Zarraga v Pelz*, ECLI:EU:C:2010:828.

the general rule of Article 56 (for an overview of the arguments for and against the two positions, see [Magnus 2023b](#), pp. 453–55). Reasons for compliance with the principle of the best interest of the child, especially in sensitive cases such as abduction proceedings, ultimately support the extension of the application of Article 56 to also return decisions within the meaning of Article 42(1)(b). Furthermore, the same terminology used in Articles 56(4) and 56(6) largely resembles the wording of the exception to return set out in Article 13(1)(b) of the 1980 Hague Convention, indirectly confirming the need to apply this ground for also suspending enforcement to privileged return decisions and adding another layer of complementarity with the Convention (in this regard, [González Beilfuss 2020/2021](#), p. 113, underlines the choice of the Brussels II-ter Regulation to restrict the application of Article 13(1)(b) of the 1980 Hague Convention, which at the same time “come[s] back at the enforcement stage”; see also [Biagioni 2023](#), p. 1089).

A further consequence of the generalized abolition of exequatur for all decisions on parental responsibility is set out in Article 57 of the Brussels II-ter Regulation, which opens the possibility of invoking grounds for suspension or refusal of enforcement provided under the domestic law of the requested Member State, provided that they are not incompatible with the ‘European’ grounds provided in Articles 41, 50, and 56 of the Regulation. It is thus a rule of coordination between the national and supranational levels of enforcement laws, even though it cannot be entirely ruled out that its practical operation may entail a risk of affecting the uniform and effective application of the EU instrument.

Besides the mentioned provisions of Chapter IV of Brussels II-ter Regulation, there are further rules that are relevant at the stage of recognition and enforcement of decisions rendered in connection with child abduction proceedings, and therefore are worth discussing in this paper.

A first aspect to consider relates to the increased importance that the Regulation attaches to agreements that can be reached by the parents in the course of return proceedings initiated under the 1980 Hague Convention, which can regulate the return or non-return of the child and further comprise the definition of issues on parental responsibility and placement of that child. By virtue of the redrafted Article 10 of the Regulation on choice of court, as already mentioned, it is possible that the courts of the Member State of refuge acquire jurisdiction also on the substance in order to give binding legal effect to those agreements. More generally, this is also encouraged under the broad terms of Article 25 on mediation and other means of alternative dispute resolution. It is then essential for that agreement, as incorporated in a decision or otherwise approved by the competent court, to be able to circulate in other Member States. To this end, it will benefit from the regime of recognition and enforcement provided for ‘ordinary’ decisions in parental responsibility matters, without the need for any exequatur procedure, as clarified by Recital 14 of the Regulation, according to which “[a]ny agreement approved by the court following an examination of the substance in accordance with national law and procedure should be recognized or enforced as a ‘decision’”. In addition, it should be mentioned that other types of agreements in matters of parental responsibility, having binding effect in the Member State of origin by means of the formal intervention of a public authority, can circulate in other Member States pursuant to the rules on recognition and enforcement laid down in Section 4 of Chapter IV of the Brussels II-ter Regulation, which equally exempts authentic instruments and agreements from the requirement of a declaration of enforceability (for a comprehensive assessment on this further regime, which falls outside the more limited scope of this paper, see [Frąckowiak-Adamska 2023](#)). The actual extent of the differentiation between the two categories of agreements may be further subject to interpretation by the Court of Justice, which could be beneficial from a practical perspective.

Another issue in connection with the regime of recognition and enforcement concerns provisional measures taken pursuant to Article 27(5) to protect the child from the grave risk referred in Article 13(1)(b) of the 1980 Hague Convention, already illustrated in the previous section. In this regard, the Regulation introduces a further substantial innovation, which is the extraterritorial effect, albeit limited in time, as a derogation to the general regime under

Article 15 (on the advantages brought by this provision, see [Honorati 2022](#), pp. 157–60; [Wilderspin 2022](#), pp. 185–86). This is not clearly stated by the provision, but can be inferred from Article 2(1)(b) of the Regulation, according to which, for the purposes of recognition and enforcement under Chapter IV, a “decision” includes “measures ordered in accordance with Article 27(5) in conjunction with Article 15”, and in particular, they will be treated as ‘ordinary’ decisions in parental responsibility matters. In addition, this is confirmed by Recitals 46 and 59, clarifying that these provisional measures may be recognized and enforced in other Member States until the courts of the Member State, having jurisdiction as to the substance of the matter on the basis of the Regulation, have taken the measures they deem appropriate. As a result, provisional measures issued pursuant to Article 27(5), as well as their regime of circulation, are comparable with those that can be taken under Article 11 of the Hague Convention on the Protection of Children of 19 October 1996, thus being able to perform the same supplementing function in the context of return proceedings between EU Member States governed by the Child Abduction Convention (for further considerations on this complementarity between the 1980 and 1996 Hague Conventions, see [Baruffi 2018](#), pp. 397–401; this was also signaled in the ([Guide to Good Practice on Article 13 1](#), p. 35)).

4. Conclusions: A Look Ahead

The analysis carried out thus far has tried to summarize the main elements of the interaction between the 1980 Hague Convention and the Brussels II-ter Regulation whenever a child abduction case involves EU Member States. The revised framework resulting from the recast Regulation has brought about several corrective mechanisms and improved provisions that seem able to streamline certain critical concerns arising from the practical application of the predecessor Regulation No 2201/2003. However, the Brussels II-ter Regulation is a particularly complex instrument, with a substantial increase in the number of provisions as compared to the previous Regulation. While the predecessor may have been criticized for its (sometimes) overly concise rules, which were not easy to implement in practice with the consequence of the frequent recourse to the procedure of preliminary ruling to the CJEU, the current Regulation may suffer from the opposite downside of being convoluted and difficult to apply, even for expert legal practitioners. Whatever the case may be, the actual impact of the changes brought to the procedures of recognition and enforcement of decisions is going to be experienced in the longer term, so that any final judgement in this regard appears premature.

Many of the novelties of the Brussels II-ter Regulation can be further read in the light of one of the preliminary documents currently available with regard to the upcoming Eight Meeting of the Special Commission on the Practical Operation of the 1980 Child Abduction Convention and the 1996 Child Protection Convention, which is scheduled in October 2023 and constitutes the subject matter of this Special Issue. In particular, the Draft Table of Conclusions and Recommendations of previous Meetings of the Special Commission that are still relevant today ([Prel. Doc. No 1 of 1 October 2022](#)) lists a number of issues on which the above-illustrated provisions of the Brussels II-ter Regulation may have a positive impact (in this regard, see also the [Reply of the European Union to Specific Questions of the Questionnaire on the Practical Operation of the 1980 Child Abduction Convention 2023](#)). Among these issues there are, for example, the procedures and the means of addressing delays in return proceedings (paras. 51–61), the enforcement of return orders (paras. 70–75), the protective measures upon return (paras. 79–86), the contact between the left-behind parent and the child pending return proceedings (paras. 94–101), and the role of mediation (paras. 102–106).

Beside a preliminary favorable outlook of the new rules of the Brussels II-ter Regulation in child abduction matters, it will additionally need to be determined whether they are effective when applied to “hard cases” such as those stemming from contexts of domestic violence, or when there is an overlap between civil and criminal abduction proceedings,

which may be different from the scenarios that the drafters of the 1980 Hague Convention had envisaged during the negotiations of that global instrument.

For instance, it has been pointed out that the provisional measures taken pursuant to Article 27(5) of the Regulation may prove limited for the purposes of protecting the abducting parent who is a victim of domestic violence, given that the wording of the provision only refers to the protection of “the child” (in this sense, [Honorati 2022](#), p. 160; conversely, according to [Wilderspin 2022](#), p. 186, the wording of Article 27(5) is broad enough to also cover measures in favor of the abducting parent). Therefore, whether it is possible to supplement this gap through the recourse to Regulation (EU) No 606/2013 on mutual recognition of protection measures in civil matters (on which see, *amplius*, [Dutta 2022](#)) should be explored.

A further consequence, insofar as domestic violence as a cause for child abduction by the primary caregiver is concerned, resides in the concurring criminal proceedings that may be initiated in the State of habitual residence before the wrongful removal. Several elements of overlapping can be imagined in this regard, such as the relevance of the further proceedings when invoking the grave risk exception under Article 13(1)(b) of the 1980 Hague Convention, or as a ground for refusal of the enforcement of a privileged return decision pursuant to Article 56(6) of the Brussels II-ter Regulation, and in any case, it would be important to ensure a proper communication, as envisaged in Article 86 of the Regulation, between the competent courts in the civil and criminal proceedings (for a comprehensive discussion of this overlap, see [Gascón Inchausti and Peiteado Mariscal 2021](#), pp. 634–37).

These examples show, once again, the many layers and implications of international child abduction cases, which require an adequate legal framework at the global and EU levels that can be both strict and flexible enough to adapt to the evolving and sensitive nature of this subject matter.

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References

- Baruffi, Maria Caterina. 2018. A child-friendly area of freedom, security and justice: Work in progress in international child abduction cases. *Journal of Private International Law* 14: 385–420. [[CrossRef](#)]
- Beaumont, Paul, Lara Walker, and Jayne Holliday. 2016. Conflicts of EU Courts on Child Abduction: The Reality of Article 11(6)-(8) Brussels IIa Proceedings Across the EU. *Journal of Private International Law* 12: 211–60. [[CrossRef](#)]
- Biagioni, Giacomo. 2023. The interplay of EU Regulation 2019/1111 with the 1980 Hague Convention in matters of child abduction. *Cuadernos de Derecho Transnacional* 15: 1077–89. [[CrossRef](#)]
- Biagioni, Giacomo, and Laura Carpaneto. 2020/2021. Children under Brussels II-ter Regulation. *Yearbook of Private International Law* 22: 139–54.
- Calvo Caravaca, Alfonso-Luis, and María Asunción Cebrián Salvat. 2023. Article 96. In *European Commentaries on Private International Law. Brussels IIter Regulation*. Edited by Ulrich Magnus and Peter Mankowski. Köln: Otto Schimdt, pp. 632–34.
- Carpaneto, Laura. 2018. La ricerca di una (nuova) sintesi tra interesse superiore del minore “in astratto” e “in concreto” nella riforma del regolamento Bruxelles II-bis. *Rivista di Diritto Internazionale Privato e Processuale* 53: 944–77.
- Dutta, Anatol. 2022. The Cross-Border Circulation of Protection Measures under Regulation 606/2013. In *Domestic Violence and Parental Child Abduction. The Protection of Abducting Mothers in Return Proceedings*. Edited by Katarina Trimmings, Anatol Dutta, Costanza Honorati and Mirela Župan. Cambridge: Intersentia, pp. 3–14.
- Frąckowiak-Adamska, Agnieszka. 2023. Articles 64–68. In *European Commentaries on Private International Law. Brussels IIter Regulation*. Edited by Ulrich Magnus and Peter Mankowski. Köln: Otto Schimdt, pp. 492–506.
- Garber, Thomas. 2023. Article 9. In *European Commentaries on Private International Law. Brussels IIter Regulation*. Edited by Ulrich Magnus and Peter Mankowski. Köln: Otto Schimdt, pp. 156–69.
- Gascón Inchausti, Fernando, and Pilar Peiteado Mariscal. 2021. International child abduction in the case law of the Court of Justice of the European Union: Learning from the past and looking to the future. *Polski Proces Cywilny* 4: 617–40.

- González Beilfuss, Cristina. 2020/2021. What's new in Regulation (EU) No 2019/1111? *Yearbook of Private International Law* 22: 95–116.
- González Marimón, María. 2022. *La Sustracción Internacional de Menores en el Espacio Jurídico Europeo*. Valencia: Tirant Lo Blanch.
- Hague Conference of Private International Law. 2012. Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. Mediation. Available online: <https://assets.hcch.net/docs/d09b5e94-64b4-4afe-8ee1-ab97c98daa33.pdf> (accessed on 23 August 2023).
- Hague Conference of Private International Law. 2020. Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. Part VI. Article 13(1)(b). Available online: <https://assets.hcch.net/docs/225b44d3-5c6b-4a14-8f5b-57cb370c497f.pdf> (accessed on 23 August 2023).
- Hague Conference of Private International Law. 2022. Draft Table of Conclusions and Recommendations of Previous Meetings of the Special Commission (SC) on the Practical Operation of the 1980 Child Abduction and the 1996 Child Protection Conventions That Are Still Relevant Today. Prel. Doc. No 1 of 1 October 2022. Available online: <https://assets.hcch.net/docs/869f42cf-2fb1-4b7d-af32-fa36b9c07be3.pdf> (accessed on 23 August 2023).
- Hirsch, Juliane. 2020. EU General Best Practice Tool for the Recognition and Enforceability of Mediated Agreements in the EU. Available online: https://assets.website-files.com/5ce3e00874fe121f2f15d93b/6135ee00ce2057467be8a7ef_EU%20General%20Best%20Practice%20Tool.pdf (accessed on 23 August 2023).
- Honorati, Costanza. 2015. La prassi italiana sul ritorno del minore sottratto ai sensi dell'art. 11 par. 8 del regolamento Bruxelles II bis. *Rivista di Diritto Internazionale Privato e Processuale* 51: 275–314.
- Honorati, Costanza. 2017. The Commission's Proposal for a Recast of Brussels IIa Regulation. *International Family Law* 2: 97–114. [CrossRef]
- Honorati, Costanza. 2022. Jurisdiction to Take Protective Measures in the State of Refuge in Child Abduction Cases. In *Domestic Violence and Parental Child Abduction. The Protection of Abducting Mothers in Return Proceedings*. Edited by Katarina Trimmings, Anatol Dutta, Costanza Honorati and Mirela Župan. Cambridge: Intersentia, pp. 139–60.
- Knöfel, Oliver L. 2023. Articles 76–84. In *European Commentaries on Private International Law. Brussels IIter Regulation*. Edited by Ulrich Magnus and Peter Mankowski. Köln: Otto Schimdt, pp. 542–95.
- Kruger, Thalia. 2017. Brussels IIa Recast moving forward. *Nederlands Internationaal Privaatrecht* 35: 462–76.
- Lazič, Vesna, and Ilaria Pretelli. 2020/2021. Revised recognition and enforcement procedures in Regulation Brussels II ter. *Yearbook of Private International Law* 22: 155–82.
- Magnus, Ulrich. 2023a. Article 48. In *European Commentaries on Private International Law. Brussels IIter Regulation*. Edited by Ulrich Magnus and Peter Mankowski. Köln: Otto Schimdt, pp. 444–49.
- Magnus, Ulrich. 2023b. Article 50. In *European Commentaries on Private International Law. Brussels IIter Regulation*. Edited by Ulrich Magnus and Peter Mankowski. Köln: Otto Schimdt, pp. 452–60.
- Martiny, Dieter. 2021. New efforts in judicial cooperation in European child abduction cases. *Polski Proces Cywilny* 4: 501–22.
- Questionnaire on the Practical Operation of the 1980 Hague Convention on the Civil Aspects of International Child Abduction. Prel. Doc. No. 4. Reply of the European Union to Specific Questions. 2023. Available online: <https://assets.hcch.net/docs/65408549-2383-4682-8c5d-e7e35bd7c39c.pdf> (accessed on 23 August 2023).
- Wilderspin, Michael. 2022. The Potential Role of Regulation 606/2013 in Protecting Abducting Mothers in Return Proceedings. In *Domestic Violence and Parental Child Abduction. The Protection of Abducting Mothers in Return Proceedings*. Edited by Katarina Trimmings, Anatol Dutta, Costanza Honorati and Mirela Župan. Cambridge: Intersentia, pp. 177–86.

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Article

Hearing Children’s Objections in Hague Child Abduction Proceedings in England and Wales, Australia, and the USA

Michelle Fernando ^{1,*} and Jessica Mant ²

¹ Justice and Society, University of South Australia, Adelaide 5061, Australia

² Faculty of Law, Monash University, Melbourne 3800, Australia; jessica.mant@monash.edu

* Correspondence: michelle.fernando@unisa.edu.au

Abstract: In this article we compare how children’s objections to being returned to their country of origin are treated in Hague child abduction matters in three different international jurisdictions: England and Wales, Australia, and the United States. We examine the relevance of children’s views for the purposes of the ‘gateway’ stage of the relevant exception to mandatory return, and how children’s objections have been approached in legislation, case law, and scholarly commentary. We critique each jurisdiction’s approach against the objectives of the Hague Convention and the Convention on the Rights of the Child. We discuss how aspects such as the methods by which children are heard can make a difference to experiences for children and make recommendations to promote greater certainty and consistency in how children’s objections are heard and considered across jurisdictions.

Keywords: child abduction; Hague Convention; children’s rights; children’s participation; children’s objections; comparative law

1. Introduction

The Hague Convention on the Civil Aspects of International Child Abduction (‘Convention’) aims to ensure that children who are wrongfully removed to or retained in a Contracting State are returned promptly and that parental rights of custody and access in a Contracting State are respected in other Contracting States (Article 1). The Convention is designed to protect children from the harmful effects of unilateral removal or retention (Schuz 2013), and it is generally presumed that it is in children’s best interests to be returned to their country of habitual residence, where issues of care and parenting can be decided (Fernando and Ross 2018).

If an application is made to a court in a Contracting State within one year of a child’s removal to or retention in that country, and the child is under the age of 16, and the court is satisfied that the removal or retention was wrongful, then the court must generally make an order that the child be returned ‘forthwith’ to their country of habitual residence (Articles 4, 3, and 12, respectively).

Nevertheless, there are limited exceptions to the requirement to return children which appear in Article 13 of the Convention. These are, firstly, if the person who would otherwise have care of the child was not actually exercising custody rights at the time of the removal or retention, or had consented to or subsequently acquiesced to the removal or retention. Secondly, if there is a grave risk that returning the child would expose them to physical or psychological harm or otherwise place them in an intolerable situation. Thirdly, if the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of their views¹. If one of the exceptions is made out, the court has discretion to not return the child.

¹ A further exception appears in Article 20 which allows a court to refuse to return a child if it would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms. This exception is rarely invoked (Schuz 2013).

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The exceptions are ‘important qualifications to the general rule for returning a child to the place of its habitual residence’. (DP v Commonwealth Central Authority 2001, para. [36]; RCB v The Honourable Justice Forrest and Ors (RCB 2012, para. [19])). In practice, they represent a ‘compromise’ between the general principle that children should be returned to their home country forthwith without considering the merits of any custody dispute, and recognition that, in certain circumstances, a departure from this principle may be justified (De L. v Director-General, NSW Department of Community Services 1996 (‘De L.’)). Where one of the exceptions is established, the general concept that a prompt return is in the best interests of the child can be rebutted, as per the Hague Guide to Good Practice on Part VI Article 13(1)(b) (‘Guide to Good Practice’) (Hague Conference on Private International Law 2020, p. 24).

In the Convention’s Explanatory Report, Pérez-Vera stated that the exceptions are to be interpreted restrictively if the Convention is to not become a ‘dead letter’, and cautioned against a systematic invocation of the exceptions (Pérez-Vera 1982, p. 34). However, she also identified that the exceptions form an important element in understanding the extent of a court’s duty to return a child (Pérez-Vera 1982, p. 27). The Convention does not contemplate an automatic return mechanism, and where one of the exceptions is raised, it should be investigated properly, within the limited scope of return proceedings (Hague Conference on Private International Law 2020, p. 27).

The exceptions play an important role in the effective operation of the Convention, and their existence and application do not automatically detract from the Convention’s objectives (Fernando 2022). This is because the underlying objective of the Convention is to protect the interests of children, including to protect them from the harmful effects of abduction (Preamble). While returning children is a method of achieving the objective of protecting children, it is not an objective in its own right (Schuz 2013). The exceptions provide appropriate recognition that there may be situations where returning children to their country of habitual residence will not protect a child from harm and may even cause greater harm (Schuz 2013). The ‘children’s objection’ exception provides express recognition in that regard in relation to mature children who object to being returned. The Convention gives these children the possibility of interpreting their own interests (Pérez-Vera 1982). The exception envisages that a mature child ‘will be permitted to dictate the return question because of his or her views on the merits’ (Elrod 2011, p. 677). Despite the usually summary nature of Convention proceedings, if a court is satisfied that a child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of their views, the court then has a discretion to allow the child to remain, or to return them in spite of the mature child’s objections (Elrod 2011).

This article focuses on the approach taken to ascertaining, considering, and incorporating children’s views for the purposes of applying the ‘children’s objection’ exception in three international jurisdictions: England and Wales, Australia, and the United States. In particular, we examine the extent to which the approach taken in each jurisdiction promotes the voices of children and enables the child’s objection to be properly taken into account in accordance with the Convention. In confining the discussion to the treatment of children’s objections, this paper does not examine in detail how courts assess the ‘age and degree of maturity’ of objecting children, nor how courts exercise their discretion to return or not return children, should the court be satisfied that the child objects and is of sufficient age and maturity. As a result, our discussion does not concern the outcomes of Convention proceedings, but, instead, the way in which courts consider and hear children’s objections, which could influence that outcome.

We have focused on these three Contracting States for particular reasons. Firstly, these jurisdictions are English-speaking, which facilitates ready access to case reports and literature. Secondly, despite the jurisdictional similarities of these three States, existing literature indicates that there are key differences in how the ‘children’s objection’ exception is approached. On one hand, this literature indicates substantive statutory differences in Australia, and England and Wales, with the former requiring additional provisions as part

of its incorporation of the Convention into domestic law. On the other hand, the literature indicates only limited engagement with the objection exception itself in the United States. By focusing on these three States, our analysis will provide a comparative insight into the range of approaches that are employed by participating jurisdictions and the extent to which common barriers and problems may be mitigated.

Comprehensive empirical research involving international reviews of case law and literature, surveys, interviews, and specialist workshops with legal professionals and family members has already revealed a divergence of practices and attitudes in relation to the ‘children’s objection’ exception (Taylor and Freeman 2018). In this paper, we build upon that knowledge by extending the global understanding of the approaches taken by different Contracting States to ascertaining and considering children’s views, which, in turn, deepens understandings of how the ‘children’s objection’ exception is treated and applied in different jurisdictions. This knowledge is necessary to promote certainty and consistency in international law in an issue on which the Hague Conference on Private International Law is yet to publish a Guide to Good Practice. This paper will, therefore, contribute important insight into how effectively and consistently children’s objections are presently used to inform applications of the objection exception across Contracting States, with a view to setting an agenda for improved practices in the future.

2. The Relevance of Children’s Objections

In order to reject or apply the ‘children’s objection’ exception when it is raised, it is necessary for the court to consider any objection that the child has expressed to being returned. The ‘children’s objection’ exception states:

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views. (Article 13)

Courts across these three jurisdictions have generally divided this inquiry into two stages. First, the court will determine whether the requirements for the exception exist; that is, whether the child objects to being returned and has attained the required age and maturity. If it determines these matters in the positive, the inquiry will move to the second stage, where the court will determine whether to nevertheless exercise its discretion to return the child. At this second stage, the court will ordinarily consider the nature, basis, and strength of the objections expressed, as well as a much wider range of considerations, including aspects relating to the child’s welfare and the objectives of the Convention (Re. R. (Child Abduction: Acquiescence) 1995; Commonwealth Central Authority v Sangster 2018; De L. 1996). Therefore, even when the ‘children objection’ exception has been made out, the court retains discretion to order that the child be returned, but this second stage only comes into play in the event that objections are acknowledged in the first stage. In England and Wales, the two stages of inquiry have been conceptualised as the ‘gateway stage’ and the ‘discretion stage’, respectively (per L.J. Black in Re. M. (Republic of Ireland) (Child’s Objections) (Joinder of Children to Appeal) 2015 (‘Re. M.’)), and that terminology has often been adopted in other jurisdictions, including Australia. For clarity, we will adopt the same terminology throughout this paper.

It is in determining the first part of the gateway stage that children’s objections to being returned are substantively relevant. Of course, children’s views may also be relevant to a number of other aspects in Convention proceedings (Schuz 2013), such as whether there is a grave risk that returning the child would expose them to harm or place the child in an intolerable situation (Article 13(b)), or whether the child is settled in their new environment, which gives a court discretion to not return a child if proceedings are commenced after one year (Article 12). A court may also consider children’s views in deciding whether to exercise its discretion to return a child, should the child’s views have been relevant to the circumstances giving rise to the discretion. Nevertheless, for the purposes of drawing comparative insights, the specific focus of this article is on the treatment of children’s

objections to being returned for the purpose of the gateway stage of the ‘children’s objection’ exception in Article 13.

The United Nations Convention the Rights of the Child (‘UNCRC’) gives children a right to express their views freely in all matters affecting them, the views of the child to be given due weight in accordance with their age and maturity (Article 12). It states that children must be given an ‘opportunity to be heard’ in any judicial or administrative proceedings affecting them. There is an apparent tension between Article 12 of the UNCRC, which gives children a right to express their views and have those views be given weight in *all proceedings* affecting them, and the ‘children’s objection’ exception which only requires a court to consider children’s views if they constitute an ‘objection’ in the relevant sense, and the child has attained an age and degree of maturity at which it is appropriate to take their views into account (Schuz 2013; Fernando and Ross 2018). A strong argument can be made that, because of the UNCRC, *all* abducted children must be given an opportunity to be heard even where the ‘children’s objection’ exception has not been raised (see, e.g., Baroness Hale in *Re. D. (A Child) (Abduction: Rights of Custody) 2007* (‘*Re. D.*’); Special Commission on the Practical Operation of the 1980 and 1996 Hague Conventions 2011). However, at the very least, Article 12 of the UNCRC requires that, where there is evidence that a child objects to being returned, the child is given an opportunity to express that objection freely and have it considered, subject to their age and maturity, in the gateway stage of the relevant exception (*Office of the Children’s Lawyer v Balev* 2018).

2.1. What Constitutes an ‘Objection’?

An ‘objection’ is, by its nature, different from a mere view, wish, or preference (*Re. M. 2015*, per L.J. Black; *De L. 1996*, per J. Kirby). An objection ‘should be a feeling beyond ordinary wishes, where the child displays a strong sense of disagreement to the return’ (Fenton-Glynn 2014, p. 134). ‘It must, at the least, involve the expression of a negative view not to return to the [country of habitual residence]’ (Nygh 1997, p. 3). A mere wish to remain with the abducting parent, for example, will not be enough to constitute an objection (Beaumont and McElevay 1999).

It is generally accepted that a child’s objection must be to being returned to their country of habitual residence, and not to being returned to the left-behind parent (*Re. M. (A Minor) (Child Abduction) 1994*; Department of Community Services v Crowe 1996). However, ‘there may be cases where this is so inevitably and inextricably linked with an objection to living with the other parent that the two factors cannot be separated’ (*Re. T. (Abduction: Child’s Objections to Return) 2000*, p. 203 (L.J. Ward); *Re. R. (Child Abduction: Acquiescence) 1995*). In *De Lewinski v Director-General, New South Wales Department of Community Services* (1997), the Full Court of the Family Court of Australia said (at 83, 939):

We would not suggest that children must articulate that they object to being returned to the country of their habitual residence for the purpose of enabling the courts of that country to resolve the merits of any dispute as to where and with whom they should live in order to come within the provisions of (Article 13). That is not the language of children and the Court should not expect them to formulate and articulate their objection. . . in that manner. The Court must have regard to the whole of the evidence and determine, no matter how the children articulate their views, whether the children object in the relevant sense.

As such, there is a seeming lack of clarity in current jurisprudence as to what may constitute an objection for the purposes of the exception, with several influencing factors for judges to consider and weigh when identifying and responding to prospective objections.

2.2. How Objections Are Raised

The phrasing in Article 13 that ‘(t)he judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned . . .’ suggests that the court is obliged to investigate whether the child objects even if the abductor does not raise this defence. However, ‘the orthodox view is that the burden of proof is

on the person opposing return as with the other exceptions' (Schuz 2013, p. 317). This is problematic because research suggests that children involved in Convention proceedings are largely unaware of their entitlement to raise an objection to returning to their country of origin (Taylor and Freeman 2018, p. 11) and, even if they are aware, have no practical way of raising the exception themselves within proceedings. Objections are invariably brought to the attention of the court by the abducting parent. This presents challenges to the extent to which the court will recognise such objections at the gateway stage, due to the unavoidable risk that judges will perceive such objections as conflated with the viewpoint of the parent (McEleavy 2008). The fact that children are dependent on parents to raise a potential objection may mean that the exception is not raised, or is raised but is treated with scepticism if viewed as a means to bolster the strength of the abducting parent's case, even before the court begins to scrutinise the substance of the objection and the question of whether the child has reached a requisite age and degree of maturity in order for the objection to be taken into account.

The pragmatic difficulty for children's ability to raise objections is further complicated by the methods applied by the various courts to ascertain and hear evidence of children's views, should an objection be raised. There are a variety of mechanisms available, and a divergence in those regularly employed by the courts in different legal systems. These mechanisms range from reports provided by child welfare experts, judicial meetings with children, independent representation for children, accounts of the child's objections from the abducting parent, and, in some instances, the child being joined as a party to the proceedings. The last of these is very rare in each of the jurisdictions we examined. The method that is employed by the court is likely to significantly influence the way in which children are able to express their objections and the way that evidence is presented to the court, and, as such, the methods employed will be explored further throughout the analysis of each jurisdiction below.

2.3. *The Importance of Accounting for Children's Objections*

It is very important that the views of children who object to being returned to their country of habitual residence are listened to and taken seriously, within the requirements of the 'children's objection' exception. This is because it is important for children to be heard, and to feel that they have been heard, and also because of the documented negative impacts on children who have been abducted and subject to Convention proceedings (Freeman 2014).

As discussed above, Article 12 of the UNCRC grants children a right to express their views, and enshrines the notion that children must be given an opportunity to be heard in proceedings that affect them. Potentially-objecting abducted children must be given an opportunity to express their objections to the court and have a right to have their views be given due weight in accordance with Article 12 of UNCRC and the requirements of Article 13 of the Hague Convention.

There are those who argue that the time necessary to properly ascertain the child's views and assess the quality of their objections and their maturity is inconsistent with the summary nature of Convention proceedings. For reasons related to children's welfare and the Convention's objectives, decisions under the Hague Convention should be made without undue delay. In jurisdictions that do not routinely embed consultations with children into their court processes, the notion of pausing proceedings in order to do so may be considered an unjustifiable delay. However, as Schuz (2013) argues, Article 13 clearly envisages that the child's maturity will be assessed, and it is difficult to see how the quality of a child's objections could be determined without someone having spoken with the child. While it is important that Convention proceedings are conducted in the most efficient manner, this must not be at the expense of a proper inquiry into the nature and quality of the child's objection and consideration of their views and maturity.

There is a wealth of research explaining the value to children in being afforded an opportunity to be heard and to have their views be taken into account in decisions that

affect them (see, e.g., [Carson et al. 2018](#); [Birnbaum 2017](#); [Smith et al. 2003](#)). Children who feel that they have been listened to are more likely to accept the court's decision, even if the decision does not accord with their views ([Cashmore 2003](#)). In contrast, excluding children from proceedings is likely to exacerbate the pain, confusion and other negative effects experienced as a result of the family circumstances ([Taylor 2006](#)).

Further, research conducted with children who have been abducted describes the tremendous impact abduction has on children and their future lives and relationships, with children describing Convention proceedings as a 'defining moment in a child's life' ([Taylor and Freeman 2018](#), p. 11). [Freeman \(2006\)](#) interviewed 10 children who had been abducted, who reported that they did not feel that they had been taken seriously in terms of decisions taken about them, or that their views had much weight. Freeman found that children need to be involved in the process and kept informed, and to not be treated as passive bystanders. Given the lasting effects experienced by children who are the subject of Convention proceedings ([Freeman 2014](#); [Schuz 2013](#)), it is imperative that their rights and interests are properly identified and accounted for.

We will now explore how children's views have been treated for the purposes of the 'children's objection' exception in each of the three nominated jurisdictions.

3. The Treatment of Children's Objections in England and Wales

The Convention is incorporated into domestic law in England and Wales via the Child Abduction and Custody Act (1985). Until 31 January 2020, England and Wales were also bound by European legislation, including 'Brussels II *bis*'²—a regulation that provides a framework for how member states were to navigate jurisdictional issues arising from disputes involving children, including international child abduction. Article 11(2) of Brussels II *bis* provided an explicit obligation for member states to make provisions for children's views to be heard in Convention proceedings, unless doing so would be inappropriate, having regard to their age or degree of maturity. As such, the importance of listening to children and providing them with opportunities to express their views has been strongly emphasised in jurisprudence emerging from England and Wales. Most notably, in the case of *Re. D.* 2007, Baroness Hale articulated a landmark judgment which had the effect of further reinforcing the Article 11 obligation, by establishing a common law presumption that all children should be heard in Convention proceedings, as long as the requisite levels of age and maturity are deemed to be satisfied.

Although the Article 11 obligation had existed since 2005, prior to *Re. D.*, it had been restrictively interpreted in relation to Convention proceedings involving objections. Commentary indicates that only mature adolescents expressing forceful objections tended to be acknowledged in the gateway stage, and, even then, such consideration was reportedly limited to circumstances involving pragmatic barriers to return, rather than as a means of recognising and respecting the views of children expressing such views ([Fenton-Glynn 2014](#); [Vigers 2011](#)). Since *Re. D.*, however, there have been positive examples of judges recognising the objections of much younger children at the gateway stage, even where the decision is ultimately taken to return them when it comes to the discretion stage (*Re. W.* 2010). Moreover, given the subsequent departure of the United Kingdom from the European Union, the authority of *Re. D.* can now be understood as even more significant, as it effectively preserved the presumption in domestic law, despite the fact that Brussels II *bis* (now Brussels II *ter*) is no longer applicable to England and Wales.

There has, however, been significant debate over the past couple of decades as to what kinds of views expressed by children will amount to an objection for the purposes of Article 13(b). Early authorities, such as *Re. T.* (2000) have been criticised (*Re. M.* 2015, para. [61–64]) for over-complicating the gateway stage, for instance, by calling for an examination of factors such as: a child's perspective of what is in their short- and long-term interests;

² This provision has been recast several times, most recently with effect from 1 August 2022, and is presently known as 'Brussels II *ter*'.

whether their objection is rooted in reality; whether their views have been coloured by pressure from the abducting parent; and the extent to which their objections would be mollified on return to their country of origin.

More recent authorities have affirmed that such a detailed investigation is, in practice, a conflation of the gateway and discretionary stages. The modern approach in England and Wales, therefore, is that the question of whether a child objects to returning to their country of origin is a simple one for the purposes of the gateway stage. In essence, the notion of an ‘objection’ is to be interpreted in ordinary terms, and the gateway stage is to be confined to a straightforward and relatively robust examination of whether the child objects and has reached an age and degree of maturity at which it would be appropriate to take account of their views, as a question of fact. As Lady Justice Black articulated in *Re. M.* (2015, para. [76–77]):

The starting point is the wording of Article 13 which requires, as the authorities which I would choose to follow confirm, a determination of whether the child objects, whether he or she has attained an age and degree of maturity at which it is appropriate to take account of his or her views, and what order should be made in all the circumstances. . . I hope that it is abundantly clear. . . that I discourage an over-prescriptive or over-intellectualised approach to what, if it is to work with proper despatch, has got to be a straightforward and robust process.

Accordingly, the capacity of courts in England and Wales to recognise views at the gateway stage is considered a ‘fairly low threshold’ because ‘it does not follow that the court should take account of a child’s objections only if they are so solidly based that they are likely to be determinative of the discretionary exercise that is to follow’ (*L.J. Black, Re. M.* 2015). In theory, therefore, current jurisprudence from England and Wales appears keenly focused on maximising the extent to which children’s objections are recognised at the gateway stage, regardless of the outcome that may ultimately be reached at the discretion stage. This is reinforced by studies that have identified a relatively liberal judicial attitude towards hearing the views of children across a range of ages and abilities in cross-border abduction cases heard in England and Wales ([Hollingsworth and Stalford 2018](#)).

In practice, however, there are pragmatic limitations on the extent to which objections can be raised for the purposes of triggering the gateway stage. If an objection is brought to the court’s attention, the primary—and, practically, universal—method by which the court will ascertain the substance of that objection in Convention cases is similar to that used in domestic parenting disputes: a report prepared by a professional from the Child and Family Court Advisory and Support Service (CAFCASS). In Convention cases, reports are prepared by a specialist team of CAFCASS officers who focus on assisting the High Court (Family Division), and, in certain cases, these officers can also be appointed as Guardians to children. As part of their assessment of a family’s circumstances, CAFCASS officers will typically meet with children and determine if there are any ascertainable views that can be included in their report, including the existence of any preferences or objections to particular arrangements for their future. Given the strong institutional standing of this CAFCASS team within the wider family justice system in England and Wales, these reports are perceived as particularly influential by judges in Convention proceedings.

Research studies have, nevertheless, exposed the limitations of the approach of relying on CAFCASS reports as a mechanism for identifying children’s objections in Convention cases. Studies such as [Hollingsworth and Stalford’s](#) analysis of cross-border child abduction cases have identified that meetings between CAFCASS officers are both short in duration and limited to one or two instances, with officers unable to gather sufficient context due to time constraints or language barriers impeding accessibility of the child’s paperwork ([Hollingsworth and Stalford 2018](#)). Further concern has been expressed about the weight that is typically given to CAFCASS reports, given that social welfare services in the UK are contending with the simultaneous pressures of increasing demand and diminishing resources, meaning that CAFCASS officers are likely to be even more constrained in their ability to effectively and accurately ascertain any objections that children may have

(Munby 2016). Despite this, studies show that CAFCASS officers frequently draw explicit distinctions between whether, in their view, the child has expressed a preference or an objection to returning to their habitual country. Such a distinction is likely to be subtle and nuanced, and scholars are hesitant that CAFCASS officers have the specialist training to be able to draw such definitive distinctions, particularly in light of their limited time and resources. As such, CAFCASS reports carry the risk of ‘filtering out’ objections, if they are not expressed forcefully enough or are not perceived as genuine by the CAFCASS officer concerned (Hollingsworth and Stalford 2018; Schuz 2013; Taylor and Freeman 2018).

In *Re. D.*, Baroness Hale acknowledged that CAFCASS reports would likely be the most common method for ascertaining children’s views within proceedings, but there are circumstances in which it may be more appropriate to ascertain children’s views through other means, such as separate representation in proceedings by a solicitor (or CAFCASS officer) acting as a Children’s Guardian, or by judges meeting with children personally. However, these options are only employed to a limited extent in England and Wales, and, even then, are often only considered when recommended by a CAFCASS officer after their initial assessment of a child. For instance, case law confirms that separate representation of children is only recommended in complex cases, and that the ordinary method for ascertaining children’s views should be through a CAFCASS officer (*Re LC* 2014). In contrast, while judicial meetings with children are far from routine, there appears to be slightly greater scope for children to express their objections through such meetings in this jurisdiction. In 2010, the Family Justice Council and the President of the Family Division (Family Justice Council 2010, p. 1) produced a set of guidelines to encourage judges to hold meetings with children, where appropriate, in order to help children feel ‘more involved and connected’ with proceedings that concern their futures. As stated in the guidelines, judicial meetings with children can be valuable for helping children to feel involved in proceedings, but the task of gathering evidence is categorically one to be undertaken by CAFCASS. In other words, while judicial meetings with children are encouraged, the expectation is that they will have no evidence-gathering function, and that the primary mechanism by which objections may be identified is through a CAFCASS report.

Taken together, the basis of the approach taken to recognising children’s objections for the purposes of the gateway stage in England and Wales appears to be relatively liberal, despite the fact that statutory safeguards concerning the importance of hearing children in Convention proceedings have been somewhat weakened by the UK’s withdrawal from the European Union. Nevertheless, this liberal approach is potentially limited by pragmatic constraints, including the central reliance on CAFCASS reports as the primary method of ascertaining children’s views and identifying objections.

4. The Treatment of Children’s Objections in Australia

In Australia, the Convention is not incorporated into domestic law, however, it is given effect through the provisions of the Family Law (Child Abduction Convention) Regulations 1986 (Cth) (‘regulations’). The regulations reflect, but are not identical to, the articles of the Convention. The subtle but important differences between the regulations and the articles of the Convention can be seen in the articulation of the ‘children’s objection’ exception which appears at reg 16(3)(c):

A court may refuse to make (a return order) if a person opposing return establishes that each of the following applies:

- i. the child objects to being returned;
- ii. the child’s objection shows a strength of feeling beyond the mere expression of a preference or of ordinary wishes;
- iii. the child has attained an age, and a degree of maturity, at which it is appropriate to take account of his or her views.

The requirements of reg 16(3)(c) are clearly different from, and more stringent than, the requirements of the ‘children’s objection’ exception as it appears in the Convention,

due to the fact that the regulation adds a requirement that the child's objection 'shows a strength of feeling beyond the mere expression of a preference or of ordinary wishes'.

One may think that this 'strength of feeling' requirement simply reflects the globally accepted position; that an objection is different from, and stronger than, a mere preference or view. However, many judges in Australia have interpreted the regulation to require an additional test beyond that found in the Convention. This effectively transforms the 'gateway stage' from a two-part to a three-part inquiry (Fernando 2022). This approach was explained by the plurality of the High Court in RCB (2012) which said (at para. [19]):

The court may also refuse to make a return order if a person opposing return establishes that the child objects to being returned, that the objection shows a strength of feeling beyond a mere expression of a preference or of ordinary wishes and that the child has attained an age and a degree of maturity at which it is appropriate to take account of his or her views.

The 'strength of feeling' requirement was created through legislative amendment in 2000. It was created to counteract the effect of the High Court's judgment in *De L.* (Nyggh 2002; Kirby 2010). In *De L.*, the plurality held that, when determining whether a child objects to being returned, a literal interpretation of the word 'objects' should be taken and no 'additional gloss' is to be supplied. This reflects the prevalent position currently taken in England and Wales, where an 'overly intellectualised' approach is strictly discouraged, as detailed by Lady Justice Black in *Re. M.* (2015, para. [77]) above. In amending the Australian law and regulations to include the 'strength of feeling' requirement, an 'additional gloss' was statutorily enshrined (Fernando 2022), thus formalising Australia's departure from the position in England and Wales.

The 'strength of feeling' requirement, if strictly applied, has created an additional hurdle which children must meet before their objections can be taken into account. For example, in the primary judgment which led to RCB (*Department of Communities v Garning 2011* ('Garning')), J. Forrest accepted that four Italian sisters wrongfully retained in Australia by their mother objected to being returned. However, his Honour was not satisfied 'that the girls' objection to being returned to Italy shows a strength of feeling beyond the mere expression of a preference or of ordinary wishes, as is the requirement in order to give rise to the defence' (*Garning 2011*, para. [116]). This additional hurdle has led to situations where the objections of children who express themselves in equivocal or less forceful terms are discounted on the basis that the objection lacks the requisite 'strength of feeling'. Further, there is a lack of clarity as to precisely what threshold is required, and as to the difference between an objection that does not meet the requirement and one that does (Fernando 2022). There is no 'clear standard with a readily identifiable border between ordinary wishes and wishes that are not ordinary, or when something moves beyond a mere preference' (*Department of Communities and Justice v Sarapo* (no. 2) 2019, para. [18]).

Fernando (2022) observed that Australian courts were more likely to be satisfied that children's objections met the required 'strength of feeling' where they were 'demonstrative of extreme or emotionally dysregulated behaviour' (*Secretary, Department of Communities and Justice v Paredes 2021*, para. [253]). In that study, Fernando analysed three separate cases where, at first instance, the court accepted that the children 'objected' to being returned. Their views were, however, dismissed on the basis that the objections did not meet the 'strength of feeling' requirement. When the respective children's views became extreme, with aspects such as threats of self-harm or actual or threatened refusal to board a plane, a later court found that the objections met the required test. Fernando also observed that, paradoxically, objections expressed in extreme terms or with high emotion can alternatively be viewed as evidence of immaturity or parental manipulation.

This approach to the 'children's objection' exception runs contrary to the Convention, which only requires that a child objects to being returned, and has attained an age and degree of maturity at which it is appropriate to take account of their views, before their views can be taken into account. The 'strength of feeling' requirement invites an assessment

of the strength of views at this first part of the ‘gateway’ stage, rather than accepting that a child objects to being returned and leaving the assessment of the strength, basis, and weight to be given to those objections to the ‘discretion’ stage. Judges will strictly analyse the child’s language and demeanour. If their objection is not considered to conform to the requisite ‘strength of feeling’, it will not be taken into account at all.

Moreover, this approach also runs in direct contrast with similar jurisdictions with which there are frequent reciprocal cases, including England and Wales. With many Convention cases involving abduction between Australia and the United Kingdom, it seems incongruous that the objections of children who have one British and one Australian parent and have spent part of their lives living in each country (which is a very common phenomenon) may be treated differently based solely on which country they have been unlawfully removed to or retained in.

Some Australian judges prefer the simplified approach advocated in England and Wales, evidenced by the fact that they interpret the ‘strength of feeling’ requirement as an ordinary corollary of the investigation into whether the child ‘objects’, rather than as an extra hurdle which must be met before the objection can be taken into account (Fernando 2022). As discussed above, an objection is, by definition, different and stronger than a mere preference or ordinary wishes. On this interpretation, the ‘strength of feeling’ requirement simply reinforces this position, rather than adding another limb to the ‘gateway’ stage. Issues such as the strength of the objection will be left to deliberation under the ‘discretion’ stage. For example, in *Commonwealth Central Authority v Sangster* 2018, J. Bennett said (at para. [54]):

I do not draw a distinction between the principles and points articulated in by L.J. Black in *Re. M. (Republic of Ireland) (Child’s Objections) (Joinder of Children to Appeal)* and by L.J. Ward in *Re. T. (Abduction: Child’s Objections to Return)* and the current state of the Australian law and regulations under [reg] 16(3)(c). These are the principles which I will apply in this case.

Similarly, J. Gill in *Department of Communities and Justice v Sarapo* (no. 2) 2019 adopted an ordinary meaning of the word ‘objects’ and held that the ‘strength of feeling’ requirement means establishing, factually, that the strength of feeling in respect of an objection is beyond the mere expression of a preference or of ordinary wishes. J. Gill said (at para. [27]):

[E]ven in the context of the Hague Regulations... , there is no high threshold before a child’s view is to be at least taken into account. If it is to be taken into account, the assessment of weight is a matter for the discretion. The establishing of the exception requires merely that it be appropriate to take the view into account, not that it also be capable of bearing ultimate or even significant weight in the discretionary assessment.

An approach which allows a court to take children’s objections into account and weigh the strength of those objections alongside other matters in the ‘discretion’ stage aligns with the principles and objectives of the Convention. It demonstrates consistency with the approach taken in England and Wales and many other jurisdictions where no particular threshold is required before children’s objections can be considered. It is in keeping with Article 12 of the UNCRC and is ‘undoubtedly to be preferred’ (Beaumont and McEavey 1999, p. 188).

When the ‘strength of feeling’ requirement is applied strictly, children must meet a very high standard before their views can be taken into account. This is problematic because children are not given any information or advice about the level of objection that is required. As discussed below, in Australia, an independent lawyer for the child, who may be able to explain the process, can only be appointed in ‘exceptional circumstances’. The fact that there needs to be an inquiry as to whether the views expressed by the child meet the ‘strength of feeling’ requirement means that the methods by which children’s voices are heard are very important.

As in England and Wales, the most common mechanism employed by Australian courts to hear children's objections is through a report from a court-appointed child welfare expert who interviews the child and provides a report on matters including the child's objections to being returned, and the report writer's expert opinion as to the validity and strength of those views, and the child's maturity and ability to understand the consequences of their choices. As noted above in relation to the reports of CAF/CASS officers in England and Wales, expert reports are very highly regarded, but there is a danger in relying on them as the sole source of information about the child's objections. Unlike general parenting matters, where the child's views are one matter amongst many for the court to consider in an assessment of the child's 'best interests', in Convention matters the existence and strength of the child's objection, and an assessment as to the child's maturity, will determine whether the court has discretion to refuse to make what would otherwise be a mandatory return order (Fernando and Ross 2018). Fernando and Ross (2018) observed that it seems risky to rely on only one source of evidence to assess the 'children's objection' exception when the stakes are so high. It is widely known that report writers differ in skill and ability, but the way a report writer approaches their task may greatly influence the court's decision. For example, the primary judge in *RCB* agreed with the report writer that, although the children objected to returning to Italy, their ability for abstract thought and future forecasting was not fully formed and the children lacked the ability to truly predict what impact their choices would have for their future relationship with their father (the left-behind parent). In his re-written judgment of *RCB* for the Children's Judgments Project, Simpson (2017) observed (at 510):

[w]ith the greatest respect to the family consultant I find considerable difficulty with the concept of 'future forecasting'. To the extent it implies being able to see into the future, I doubt that that is an attribute that many adults possess (if any). Nor am I convinced that a fully formed ability for abstract thought is something that all mature adults possess let alone children.

In both Australia and in England and Wales, expert reports have limited utility in providing children with a 'voice' in proceedings. Children have reported that they are dissatisfied with a process that requires them to express their views to a person who then includes them, amongst other matters, in a report to the court (Parkinson and Cashmore 2008). In particular, children have commented that they are not happy about the techniques used by report writers, the lack of confidentiality, the feeling that their views have not been properly understood or taken seriously, and the filtering and reinterpretation by the report writer of what the children have said (Parkinson and Cashmore 2008). Children have no say in how their views are presented and have no opportunity to respond if they feel that they have been misrepresented (Fernando and Ross 2018).

In Australia, a court may appoint an independent children's lawyer (ICL), usually in addition to an expert report. An ICL may lead evidence and advocate in favour of the child's views. However, the ICL has a limited role in promoting the views of a child or ensuring that the child's objections are taken into account. This is because the ICL is a 'best interests' advocate. They are not the child's legal representative and are not obliged to act in accordance with a child's instructions (Family Law Act 1975 (Cth) ('FLA') s 68LA(4)). Further, in Convention cases in particular, a court can only make an order appointing an ICL 'if the court considers that there are exceptional circumstances that justify doing so' (FLA s 68LA(2A))³. The fact that there is evidence that a child objects to being returned is not enough, on its own, to constitute 'exceptional circumstances' (see, e.g., *RCB* 2012). This means that there are many cases where children object to being returned but no ICL is appointed to represent their interests.

Judicial meetings with children are very rare in Australia (Fernando 2012) and no steps have been taken to encourage the practice, such as through the promulgation of guidelines.

³ Note that the Family Law Amendment Bill 2023 (Cth) proposes to repeal that provision.

This, again, sits in contrast with other jurisdictions, including England and Wales, where, although judicial meetings are not designed to be evidence-gathering strategies, the existence of guidelines provides at least some scope for children to feel more involved in the decision-making processes that occur in Convention proceedings.

5. The Treatment of Children's Objections in the USA

The Convention is incorporated into domestic law in the United States via the International Child Abduction Remedies Act (1988), which permits Hague Convention cases to be heard in either State or Federal courts. Despite several advancements in respect of other areas of the Convention⁴, the application of the child's objection exception in the United States is somewhat misaligned with the UK and Australia

Historically, many courts in this jurisdiction have been accused of paying little—if any—attention to children's views in cases that raise the objection exception (Schuz 2013). Commentators have described the US approach to such cases as one in which judges are, generally, reluctant to consider children's views, and take a very limited view of their ability to express legitimate objections (Greene 2005, p. 134). In fact, some scholars have gone as far as to regard the application of the 'children's objection' exception in the US as 'fairly straightforward—for the most part, it does not exist' (Kenworthy 2002, p. 351). The traditional resistance to considering children's objections that has inspired this degree of criticism is clear in early case law. In the case of *Tahen v Duquette* (1992), a New Jersey court refused to engage with the objections raised by a nine-year-old child by stating that the exception was simply incapable of applying to a child of this age. Importantly, the court saw no potential benefit or purpose to interviewing the child to further examine their views and no further explanation or analysis was provided to justify why the child was not capable of objecting. Similarly, in the slightly later case of *England v England* (2000), a Texas court determined that a 13-year-old's views could not be interpreted as an objection for the purposes of the exception because there was not sufficient evidence to show that she *was* mature enough to express reasonable objections. In a unique dissenting judgment in this case, Circuit Judge Duhe reflected upon the logical dissonance of the approach taken by the majority, arguing that if the child's objection exception is 'to have any meaning at all, it must be available for a child who is less than 16 years old' (*England v England* 2000, para. [274]). In practice, US courts have traditionally justified this non-engagement with children's objections in two different ways. Firstly, there is a strong judicial belief that it is not appropriate for US judges to engage in the detail of custody disputes that are best dealt with by courts in the country of origin (Kenworthy 2002, p. 348). Secondly, there is judicial concern about the wide scope of discretion that the Convention permits individual judges in each jurisdiction when identifying and weighing up children's objections. From this perspective, the lack of a specified age limit in the Convention opens the door to "potential subjective and arbitrary decision making" and arguably risks situations where "... the child and not the judge would, in effect, be making a return decision" (Greene 2005, p. 134).

While these examples illustrate a degree of judicial contempt towards the 'children's objection' exception that was apparent in the 1990s and 2000s, recent case law indicates that this is gradually changing, albeit very slowly. In *Wan v Debolt* (2021), an Illinois District Court held that, in cases concerning objections from children, it is necessary for a court to engage in a fact-intensive inquiry into the maturity of the child on a case-by-case basis. In the event that a child is mature enough to express such views, their objections must be more than generalised preferences if a court is to give them due weight. In practice, this requires an assessment of maturity at the gateway stage, rather than the discretion stage. In respect of the gateway stage, US judges are perceived as 'divided' on the issue of how old a child should be before they are deemed sufficiently mature (Pritchard 2015, p. 271). Nevertheless, there is evidence that such inquiries have indeed been undertaken,

⁴ Recent judicial decisions have clarified and strengthened the position in the US with regard to habitual residence (*Monasky v Taglieri*, 140 S. Ct. 719 (2020) (habitual residence test and appeal standard of review for habitual residence)), and undertakings (*Golan v Saada*, 142 S. Ct. 1880 (2022)).

with examples such as *Avendano v Balza* (2021) indicating that courts can and do recognise children as sufficiently mature to express objections and overcome the gateway stage, even if these are ultimately outweighed at the discretion stage. However, the need for objections to be particularised is clear: in *Dubikovskyy v Goun* (2022), a District Court for the Western District of Missouri reversed a decision to prevent the return of a child who expressed a general but otherwise clear and justified preference to remain in the US.

The emphasis on particularised objections remains restrictive, but, nevertheless, these cases indicate that there is now some tentative willingness to consider children's views, at least, in principle. In *Bhattacharjee v Craig* (2021), a District Court for the Eastern District of Missouri took a similar view, but strongly emphasised that such factual inquiries should be approached restrictively. Here, the District Court asserted that only in extraordinary cases should children be deemed mature enough to express objections. Interestingly, this case also indicated that this standard should be interpreted even more strictly when the 'children's objection' exception is the only defence raised in the case. In this respect, this suggests there has been little progress in the US. Nearly 20 years ago, [Greene \(2005, pp. 116–17, 121\)](#) argued that it is rare for US courts to recognise the children's objections exception in its own right, and instead a tendency to consider expressed objections merely as a component of evidence that may be put forward in support of the grave risk of harm exception.

On the basis of this, it appears that the US is no longer as firmly opposed to the objection exception as it once was, but that this jurisdiction, nevertheless, continues to take a staunchly restrictive approach to interpreting this exception. Despite the aforementioned developments in other areas of the Convention, [Cullen and Powers \(2023, p. 199\)](#) recently summarised the US position on children's objections as one that, unfortunately, 'remains out of step with the rest of the world'.

A further concern is that the US appears to have little consensus on how children's views should be ascertained and evaluated for the purposes of the objection exception. When US courts have sought children's views in support of other aspects of the Convention, such as the grave risk of harm exception, there have been a range of strategies: some judges are willing to instruct psychologists or social workers to assess the maturity of children; others request that parents engage their own experts to evaluate children and testify in court proceedings; and others may meet privately with children via video link or in chambers ([Cullen and Powers 2023, p. 199](#)). Therefore, the extent to which children's views are heard in the US is limited not only by the current restrictiveness of US courts' application of the objection exception, but also by the lack of clear mechanism by which such objections might be identified.

In sum, while recent case law indicates a tentative shift in the right direction, consideration of children's views is extremely limited in the US context. The judicial hesitancy to engage in the objections exception can be largely attributed to the fact that the US is one of only two countries that has not ratified the UNCRC, which specifically supports the notion that children's voices should be heard in any matters that affect them. The situation of US courts is rather unique in that it is not a signatory to the Convention that enshrines the importance of children's views, yet it is required to navigate the 'children's objection' exception as part of its obligations under the Hague Convention. This gives rise to a situation where Hague Convention cases are routinely heard within a legal context that does not recognise the importance of hearing children's views, let alone engage with children's objections, meaning that this aspect of the Convention is largely ignored ([Elrod 2011, p. 663](#)).

6. Discussion and Recommendations

Our analysis of the ways children's views are ascertained and treated for the purpose of the 'children's objection' exception in the three jurisdictions identified reveals a concerning lack of consistency and clarity between and within the jurisdictions. Our analysis suggests a distinct possibility that the views of abducted children will be treated differently based on the country which they have been unlawfully retained in or removed to. This result

is contrary to principles of international law which aim to achieve consistency between Contracting States.

Of the three jurisdictions examined, England and Wales demonstrates an approach which is most aligned with the Convention. The family court in England and Wales generally takes a simplified approach to the treatment of children's views, taking into account any objections expressed by a sufficiently old and mature child in the gateway stage, and leaving assessment as to the nature, strength, or weight to be given to those views to the discretion stage. However, even in England and Wales there remain problems in relation to clarity in how the 'children's objection' exception is to be approached in practice, and there are limitations in the methods by which children's views are heard.

The Australian approach to the 'children's objection' exception is problematic, because children's objections are only taken into account if they are held to show a particular 'strength of feeling', which is not a requirement of the Convention itself. When judges interpret this requirement strictly, children's objections are likely to be discounted unless they are expressed with a sufficient degree of 'strength', in circumstances where there is no clarity as to the threshold required. The Australian approach presents a danger that children's objections will be rejected in the gateway stage in situations where proper application of the Convention would require that those views be taken into account and considered, along with other factors, in the discretion stage.

The approach in the US is the most misaligned with the Convention, and is largely inconsistent with the other two jurisdictions examined in this paper. While recent case law demonstrates greater willingness to engage with the 'children's objection' exception, it appears that courts favour a restrictive approach, where children may be considered not 'mature' enough to have any objections they may express taken into account. This is compounded by a reluctance to consider the 'children's objection' exception unless it is one of a number of exceptions raised in a case. Children's objections are only typically engaged insofar as they may provide evidence to substantiate other exceptions under the Hague Convention, namely, that returning the child would result in a grave risk of harm. Even then, the methods by which these objections are ascertained are limited in their scope and do not enable children to have an effective voice. In short, by failing to properly engage with the 'children's objection' exception, and prioritising return of children, the US approach neglects the true scope of its obligations under the Convention. As discussed earlier in this article, the primary objective of the Convention is not to return children at all costs. It is to protect children from harm, including from the harmful effects of abduction. Through the exceptions, the Convention recognises that there are situations where a refusal to return a child may be justified to protect a child from harm. Where one of the exceptions is raised, it must be investigated properly and, if it is found to be supported, a court must carefully consider whether to exercise its discretion to, nevertheless, return a child.

In all three jurisdictions, it could be argued that children are not given a right to express their views or be given opportunities to be heard, as is required by Article 12 of the UNCRC. The reliance on expert reports as the primary, and often only, means of ascertaining and communicating the child's objections to the court is inherently limited in that regard. Expert reports necessitate a third-party filtering and contextualising children's views, and have other limitations which we have discussed earlier. Other strategies which could allow more direct involvement by children, such as separate representation or judicial meetings with children, are used to a minimal extent, or in a restricted way, which also curtails the extent to which children's voices can be effectively heard.

On the basis of the research set out in this article, we recommend that the Hague Conference on Private International Law (HCCH) issues a Guide to Good Practice to provide clarity in how the 'children's objection' exception is to be interpreted and applied, to promote consistency in how Contracting States approach the exception, and to ensure that children are given a voice in a way that promotes children's rights under the UNCRC but also complies with the objectives of the Hague Convention.

In addition to its Conventions and accompanying Explanatory Memoranda, the HCCH publishes post-Convention documents from time to time, including Guides to Good Practice, which are designed to assist those in charge of implementing and applying Conventions, as well as academics, legal practitioners, and the general public, to support their sound implementation and effective operation ([Hague Conference on Private International Law 2022](#)). Guides to Good Practice are not binding on Contracting States, and are intended to provide guidance and advice on interpreting and applying the Convention. The HCCH has published six Guides to Good Practice on various aspects of the Hague Child Abduction Convention ([HCCH 2020](#), [2012](#), [2010](#), [2005](#), [2003a](#), [2003b](#)). The most recent was published in 2020 on the ‘grave risk of harm’ exception and was the first Guide to Good Practice offering guidance on the interpretation and application of one of the exceptions to mandatory return.

The objective of the ‘grave risk of harm’ Guide to Good Practice is expressed to be ‘to promote, at the global level, the proper and consistent application of the grave risk exception in accordance with the terms and purpose of the 1980 Convention. . .’ ([Hague Conference on Private International Law 2020](#), p. 3). To achieve that objective, the Guide offers information and guidance on proper interpretation and application of the ‘grave risk of harm’ exception, drawing from interpretive aids such as the Convention’s Explanatory Report and Conclusions and Recommendations of the Special Commission, and documents good practice from diverse jurisdictions. Given the problems with consistency and clarity in interpreting and applying the ‘children’s objection’ exception that we have identified, we advocate for the publication of a Guide to Good Practice on this exception also as an appropriate and necessary step.

As with the Guide to Good Practice on the ‘grave risk of harm’ exception, a Guide to Good Practice on the ‘children’s objection’ exception should provide a thorough overview of the legal framework and relevance of the relevant exception in relation to the Hague Convention, including the assistance for Central Authorities in managing cases and providing helpful resources. Our recommendations below relate to how a Guide to Good Practice can promote the correct interpretation and application of the first part of the ‘gateway’ stage of the ‘children’s objection’ exception, and ensure that children’s views are ascertained and considered in a way that accords with both the objectives of the Hague Convention and Article 12 of the UNCRC. In particular, we consider that a Guide to Good Practice on the ‘children’s objection’ exception should include, *inter alia*:

1. Clarification of what constitutes an ‘objection’ for the purposes of the exception;
2. Clarification of what considerations are relevant to satisfy the ‘gateway’ and ‘discretion’ stages, including when and how the ‘strength’ of an objection is to be considered;
3. A recommendation that all children with capacity to express their views be given an opportunity to be heard;
4. A recommendation that in all cases where a child objects to being returned, the child is afforded independent legal representation;
5. A recommendation that in all cases where a child objects to being returned, a judge considers whether to meet with the child;
6. A recommendation that the court ensure that the child is kept informed of the proceedings and possible consequences in a timely and appropriate way.

We will briefly discuss each of these in turn.

6.1. Clarification of What Constitutes an ‘Objection’ for the Purposes of the Exception

The Guide to Good Practice should include an explanation of the words which appear in the ‘children’s objection’ exception. This would include an explanation of what constitutes an ‘objection’ and clarification as to what a child must be objecting to.

It is expected that an ‘objection’ would be described as being an expression of a negative view to being returned to the child’s country of habitual residence, and explain that there is a difference between an objection and a mere wish or preference. The explanation would make clear that a child’s objection must be able to be interpreted as an objection

to returning to their country of habitual residence and not merely an objection to being returned to the left-behind parent. However, in accordance with the case law on this issue earlier discussed, the child does not need to explain their objection in those terms.

It would be useful for the explanation to clarify that an objection does not need to be an objection to returning in any circumstances. This would guard against situations where a child's objections may be rejected because the child has expressed that they will return if certain circumstances are present, such as being able to return with, and remain living with, the abducting parent. Just as a child's objection should not be accepted if it is merely an objection to being returned to a left-behind parent, a child's objection should not be rejected merely because a child is willing to return if they remain with an abducting parent.

6.2. Clarification of What Considerations Are Relevant to Satisfy the 'Gateway' and 'Discretion' Stages, Including When and How the 'Strength' of an Objection Is to Be Considered

The question of whether a child objects and whether a child's objections should be given weight are frequently conflated. This amounts to an unacceptably inconsistent application of the gateway and discretion stages identified at the beginning of this article. This is evident, for instance, by comparing the US, where children's objections are discounted for a range of circumstantial reasons (and, sometimes, for no reason at all), and Australia, where children's objections are discounted if they are not expressed with sufficient strength of feeling.

The Guide to Good Practice should clearly articulate the relevant criteria and considerations that factor into the gateway stage—namely, whether the child objects, and whether they have attained an age and degree of maturity at which it is appropriate to take account of those objections. The Guide should explicitly direct judges to avoid assessing the nature or strength of such objections at the gateway stage, with these factors more appropriately considered at the discretion stage. The position in England and Wales offers a practical example of how this distinction can work effectively. As noted earlier in this article, Lady Justice Black's articulation of the gateway stage shows that it is not 'an over-prescriptive or over-intellectualised approach' (Re. M. 2015, para. [77]), but, rather, a simple question of whether the child objects, and has attained a sufficient age and degree of maturity at which it is appropriate to take account of their views.

By approving, firstly, this approach to the gateway stage, and, secondly, the distinction between the two stages, the Guide to Good Practice will ensure that all countries are well equipped to approach the 'children's objection' exception in a way that is consistent with the intentions of the Convention. In other words, it will assist all signatory jurisdictions to strike an appropriate balance between the objectives of the Convention—that is, returning children where appropriate whilst also protecting children in situations where a refusal to return may be justified. In terms of the latter, it is essential that any objections are carefully investigated through this designated process, rather than prematurely dismissed.

The Guide to Good Practice should also provide guidance as to how to approach the question of the age and maturity of the child in the gateway stage, and the specific considerations that should be taken into account at the discretion stage, both of which fall beyond the scope of this article but are likely to require further clarification and scrutiny in order to ensure consistency.

6.3. A Recommendation That All Children with Capacity to Express Their Views Be Given an Opportunity to Be Heard

The Special Commission on the Practical Operation of the Hague Conventions welcomed the 'overwhelming support for giving children, in accordance with their age and maturity, an opportunity to be heard in return proceedings under the 1980 Convention independently of whether (a 'children's objection' exception) has been raised' (Special Commission on the Practical Operation of the 1980 and 1996 Hague Conventions 2011, p. recommendation 50). This reflects the common law presumption espoused by Baroness Hale in Re. D. (2007) and is consistent with, and gives effect, to Article 12 of the UNCRC,

which gives children a right to express their views and be given opportunities to be heard in any proceedings affecting them.

Some jurisdictions have already enshrined this right within domestic law. Section 278(3) of the South African Children's Act 38 of 2005 states that the court must afford the child 'the opportunity to raise an objection to being returned to their home country' and 'must give due weight to that objection', taking into account the child's age and maturity. Further, the Brussels II *ter* Regulation discussed earlier which is applicable for member states of the European Union clarifies that children must be given an opportunity to be heard in the proceedings unless this appears inappropriate having regard to the child's age or maturity (Article 11(2)).⁵

Ensuring that children have an opportunity to be heard also gives them an opportunity to express an objection to being returned, thus invoking the 'children's objection' exception if it has not already been raised by the taking parent. A court must ensure that there is an independent means of conveying the child's views to the court, which could be via an expert report, separate representation, or a meeting between the judge and the child.

6.4. *A Recommendation That, in All Cases Where a Child Objects to Being Returned, the Child Is Afforded Independent Legal Representation*

Subject to the rules and procedures in each Contracting State, a court should ensure that children who object to being returned to their country of habitual residence are independently represented within Hague Convention proceedings. This will ensure that the child's views and interests, which are integral to the court's determination of whether the 'children's objection' exception is made out, and whether the child should be returned, are properly represented. It also ensures that children are given an opportunity to be heard, as part of a lawyer's role will be to ascertain the views of the child, preferably by communicating with them directly.

Elrod (2011) opined that a lawyer for a child is particularly important in Hague Convention cases because the child's interests are at stake and the parents' interests may not be the same as the child's. She argued that, in a high-conflict case, independent representation offers the best chance of ensuring that the child's views are presented to the court.

Independent representation for children can assist courts to make the best decisions for children in situations where judges are otherwise dependent on information presented by the parties (Schuz 2013). As well as allowing children to be heard, it also ensures that children's perspectives and interests are put to the court in a professional and persuasive manner, and ensures that the court has all the essential information to determine whether the exception is made out (Schuz 2013). The role of a child's lawyer is different from the role of the court-appointed child welfare expert, who ascertains the child's views and contextualises them in a report, but has no obligation to advocate on behalf of the child or their best interests. Appointing a lawyer for a child conforms with article 12(2) of the UNCRC which provides that a child be provided the opportunity to be heard, either directly, or through a representative or an appropriate body.

In 2011 the Hague Special Commission noted that an increasing number of States provide for the possibility of separate legal representation in abduction cases, and cases and commentators have argued that children who object to being returned should, generally, be represented (e.g., Schuz 2013; Elrod 2011; De L. 1996).

There are various models for independent representation, ranging from a strictly 'best interests' representative—as seen in Australia—to direct representation in a traditional advocate/client model—as found in some states of the USA. However, whichever model is adopted in the Contracting State, independent representation for children can provide an important role in the presentation of necessary information for a court to determine the

⁵ As of 1 January 2021, this provision no longer applies to the jurisdiction of England and Wales due to its departure from the European Union, but, as noted earlier, the essence was nevertheless preserved by Re. D.

‘children’s objection’ exception, and in giving children a voice which accords with their right under the UNCRC and their interests under the Hague Convention.

6.5. A Recommendation That, in All Cases Where a Child Objects to Being Returned, a Judge Considers Whether to Meet with the Child

In each of the jurisdictions examined in this article, and in many jurisdictions around the world, judges have discretion to meet with a child who is the subject of proceedings. Meeting with a judge gives a child an opportunity to directly express their views to the decision maker, satisfying the child that their views have been heard. International research shows that when children are given the opportunity to meet with a judge, many choose to do so (Morag et al. 2012; Taylor et al. 2012).

Despite the judicial hesitancy to meet with children in some jurisdictions, this mechanism allows judges to hear children’s objections first-hand, to clarify or supplement information already contained in an expert report. It allows judges to fill any gaps in the report, to ensure that the court has all information on which to adequately assess the ‘children’s objection’ exception (Fernando and Ross 2018).

We acknowledge the barriers to judges embracing this practice in some jurisdictions, including Australia, due to judges feeling uncomfortable about speaking with children, or having concerns about how the evidence gleaned will be reported back to the parties (Fernando 2012; Parkinson and Cashmore 2008). Nevertheless, we consider that there is value in judges considering whether to meet with children in Hague cases, and whether, in the circumstances, these barriers can be overcome. The Hague [Special Commission on the Practical Operation of the 1980 and 1996 Hague Conventions](#) (2011, recommendation 50) emphasised the importance of ensuring that any person who speaks with a child for the purpose of ascertaining the child’s views has appropriate training for this task where possible. It is, therefore, important that judges are offered training in how to appropriately speak with children and interpret their views.

Meeting with a child is an important acknowledgement of the child’s right to express their views in proceedings as required by Article 12 of UNCRC, and of the significance of the child’s voice in determining the ‘children’s objection’ exception.

6.6. A Requirement That the Court Ensure That the Child Is Kept Informed of the Proceedings and Possible Consequences in a Timely and Appropriate Way

In 2011, the Hague [Special Commission on the Practical Operation of the 1980 and 1996 Hague Conventions](#) (2011, p. recommendation 50) recognised ‘the need for the child to be informed of the ongoing process and possible consequences in an appropriate way considering the child’s age and maturity’. Similarly, the [United Nations Committee on the Rights of the Child](#) (2006) recognised the right to receive and impart information as an important component to children’s participation. The requirement to keep children informed also appears in the ‘grave risk of harm’ Guide to Good Practice (HCCCH 2020, p. 88) where it is stated that a court should, where appropriate under the relevant laws and procedures:

inform and encourage the parties, the separate representative for the child or an appointed expert to inform the child of the ongoing process and possible consequences in a timely and appropriate way considering the child’s age and maturity.

Giving a child information about court processes and keeping them informed about the proceedings is a necessary corollary of the child’s right to be heard in proceedings (Freeman et al. 2019). To facilitate this, a court could also ensure that a child is given a child-friendly version of the Convention which would give them information about the Convention’s objectives, what a court may take into account, and the extent to which children’s views may be relevant to the court’s decision. Recently, a website has been launched for the specific purpose of informing children and young people about international parental child abduction. The ‘[FindingHome.world](#)’ website explains the main aspects of the Convention

and includes stories providing examples of the different situations and circumstances that can occur in abduction cases. It explains the processes that will occur after a child has been abducted and informs children of their right to be heard and for their views to be considered in the proceedings. The website also provides answers to common questions that children have about abduction and the law, and links to organisations which can provide support and further assistance. Judges can refer children to resources such as this to ensure that children have information about court processes and how they can be heard.

As envisioned in the ‘grave risk of harm’ Guide to Good Practice (HCCH 2020), a court can ensure that children are kept informed of the proceedings and possible consequences by instructing or encouraging the parties, the separate representative for the child, or the appointed expert to undertake this task. Alternatively, a judge may choose to meet with a child directly for this purpose.

7. Conclusions

As Schuz (2013, p. 353) explains:

If courts remember that (the ‘children’s objection’ exception) creates a child’s defence rather than a defence for the abducting parent, they will understand that giving appropriate weight to the objections of sufficiently mature children is not contrary to the policy of the Convention and that a child-centric approach has to be taken in determining whether the defence is established.

Children have a right to be heard and have their views taken into account in all proceedings that affect them, and, particularly, in circumstances where the ‘children’s objection’ exception may be relevant. This is because if a child objects to being returned, and has attained an age and degree of maturity at which the court determines it is appropriate to take account of their views, a court is not obliged to return the child to their country of habitual residence.

Our examination of how children’s views are heard and considered for the purposes of the ‘children’s objection’ exception has demonstrated considerable differences in the three jurisdictions examined. While we have observed that the approach to the treatment of children’s objections in England and Wales is superior to that taken in Australia and the USA, there are still limitations, in all three jurisdictions, in how children’s objections are brought before the court. In an area of international law which relies on consistency and comity, it is concerning that different jurisdictions are taking divergent approaches to children’s objections. As articulated in this article, guidance is needed to promote clarity and consistency on the ‘children’s objection’ exception, and to ensure that children’s voices are heard to an extent that upholds their rights and complies with the objectives of the Convention.

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References

Primary Sources

Avendano v Balza 985 F. 3d 8, (1st Cir. 2021).

‘Brussels II bis’ Council Regulation (EU) 2201/2003.

- 'Brussels II ter' Council Regulation (EU) 2019/1111.
- Commonwealth Central Authority v Sangster. 2018. FamCA 765.
- Child Abduction and Custody Act 1985 (UK).
- Children's Act 2005 (South Africa).
- Department of Communities (Child Safety Services) v Garning. 2011. FamCA 485
- Department of Communities and Justice v Sarapo (No 2). 2019. FamCA 829.
- Department of Community Services v Crowe. 1996. 21 Fam LR 159.
- De L v Director-General, New South Wales Department of Community Services and Anor. 1996. 187 CLR 640.
- De Lewinski v Director-General, New South Wales Department of Community Services (1997) FLC 92-737.
- DP v Commonwealth Central Authority. 2001. 206 CLR 401.
- Dubikovskyy v Goun No. 21-1289 (8th Cir. 2022).
- England v England 234 F.3d 268 (5th Cir. 2000).
- Family Law Act 1975 (Cth).
- Family Law Amendment Bill 2023 (Cth).
- (Regulations 1986) Family Law (Child Abduction Convention) Regulations. 1986. (Cth).
- Hague Convention on the Civil Aspects of International Child Abduction 1980. Opened for signature 25 October 1980, Hague XXVIII (entered into force 1 December 1983).
- RCB v The Honourable Justice Forrest and Ors. 2012. 247 CLR 304.
- Re F (Abduction: Acquiescence: Child's Objections) [2015] EWCA Civ 1022.
- Re LC. 2014. UKSC 1.
- Re M (Republic of Ireland) (Child's Objections) (Joinder of Children to Appeal). 2015. EWCA Civ 26.
- Re W (Abduction: Child's Objections). 2010. EWCA Civ 520.
- Secretary, Department of Communities and Justice v Paredes. 2021. FamCA 128.
- Tahen v Duquette 613 A.2d 486, 490 (N.J. Super. Ct. App. Div. 1992).
- United Nations Convention on the Rights of the Child. 1991. Opened for signature 20 November 1989, ATS 4 (entered into force 2 September 1990).
- International Child Abduction Remedies Act 1988 Pub. L. No. 100-300, 102 Stat. 437 (29 April 1988), codified as amended at 42 U.S.C. §§ 11601-11 (2006).
- Re M (A Minor) (Child Abduction). 1994. 1 FLR 390.
- (1995) Re R (Child Abduction: Acquiescence). 1995. 1 FLR 716.
- (2000) Re T (Abduction: Child's Objections to Return). 2000. 2 FLR.
- Re D (A Child) (Abduction: Rights of Custody). 2007. 1 AC 619.
- Office of the Children's Lawyer v Balev. 2018. 1 SCR 398.
- Wan v Debolt CD III No. 20 cv 3233, (3 May 2021).
- Bhattacharjee v Craig 2021 ED Mo, No. 21 cv 826 (1 October 2021).

Secondary Sources

- Beaumont, Paul, and Peter McEleavy. 1999. *The Hague Convention on International Child Abduction*. Oxford: Oxford University Press, pp. 1–188.
- Birnbaum, Rachel. 2017. Views of the Child Reports: Hearing Directly from Children Involved in Post-Separation Disputes. *Social Inclusion* 5: 148–54. [CrossRef]
- Carson, Rachel, Edward Dunstan, Jessie Dunstan, and Dinka Roopani. 2018. *Children and Young People in Separated Families: Family Law System Experiences and Needs*. Melbourne: Australian Institute of Family Studies, pp. 1–111.
- Cashmore, Judy. 2003. Children's Participation in Family Law. In *Hearing the Voices of Children: Social Policy for a New Century*. Edited by Christine Hallett and Alan Prout. London: Routledge Falmer, pp. 158–76.
- Cullen, Stephen, and Kelly Powers. 2023. The 1980 Convention Comes of Age in the United States. In *Research Handbook on International Child Abduction*. Edited by Marilyn Freeman and Nicola Taylor. Cheltenham: Edward Elgar Publishing, pp. 191–99.
- Elrod, Linda D. 2011. Please Let Me Stay: Hearing the Voice of the Child in Hague Abduction Cases. *Oklahoma Law Review* 63: 663–90.
- Family Justice Council. 2010. *Guidelines for Judges Meeting Children who are subject to Family Proceedings*. London: Judiciary UK, pp. 1–2.
- Fenton-Glynn, Claire. 2014. Participation and Natural Justice: Children's Rights and Interests in Hague Abduction Proceedings. *Journal of Comparative Law* 9: 129–44.
- Fernando, Michelle, and Nicola Ross. 2018. Stifled Voices: Hearing Children's Objections in Hague Child Abduction Convention Cases in Australia. *International Journal of Law, Policy and the Family* 32: 93–108. [CrossRef]
- Fernando, Michelle. 2012. What do Australian Family Law Judges Think About Meeting with Children? *Australian Journal of Family Law* 26: 51–77.
- Fernando, Michelle. 2022. Children's Objections in Hague Child Abduction Convention Proceedings in Australia and the 'Strength of Feeling' Requirement. *International Journal of Children's Rights* 30: 729–54. [CrossRef]
- Freeman, Marilyn, Rhona Schuz, and Nicola Taylor. 2019. *The Voice of the Child in International Child Abduction Proceedings under the 1980 Hague Convention: Project Report*. Westminster: University of Westminster, pp. 1–9.
- Freeman, Marilyn. 2006. *International Child Abduction: The Effects*. Leicester: Reunite International, pp. 60–61.

- Freeman, Marilyn. 2014. Parental Child Abduction: The Long-Term Effects. *International Centre for Family Law, Policy and Practice* 2014: 19–37.
- Greene, Anastacia M. 2005. Seen and Not Heard? Children’s Objections Under the Hague Convention on International Child Abduction. *University of Miami International and Comparative Law Review* 13: 105–54. [\[CrossRef\]](#)
- Hague Conference on Private International Law. 2020. *Guide to Good Practice: Part VI Article 13(1)(b)*. The Hague: HCCH Permanent Bureau, pp. 1–82.
- Hague Conference on Private International Law. 2022. *HCCH General Information Brochure*. The Hague: Hague Conference on Private International Law, pp. 1–6.
- HCCH. 2003a. *Guide to Good Practice Child Abduction Convention Part I: Central Authority Practice*. The Hague: HCCH.
- HCCH. 2003b. *Guide to Good Practice Child Abduction Convention Part II: Implementing Measures*. The Hague: HCCH.
- HCCH. 2005. *Guide to Good Practice Child Abduction Convention Part III: Preventative Measures*. The Hague: HCCH.
- HCCH. 2010. *Guide to Good Practice Child Abduction Convention Part V: Mediation*. The Hague: HCCH.
- HCCH. 2012. *Guide to Good Practice Child Abduction Convention Part IV: Enforcement*. The Hague: HCCH.
- HCCH. 2020. *Guide to Good Practice Child Abduction Convention Part IV: Article 13(1)(b)*. The Hague: HCCH.
- Hollingsworth, Kathryn, and Helen Stalford. 2018. Judging Parental Child Abduction: What does it mean to adopt a children’s rights-based approach? In *International and National Perspectives on Child and Family Law: Essays in Honour of Nigel Lowe*. Edited by Gillian Douglas, Mervyn Merch and Victoria Stephens. Cambridge: Intersentia, pp. 125–46.
- Kenworthy, Brian S. 2002. The Un-Common Law: Emerging Differences Between the United States and the United Kingdom on the Children’s Rights Aspects of the Hague Convention on International Child Abduction. *Indiana International and Comparative Law Review* 12: 329–63. [\[CrossRef\]](#) [\[PubMed\]](#)
- Kirby, Hon Michael. 2010. Children Caught in Conflict: The Child Abduction Convention and Australia. *International Journal of Law, Policy and the Family* 24: 95–114.
- McEleavy, Peter. 2008. Evaluating the Views of Abducted Children: Trends in Appellate Case Law. *Child and Family Law Quarterly* 20: 230–54.
- Morag, Tamar, Dori Rivkin, and Yoa Sorek. 2012. Child Participation in the Family Courts: Lessons from the Israeli Pilot Project. *International Journal of Law, Policy and the Family* 26: 1–30. [\[CrossRef\]](#)
- Munby, Hon James. 2016. 15th View from the President’s Chambers: Care Cases: The Looming Crisis. *Family Law* 9: 1102.
- Nygh, Hon Peter. 1997. The High Court Considers the Hague Child Abduction Convention in *De L v Director-General, New South Wales Department of Community Services*. *Australian Journal of Family Law* 11: 1–4.
- Nygh, Hon Peter. 2002. Review of the Hague Convention on the Civil Aspects of Child Abduction. *Australian Journal of Family Law* 16: 1–10.
- Parkinson, Patrick, and Judy Cashmore. 2008. *The Voice of a Child in Family Law Disputes*. Oxford: Oxford University Press, pp. 149–52.
- Pérez-Vera, Elisa. 1982. Explanatory Report on the 1980 Hague Child Abduction Convention. In *Proceedings of the Fourteenth Session (1980)*. The Hague: Imprimerie Nationale, pp. 27–34.
- Pritchard, Mary. 2015. *Smedley v Smedley* 772 F.3D 184 (4th Cir. 2014): The Effect of International Comity on the Hague Convention. *South Carolina Journal of International Law and Business* 11: 261–76.
- Schuz, Rhona. 2013. *The Hague Child Abduction Convention: A Critical Analysis*. Oxford: Hart Publishing, pp. 1–439.
- Simpson, Brian. 2017. RCB as Litigation Guardian of EKV, CEV, CIV and LRV v The Honourable Justice Colin James Forrest. In *Rewriting Children’s Rights Judgments: From Academic Vision to New Practice*. Edited by Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore. Oxford: Hart Publishing, pp. 503–11.
- Smith, Anne B., Nicola J. Taylor, and Pauline Tapp. 2003. Rethinking Children’s Involvement in Decision-Making After Parental Separation. *Childhood* 10: 201. [\[CrossRef\]](#)
- Special Commission on the Practical Operation of the 1980 and 1996 Hague Conventions. 2011. Conclusions and Recommendations. *Hague Conference on Private International Law*, June 1–10.
- Taylor, Nicola, and Marilyn Freeman. 2018. Outcomes for Objection Children under the 1980 Convention. *The Judges’ Newsletter* XXII: 8–12, Summer-Fall 2018.
- Taylor, Nicola, Robyn Fitzgerald, Tamar Morag, Asha Bajpai, and Anne Graham. 2012. International Models of Child Participation in Family Law Proceedings Following Parental Separation/Divorce. *International Journal of Children’s Rights* 20: 645–73. [\[CrossRef\]](#)
- Taylor, Nicola. 2006. What do we know about Involving Children and Young People in Family Law Decision Making? A Research Update. *Australian Journal of Family Law* 20: 154–78.
- United Nations Committee on the Rights of the Child. 2006. *Day of General Discussion on the Right of the Child to be Heard*. Geneva: United Nations Committee on the Rights of the Child.
- Vigers, Sarah. 2011. *Mediating International Child Abduction Cases: The Hague Convention*. Oxford: Hart Publishing, pp. 76–91.

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Article

The U.S. Experience in Drafting Guidelines for Judicial Interviews of Children and Its Translation to Hague Abduction Convention Return Proceedings Globally

Melissa Ann Kucinski

MK Family Law, PLLC, 1717 K Street, NW, Suite 900, Washington, DC 20006, USA; melissa@mkfamily.law

Abstract: This article will focus on judicial interviews of children, in chambers, including in Hague Abduction Convention cases; the potential promise and pitfalls of conducting such interviews; and how the U.S. experience provides an excellent template for future discussions and work on creating a soft law instrument on this important information-gathering tool.

Keywords: interview; testimony; maturity; evidence; objection

1. Introduction

Judges do and will continue interviewing children in return proceedings brought under the Convention on the Civil Aspects of International Child Abduction (“Hague Abduction Convention”). Yet, the lack of informed guidelines makes this a dangerous prospect. A recent U.S. appellate court case serves as a cautionary tale when children are interviewed by a judge in a Hague Abduction Convention case. It also provides a significant starting point for discussions on the practice of interviewing children and highlights the complexity of these interviews in international cases.

In this recent case from the U.S. Court of Appeals for the Eighth Circuit, the parents shared custody of their 12-year-old child under the terms of a Swiss custody order (Dubikovskyy 2022)¹. The child’s mother unilaterally relocated the child to Missouri in the United States in the summer of 2020. About three months later, the father filed his lawsuit in a federal court in Missouri, seeking the child’s return to Switzerland under the Hague Abduction Convention. The court’s evidentiary hearing was held within six weeks of the lawsuit’s filing. As part of this hearing, the court interviewed the child with “only her parents’ attorneys present.” Two days later, the court appointed a psychologist to provide an opinion on the child’s maturity and independence, concerned that the child had been unduly influenced by her mother. Less than two weeks later, the psychologist provided a written report concluding that the child was mature, intelligent, and not influenced by her mother. Therefore, the court interviewed the child again, in chambers, without the attorneys.

The second interview is the starting point of our conversation. This second interview led the court to conclude that “there is no doubt based on [the child’s] words and expressions that she does not want to return to Switzerland.” (Dubikovskyy 2022). Under U.S. case law, for the court to refuse to return a child under Article 13 of the Hague Abduction Convention, the court must conclude that the child is mature and has more than a generalized desire to remain in the United States (Rodriguez 2016)². In other words, the child’s views must show particularized objections against returning to her habitual residence. The trial judge, realizing that the child must object to returning to Switzerland, and not simply state a preference, “asked [the child] if she knew the meaning of the words ‘objection’ and

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¹ Dubikovskyy v. Goun. 2022. No. 21-1289 (8th Cir.).

² Rodriguez v. Yanez. 2016. 817 F.3d 466.

‘preference.’” (Dubikovskyy 2022). The child, who testified in English, which is not her first language, apparently told the judge that “she did not understand ‘object.’” (Dubikovskyy 2022). The judge then tried to explain the definitions of the words “objection” and “preference” by offering examples, such as “I object to cleaning the bathroom[,]” “I object to my little sister yelling in my ears[,]” and “[d]o you object to getting up early in the morning to go to school?” (Dubikovskyy 2022). The child had, in her first interview, already stated her reasons for not wanting to return to Switzerland, including missing her mother, being unable to help with her half-sister if returned, having a substantially larger house in the United States that would allow for more pets and space, being unable to take her dog back to Switzerland, her desire to volunteer at the University of Missouri’s veterinarian clinic, her interest in large animals and passion for horse riding, and the opportunities in the United States to take riding lessons (Dubikovskyy 2021)³. At the conclusion of the second interview, the Court found that the child gave reasons for objecting that were “grounded in reality and are not superficial or childish. The reasons given are ones that an adult might consider when deciding where to live, i.e. family responsibilities, comfort, and opportunities to pursue goals that are meaningful and inspiring to them.” (Dubikovskyy 2021). Based on the child’s objection, the court denied the Petitioner’s request to return the child to Switzerland.

The Petitioner father appealed. On appeal, he did not argue that the child was immature. Instead, he focused on whether the child’s words met the standard of a particularized objection (Dubikovskyy 2022). The appellate court, in reviewing the record, stated that, after the trial judge’s explanation of the words “objection” and “preference” to the child, the judge then asked her if she “objected” to returning to Switzerland, or whether she “preferred” one location over the other, and the child’s response was “equivocal.” (Dubikovskyy 2022). “Her most complete answer was: ‘I would say it’s, like, middle, but yeah. Maybe I object—I don’t know I mean, I—I’m kind of in the middle, but I think I—I’m more on the object—object side. I don’t know. Objection. Yeah.’” (Dubikovskyy 2022).

The U.S. appellate court, since it reached the opposite conclusion to the trial court, reversed the trial court’s judgment and remanded the case, with directions to grant Mr. Dubikovskyy’s petition and promptly return the child to Switzerland. This presented another interesting component of this case. The trial judge rendered a decision quickly. The evidentiary hearing was held weeks after the Petitioner father filed in the courts (Dubikovskyy 2021). An ultimate decision to not return the child was made within one academic semester of the child’s residing in Missouri. Yet, by the time the appellate court reached its decision, automatically returning the child to Switzerland after it reversed the trial court, the child had two more years of integration into her academic and social environment in Missouri, returning to Switzerland a very different young woman. The delay by the appellate court is clearly extensive, which is not uncommon (Radu 2022⁴; Golan 2022)⁵. By reaching the opposite conclusion, after so much time, this child’s life became unsettled. Setting aside the need to address such lengthy delays, could guidelines have helped the trial judge and the appellate judge look at the child’s interview through the same uniform lens, so that the outcome from the trial court to the appellate court was the same?

The trial judge and the appellate judges, in the same region of the United States, reached very different conclusions over whether the child objected to returning to Switzerland, even though they applied the exact same correct legal standard, and heard (or read) the precise same words come from the child’s mouth. Coupled with the appointment of a psychologist for the limited scope of determining if the child was mature and had been influenced, the child’s language skills (speaking English, French, Russian, and some German), and the child’s having already spoken to the court in Switzerland when the Swiss

³ Dubikovskyy v. Goun. 2021. 2021 WL 456634 (W.D. Missouri).

⁴ Radu v. Shon. 2022. 142 S.Ct. 2861.

⁵ Golan v. Saada. 2022. 142 S.Ct. 1880.

court was examining the child's best interests in rendering the child custody order, one can see that this is a highly complex process with a variety of complicating factors. Should the trial judge have been speaking with this child? If so, should they have spoken through a foreign language interpreter? Should they have asked the psychologist to participate in the conversation, or even conduct the interview? What questions should the judge ask of the child, and how? There are a variety of questions that this and other cases raise that should give the international community a genuine desire to further examine the role of the interview of children in Hague Abduction Convention cases. For not only this child, but all children, what is most needed is consistency. Unfortunately, that will not come without guidance for those conducting the interviews.

2. Considerations for in Camera Interviews

In camera interviews are not a bad tool, although as demonstrated in the *Dubikovskyy* case, there are a myriad of concerns that become immediately evident—the ability to communicate with a child, language comprehension, cultural issues, implicit bias, and the scope of the proceeding, among other things. The *Dubikovskyy* case also demonstrates the complexity of judicial interviews in Hague Abduction Convention cases. When the interviewer controls the questions, they get certain information, which may not give a full picture. When the interviewer is also the assessor making the ultimate decision, they may have a predisposition to a certain outcome, so they may hear what they want or expect. The line of questioning in *Dubikovskyy* that focused on the definition of “objection” and “preference” was awkward, at best. Further, in a summary proceeding, there may be other resources or professionals that could assist the court in its interview process. For children who are in the middle of such a high-conflict situation, they have special considerations—trauma, new environments, and absences from one or both parents, among other things. Judicial interviews may not be the best tool for all children and families, and in all situations. They may not be the best tool in all jurisdictions and court systems. They may not be the best process for all judges, given the disparity in judicial training and resources. Yet, they provide a cost-effective tool, and, when done correctly, can help provide information for the court that, taken in context, could lead the court to reach certain conclusions necessary to the legal questions presented by the parties. They also serve as a cathartic tool for a willing child—the opportunity to share the child's views with someone who is deciding the next phase of their daily life.

The U.S. Uniform Law Commission (ULC) examined the U.S. approach to hearing children in their parents' private disputes, appointing a study committee to explore the need for uniformity and the feasibility of a uniform law that relates to a child's participation in family law proceedings. When focusing on in camera or judicial interviews of children, the ULC Study Committee highlighted four key issues: (1) when and by whom a child interview is appropriate, (2) the scope of an in camera child interview, (3) the protection of the parents' due process rights, and (4) the protection of the child from coercion or retaliation.

2.1. The U.S. Uniform Law Commission's Work

Recognizing that a child's input is an important component of cases where the child is at issue, but that the law often leaves voids in how to incorporate a child's views in private disputes between the child's parents, the U.S. Uniform Law Commission (ULC) appointed a Study Committee in November 2021 with the goal of assessing whether the ULC should undertake the drafting of a new uniform law that can be enacted throughout the United States, particularly in U.S. jurisdictions that may lack existing procedures ([Study Committee on Child Participation 2021](#)). The ULC, established in 1892, has long provided clarity and stability in critical areas of U.S. state law that need consistency (www.uniformlaws.org, accessed on 1 February 2023). In the area of family law, the ULC has focused on issues such as custody jurisdiction, child support jurisdiction, child abduction prevention, family law arbitration, and military deployed parent rights. One key example of how the ULC

has ventured into the field of international family law is when it updated its child support jurisdiction statute to give effect to the Hague Child Support Convention at the state level (UIFSA 2008). The process by which the ULC undertakes its work typically starts with a project proposal submitted by a panel of expert lawyers to a committee within the ULC, justifying the need to study the project and assessing whether it may ultimately prove useful to states in harmonizing their laws. The Study Committee, if appointed, typically meets multiple times, and, with the guidance of a Chair and Reporter, explores existing practice among U.S. states, and ends its work with a proposal to the ULC as to whether a Drafting Committee should be convened.

At the end of one year of work, the ULC Study Committee on Child Participation in Family Court Proceedings recommended that the ULC appoint a Drafting Committee. In other words, the Study Committee concluded that the existing law among U.S. states warranted a new law that states could enact that would provide more consistency and uniformity for a more cohesive national practice. During the year-long Study Committee undertaking, a variety of experts were consulted and joined in the meetings and debate, including lawyers, judges, legislators, mental health professionals, lawyers for children, and academics. The Study Committee narrowed its original project focus, however, when making its December 2022 recommendation to the ULC. Consistency also has an ancillary effect in Hague Abduction Convention matters. If U.S. state practice is consistent in the process of hearing a child's voice, this disincentivizes forum shopping by abducting a child to a particular U.S. state to have that child heard (or not).

The Study Committee concluded that it would not be useful to conduct work on the appointment and role of children's representatives, including lawyers. The ULC had already approved a model law on that topic ([Model Representation of Children 2007](#)). The Study Committee also distinguished between a child's oral testimony as a fact witness and that of providing an opinion to a judge through an interview. While some laws among U.S. jurisdictions interchange the words "testimony" and "interview," there is a distinction. Testimony invokes a formal court process, subject to civil rules of procedure and with evidentiary limitations, such as forbidding hearsay testimony (Federal Rules of Evidence, Rule 801). An interview is different. A child who is interviewed is not limited by having their words restricted by evidence rules. A child interview is frequently structured in a protective format, focused on the dual concerns of a child's needs and a parent's rights. Therefore, the Study Committee decided any work should avoid formal testimony by a child witness, as that is sufficiently covered by a court's existing rules. Additionally, the Study Committee decided that a project that involves the role of an expert evaluator who gives a formal opinion is beyond the scope of what needs exploration. Evaluators are often mental health professionals, who have rigid guidance by their own licensing bodies and formal practice guidelines for conducting certain forensic evaluations ([American Psychological Association Guidelines 2010](#)). The one area, however, that is most in need of guidance—where there is a large void in what to do, when to do it, and what it should look like—is a judicial interview of a child. Judges interview children. Yet, the variations among judges, even in the same courthouse, can be dramatic, and lead to opposing outcomes and inconsistency for children and families.

2.2. Why the United States Provides a Unique Incubator for a Global Project

The U.S. implementing legislation for the Hague Abduction Convention provides for jurisdiction to be vested in both state and federal courts in the United States (22 USC §9003(a)). There are no centralized Hague Abduction Convention courts in the United States, and almost any courthouse in the entire country is the potential venue of a parent's petition to return their child under the Hague Abduction Convention. The actual process (courthouse, length of time until a hearing, experience of the judge, availability of resources) differs by court and state. Depending on the court and state, judges may be appointed by a chief executive or elected by the public or a combination of both. Some courts may

be vested with general jurisdiction, with each judge hearing a range of cases on the same docket. It may be heard by a judge with no experience in family law.

Each U.S. state dictates its own training standards for its judges. Each judge will have their own political persuasion, ethics, religion, culture, and view of the world. Some state courts will have rules that provide for their family courts to interview children, while others will not. Each U.S. jurisdiction will vary in the role a lawyer may undertake on behalf of a child client. Each state, with its own budgetary constraints and priorities, will have different resources—different access to interpreters, court reporters, or ability to hear a case expeditiously. Others may have therapy dogs, on-site social workers, and dedicated judges to handle Hague Abduction Convention cases. The states of the United States have the same complex and dramatic variations that we find from one country to another.

To give an example that is the macrocosm of the United States, consider the wide variation among different U.S. states when it comes to interviewing children in their parents' custody cases (Bala et al. 2013). For the most part, it is entirely at the discretion of the judge—when, how, and with what weight. In Georgia, a child aged 14 has the absolute right to “select the parent with whom he or she desires to live[]”, unless the judge determines their selection is not in their best interests. However, the method by which this “selection” is shared with the judge is entirely within the judge's discretion, without any guidance (GA Code § 19-9-3 (2020)). In California, a child aged 14 that wishes to address the court regarding custody or visitation must be permitted to do so, without their parents' presence, all within the scope of the child's best interests. While the California statute does not give strict guidance on a judicial interview, it does give the judge wide discretion to seek assistance by appointing a lawyer for the child, an evaluator, investigator, or a recommending counselor. The law specifically states that the child is not required to express their views (Cal. Fam. Code 3042). Compare the U.S. state laws that provide courts discretion to interview children with the law in Florida state (family) courts, where any child who is a witness, a potential witness, or related to a family law case is prohibited from attending any part of the proceedings, including depositions, proceedings in the court, and even proceedings using technology, unless a court permits their attendance by court order (Fla. Fam. Law. R. P. 12.407).

While a handful of U.S. states have codified some amount of permission for courts to interview children in statute, it is rare to find specific guidance on what those interviews should consist of, how they should be conducted, or what guidelines a judge should use when assessing the appropriateness of the interview, the questions, and the ultimate assessment of the child's views. Some U.S. states have elaborated on this in appellate case law, but not many. It is, in almost all circumstances, again left entirely to the discretion of each individual judge to decide. The guidance, in case law, can range dramatically, just like the existing statutes. For example, the Virginia Court of Appeals has specifically stated that its preferred method of receiving evidence from a child is through an in camera interview, as opposed to in-court testimony (Haase 1995)⁶. On the opposite end of the spectrum, and geographically adjoining Virginia, is the District of Columbia, which permits in camera interviews only in rare situations when there is a “firm factual foundation that such harm may result if a child is made to testify in court.” (ND McN 2009)⁷. Two abutting jurisdictions, two opposing views, with children who might all play at the same playground, are in the same daycare, and participate in the same activities.

Most case law, if it exists, focuses on the protection of the child as it relates to the protection of the parents' due process rights, and whether the interview must be recorded, and, if recorded, be provided to the parents, and when. The case law also tends to flesh out who may be present during these interviews, ranging from court personnel, the child's attorney, interpreters, court reporters, the parents' attorneys, to professionals the judge felt necessary to assist in the interview, but rarely, if ever, the parents themselves (Helen

⁶ Haase v. Haase. 1995. 20 Va.App. 671, 680.

⁷ ND McN v. RJH Sr. 2009. 979 A.2d 1195, 1200.

SK 2013⁸). Above all, the case law makes it clear that it is difficult, if not impossible, to interpret a child's preference, with a Michigan court's noting that "even an experienced interviewer may find it difficult to determine 'whether the child is truthful, intentionally deceptive, or unwittingly led . . .'" (Molloy 2001)⁹. There was even disagreement among the U.S. states as to whether a judge must limit the discussion with the child to the child's wishes (opinions, desires), or whether the judge may engage in evidentiary fact finding during these in camera interviews (Jackson 2005)¹⁰.

In the United States, there is no national law that permits (or denies) a judge the right to interview a child, although judges may do so at their discretion. In U.S. states, the child interview statutes, if any even exist, tend to focus entirely on custody (parenting) cases, and there is no law directly on point for interviews of children in Hague Abduction Convention cases. Despite there being no law or guidance on point for U.S. Hague Abduction Convention judicial interviews, judges routinely interview children, and recent U.S. case law shows a trend towards more judicial interviews, not less. Without existing guidance, it is unclear how judges are exercising their discretion in determining whether a child should be interviewed, how to conduct the interview, and the scope of it. There is no guidance on protections for the parent or child. Because there is a lack of guidance, there are a variety of questions that arise when one reviews the case law. Do we know if a different judge would have done the same thing? Do we know if the child had been abducted to a different U.S. state, that the same process would be employed? Could a parent forum shop, by abducting their child to a specific state, or even a specific venue within a state to dictate the mechanism by which the child is heard, thereby effecting a different outcome in the Hague Abduction Convention return proceeding?

A review of the recent U.S. case law shows the upward trend in interviews and provides a sampling of the different approaches to child interviews by Hague Abduction Convention judges in the United States. For example, a Florida federal district court conducted in camera interviews of the children, but also ordered that the children be interviewed by a psychologist separately (Romanov 2022)¹¹. Although the interviews were conducted outside the presence of the parties or counsel, the court provided the parties with summaries. The court ultimately ordered the return of the children, finding that the children had not voiced a sufficiently particularized objection to their return. The U.S. Court of Appeals for the Eleventh Circuit (a federal appellate court) upheld a decision not to return based on the exception of the mature child's objection after two in camera interviews, one conducted outside of the presence of the parties or counsel, and the second conducted with the parties listening by telephone and based on questions that they had submitted to the judge in advance (Romero 2020)¹². In contrast, a New Jersey federal district court was asked to hear testimony by the children, but declined, finding that it was duplicative of other evidence, and the court was concerned about the potential influence the abducting parent had over the child (JCC 2020)¹³.

When U.S. judges interview children, there are struggles. Take, for example, a recent Hague Abduction Convention case in Texas (Esparza 2022)¹⁴. The judge granted the Respondent mother's request to have her 2 children, ages 11 and 6, interviewed by the judge in chambers so the court could rely on "live, oral testimony as well as the demeanor of the witness." (Esparza 2022). The court was tasked with determining whether these two children were mature, had a particularized objection, and were unduly influenced. Ultimately, the court determined they were not mature. Yet, in doing so, it acknowledged that the interview took place under "unusual circumstances." (Esparza 2022). Neither child

⁸ *Helen SK v. Samuel MK*. 2013. 288 P.3d 463.

⁹ *Molloy v. Molloy*. 2001. 247 Mich.App. 348, 358.

¹⁰ *Jackson v. Herron*. 2005. 2005 WL 1861965 (Ohio).

¹¹ *Romanov v. Soto*. 2022. 2022 WL 356205 (M.D. Fla.).

¹² *Romero v. Bahamonde*. 2020. 2020 WL 8459278 (M.D. Ga.).

¹³ *JCC v. LC*. 2020. 2020 WL 6375789 (NJ).

¹⁴ *Esparza v. Nares*. 2022. No. 4:22-CV-03889, (S.D. Tex.).

spoke English, so they testified through an interpreter. During their respective interviews, they “kept their eye cast downwards and spoke in a quiet manner.” (Esparza 2022). They only spoke a few words at a time, and they were unable to explain their answers, often saying “yes” or “no” or “I don’t know” or one-word answers (Esparza 2022). The judge, in reaching the conclusion that the children were not mature, compared the way these 2 specific children answered questions with a case several years earlier, where a 13-year-old exhibited a similar tone and facial expressions in a judicial interview. Comparing these children to children in a prior case in a different court with a different judge at a different time (and with different parents, culture, etc.) may ignore the unique traits of the children before this judge, their distinct communication style, their cultural communication patterns, and their history with adults or authority figures, among other things.

Still, other U.S. judges have interviewed children, but alongside other interviews, such as by the child’s Guardian Ad Litem, to help the judge confirm their own evaluation of the child’s words, views, and maturity (Carlson 2023)¹⁵. Depending on the jurisdiction, the appointed Ad Litem for the child also provides a report, to be considered along with other evidence, in addition to any judicial interview (Preston 2023)¹⁶.

In yet another example of a recent Hague Abduction Convention case, the court interviewed the children, and elicited information about their habitual residence (not just their objections to a return) (Sain 2021)¹⁷. The children had been living in China with their father, but, because of COVID, had traveled to the United Kingdom with their father. Once there, the children and father resided with the mother before traveling to Florida, where the return petition was filed by the mother, seeking their return to England. The children clearly described China—the place with friends, school, and most of their personal belongings—as their home. They described their time in England as temporary—residing with their mother and her boyfriend, going on walks, and seeing tourist sites (Sain 2021). A Florida judge likewise interviewed 2 children, ages 13 and 10, who described Florida as home and minimized their connections to Canada, where they had been living for over a year prior to their retention in Florida (Watson 2023)¹⁸. Some U.S. courts interview children to elicit their opinion, while others seek factual information. Is this the correct use of a judicial interview? How did the judge decide they would seek this information from the children? Did it come naturally during the interview, unprovoked? Did the judge design the interview specifically to secure information that could form the basis of their ultimate decision? Would the neighboring U.S. state courts, or even different courts or different judges within the same state, define the scope of this interview differently, all but encouraging a parent to forum-shop? How does the judge weigh the children’s views on where is “home”?

Given the disparity among states, it is easy to see that the United States suffers internally with the same struggles experienced among other countries. There is a range of approaches among other countries in how a child is heard, and a range in whether laws/rules even exist for judicial interviews of children in Hague Abduction Convention cases (Elrod 2011). Countries vary in resources, such as whether they have the ability to train their judges, have centralized Hague Abduction Convention courts, or have psychologists on staff. Some countries may have established processes for eliciting a child’s view in Hague Abduction Convention cases; others may have none. This inconsistency could lead to forum shopping to seek a more sympathetic court that would hear a child a particular way. This lack of uniformity could lead to delays and inefficiencies in courts. There is room for a global project to develop a soft law instrument to provide the lacking guidance.

¹⁵ Carlson v. Carlson. 2023. No. 1:22-cv-00345-MSM-PAS (D.R.I.).

¹⁶ Preston v. Preston. 2023. Civil Action No. 4:22-CV-00990-CAN (E.D.Tex.).

¹⁷ Sain v. Sain. 2021. No. 8:21-CV-01229-KKM-AAS, (M.D. Fla.).

¹⁸ Watson v. Watson. 2023. 8:22-CV-2613-WFJ-TGW (M.D. Fla.).

3. A Global Project

Given the differences in practices worldwide, any project should start with a review of the global landscape to assess the differences in what currently happens from country-to-country, including whether there is a lack of uniformity within the country. This information can be used in crafting a tool that will ultimately help countries, regardless of resources and processes.

3.1. *The Focus of a Global Project*

In 2003 and in 2018, the Hague Conference on Private International Law sought the views of judges and experts from a wide range of countries to publish newsletters focused on the child's voice in parental child abduction proceedings (*Judges Newsletter*, 2003, 2018). The articles in both newsletter editions clearly showed the difference in existing laws and practices. Even the authors themselves seemed to disagree on the purpose of involving a child in the process. For some, it was clear that their only focus was to elicit whether a child objected to returning to their habitual residence, while others felt that a child's views could provide evidence to support (or not) any element of either parent's legal case. Finally, still others felt that including the child serves no evidentiary purposes, but is merely cathartic and educational for the child, whose life is clearly being impacted (Hale 2018). Therefore, the initial discussion in any global project needs to ask the purpose for hearing children in Hague Abduction Convention cases. While a discussion focused on the Hague Child Protection Convention may lend itself better to exploring the wide range of child interview techniques and processes, with most existing law or processes focused on custody (parenting) matters, the summary nature of Hague Abduction Convention proceedings, and the unique nature of these cases, coupled with more courts venturing into interviewing children without guidelines (or with inconsistently applied guidelines), presents a different challenge and the best place for engaging in meaningful discussion. It is where there is a void of guidance, to date.

3.1.1. Why the Hague Abduction Convention and Not All Children's Cases?

Some judges have raised concerns that the very nature of a parental child abduction, with the added distress and emotion beyond a custody case, should cause any judge, even one experienced in interviewing children, to question how to interpret the child's voice in an interview (Celeyron-Bouillot 2003). An interview may serve to isolate the child within their family, traumatize the child, make the child into an advocate for a parent, or even elicit inaccurate information that could lead a court astray in making its ultimate decision. When a judge interviews a child, they need to interpret the child's words and unspoken body language, and then look at this communication through the complex lens of a parental child abduction. Added to that complexity is the fact that an interviewer should act at arm's length, a contrast to the judge who will need to make a legal assessment and decide whether to ultimately return the child (Diamond 2003).

Parental child abduction cases are simply different—the children tend to have different and more complicated external influences that factor into their voice. Hague Abduction Convention cases are different in that they are not custody cases and should be focused summary proceedings. Given that the challenges are different, if a global project explores all children's cases, it may miss providing the most appropriate guidance. The narrower focus of a project on Hague Abduction Convention return cases will provide the best tailored guidelines for judges.

3.1.2. Why in Camera Interviews, and Not All Ways to Hear Children?

Much like the narrower focus of the ULC project, a global project should have a narrow focus on in camera interviews of children, instead of focusing on all the potential avenues by which a child should or could be heard. It is inevitable that interviewing children is not the only option to hear them. It may not even be the best option in some, many, or all cases. Yet, it is the practice with the least clarity in the law. It is also very practice-focused,

and not legally structured. It is a discretionary practice in many jurisdictions, without any guidance as to how judges should exercise that discretion, and when.

There are clearly other alternatives—designating or appointing a lawyer or representative on behalf of the child, seeking an expert to provide a reasoned and sophisticated opinion after speaking with the child, or having the child go through the formal process of testifying as a witness in the court proceeding. Each has its own benefits and drawbacks. A judge may determine one of these options is better for a particular child, or that the child should be the beneficiary of several different processes simultaneously. A global project, while laser focused on judicial interviews, could also explore what other options exist, and what criteria a judge should use to exercise their discretion in determining another option is better for a particular child than a judicial interview.

While it is necessary to include a broad range of professionals and expertise in any global project, the scope of a global project should remain focused on interviews of children, and not be about the credentialing and training and process of these other professionals in ascertaining a child's views. Each process could serve as its own independent project. A narrower scope should lead to a manageable project; a focused discussion; and more practical, tailored guidance.

3.2. Next Steps for a Global Project

Guidelines, or at the least, a reflection of practices, both when they have worked and when they have not, may prove extremely useful to judges in deciding whether to interview a child in chambers, and how to structure that process if they choose to use it.

3.2.1. The Role of the Hague Conference

The Hague Conference has the appropriate institutional knowledge of past discussions, resources, and research. It has the gravitas to gather the most important views on the subject. It is a neutral body to oversee the discussion, with no ultimate stake in the outcome, but for the better implementation of its own Convention. It has a direct pipeline to the International Hague Network of Judges, perhaps the most important participant in any discussions on judicial interviews of children.

Professors Marilyn Freeman and Nicola Taylor, after conducting research about the role of the child's voice in Hague Abduction Convention cases, proposed the creation of an International Working Group, which was to start its work in July 2019 (but was delayed because of COVID) and would be independent of the Hague Conference on Private International Law (Taylor and Freeman 2018). However, it would be beneficial to convene such an experts' group of judges, practitioners, and mental health professionals to discuss this topic under the auspices of the Hague Conference and have its work product take the form of a soft law instrument.

3.2.2. Questionnaires

The child interview is but one data point in a broader picture of a particular family. The examination of the child and their needs, experiences, skills, and culture must start early in a Hague Abduction Convention case to determine the most appropriate process to hear the child's voice for this particular child and family. The examination of the family itself can help tailor the best process to include the child's words in the most accurate and protective way, and permit the judge to tailor the process in the best manner for everyone.

As with most projects undertaken by the Hague Conference, a questionnaire would serve to clarify existing standards and provide a starting point for any discussions on this topic. A questionnaire could be sent to Hague Abduction Convention Contracting States, and could include questions, such as:

- Under what circumstances do your courts use in camera interviews in Hague Abduction Convention cases? Under what circumstances would they not use in camera interviews?

- At what point in time in the process/proceeding would an in camera interview be conducted? Would it ever be conducted before evidence is taken by the fact-finder/judge? Would it ever be conducted after evidence is taken by the fact-finder/judge?
- If courts do not interview children in camera in Hague Abduction Convention cases, how do the courts hear from children in these cases?
- If there is no process or guidance on in camera interviews of children in Hague Abduction Convention cases in your jurisdiction, is there such guidance in other parenting cases that might be translatable to Hague Abduction Convention cases?
- Who conducts the in camera interview? Is it always the judge? An alternative to the judge, and when? The judge and others?
- Who is included in the in camera interview? (e.g., lawyers, court personnel, other professionals, parents)
- What is the training of the interviewer?
- What is the scope of the interview? Is it to collect evidence on any issue before the court? Is it only for the child to express an opinion? Is it only to advise the child of the proceedings and provide them an opportunity to be heard?
- What issues are part of the interview? (e.g., Article 13 mature child exception, or other parts of the Convention case)
- Are the interviews recorded? Private?
- If the interview is recorded, who has access and when?
- What measures are put in place for child protection?
- Where is the interview conducted?
- What is the average length of an interview?
- Is there usually one interview or more than one interview of the same child?
- If there is more than one child, are the children interviewed separately, together, or a mix?
- Will the child be able to have access to the Petitioner (Left Behind) parent in advance of any interview? With the Respondent (Taking) parent?
- Does the court structure how the child is transported to the interview?
- Are interviews used in other complimentary processes, such as mediation?
- Does your jurisdiction have any existing laws that touch upon child interviews in Hague Abduction Convention cases? (include a copy or citation)
- Under what circumstances is an in camera interview accompanied by another process, such as a child's lawyer, expert evaluation, or in-court testimony?
- Who assesses the child's maturity and how? Are there factors in your law? (include a copy or citation)
- Who prepares the questions to be asked?
- Approximately how much time runs from the filing of the return petition to the child's interview?
- Approximately how much extra time is added to the proceedings by interviewing the child?
- Have there been any recent court cases in your jurisdiction that provide examples of an in camera interview in a Hague Abduction Convention case? Does your jurisdiction have any important (precedent-setting) court cases on the topic?
- Does your court provide a foreign language interpreter for the child? Who determines if a child needs an interpreter? Is there a cost, and who typically bears that cost?
- What role does the Central Authority take in a child interview?

3.2.3. "Study Committee"—i.e., Experts Group

When convening an experts group about in camera interviews of children, there are a wide range of professionals that need to be included. They include psychologists, judges, court administrators, cultural experts, mediators, lawyers, and child representatives, among others. Any discussion must include judges from a wide range of jurisdictions, including those who are familiar with the Hague Abduction Convention and may sit on

the International Hague Network of Judges. It should account for differences in judges in civil and common law jurisdictions (and, in federated states, such as the United States, federal and state court judges). These judges can lead an excellent discussion about what their courts can do, and how well they can accomplish the goal of hearing a child across a wide range of processes: interviews, testimony, or experts.

3.2.4. Soft Law Instrument

A soft law instrument is a far superior vehicle through which to share useful information that can be implemented in states. Each country has different resources—different funding for their courts, different training schemes for their judges, and even different courts that will ultimately hear the cases. The discussion should focus on practice, which is more often implemented through guidelines or practice tools, rather than legal instruments. A soft law instrument may include topics ranging among training suggestions, whom to include in an in camera interview, and who should conduct the interview. The result needs to be flexible, and implementable in part or in whole in a wide range of jurisdictions with different resources and structures. The goal should not be to force a particular method of hearing a child, but to give a judge, on the ground, options so that children can be heard more easily, in a manner best for the child and family, while preserving the integrity of the process and adhering to the goals of the treaty for a prompt return. Guidelines may invoke training or judicial education suggestions. A new Convention that mandates such training, for example, will unlikely prove popular (Serguides 2003). In a country as vast as the United States, without centralized courts, it may be beneficial that the International Hague Network of Judges, and other judicial groups, take a role in putting forth views on what training can even exist in their jurisdictions, given a need to focus resources for judicial training.

While an Experts Group has the primary responsibility of directing any global project, it can decide to host public fora, particularly with the ease of virtual platforms to do so. A public forum at strategic points in the Experts Group's work could help inform it on practice, concerns, and focus. It may prove useful in allowing a farther reach to regions and jurisdictions that may not be directly engaged in the Experts Group. Different public meetings could focus on different professional groups, for example, one forum for judges and a separate forum for mental health professionals.

4. Summary Conclusions

A soft law instrument that focuses on practical and implementable processes and helps educate courts globally on options for hearing children will lead to more consistency among courts' practice in Hague Abduction Convention cases, which should lead to more routine hearing of children in child-focused ways. It will help with the implementation of the Convention and contribute to the goal of ensuring that children are heard uniformly and that cases are resolved expeditiously. The United States' existing work in this field is instructive on how best to narrow the focus of a global project in that the United States is a unique incubator of the global legal community, with different courts, resources, education, training, and application of laws and process (at times, diametrically opposed).

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References

- American Psychological Association Guidelines for Child Custody Evaluations in Family Law Proceedings. 2010. Available online: <https://www.apa.org/practice/guidelines/child-custody> (accessed on 12 May 2023).
- Bala, Nicholas, Rachel Birnbaum, Francine Cyr, and Denise Mccolley. 2013. Children's Voices in Family Court: Guidelines for Judges Meeting Children. *Family Law Quarterly* 47: 379–408.
- Celeyron-Bouillot, Marie-Caroline. 2003. The voice of the child in Hague Proceedings: A French perspective. *The Judges' Newsletter* 6: 18–20.
- Diamond, Robyn Moglove. 2003. Ascertaining a Child's Voice in Inter-Jurisdictional Cases of Parental Abduction. *The Judges' Newsletter* 6: 23–26.
- Elrod, Linda D. 2011. "Please Let Me Stay": Hearing the Voice of the Child in Hague Abduction Cases. *Oklahoma Law Review* 63: 663–91.
- Hale, Baroness of Richmond. 2018. Child Abduction from the Child's Point of View. *The Judges' Newsletter on International Child Protection, Special Focus: The Child's Voice—15 Years Later* 22: 40–45.
- Model Representation of Children in Abuse, Neglect, and Custody Proceedings Act. 2007. Available online: <https://www.uniformlaws.org/committees/community-home?CommunityKey=1de8829e-e723-4d1b-97b9-94622cf68269> (accessed on 6 February 2023).
- Serghides, George A. 2003. The voice of the child in Hague Proceedings: A Cypriot perspective. *The Judges' Newsletter* 6: 39–44.
- Study Committee on Child Participation in Family Court Proceedings. 2021. Available online: <https://www.uniformlaws.org/committees/community-home?CommunityKey=31c83600-b278-427c-a715-ff06e54b9a41> (accessed on 12 May 2023).
- Taylor, Nicola, and Marilyn Freeman. 2018. Outcomes for Objecting Children under the 1980 Convention in HCCH. *The Judges' Newsletter on International Child Protection, Special Focus: The Child's Voice—15 Years Later* 22: 8–12.
- Uniform Interstate Family Support Act (UIFSA). 2008. Available online: <https://www.uniformlaws.org/committees/community-home?CommunityKey=71d40358-8ec0-49ed-a516-93fc025801fb> (accessed on 12 May 2023).

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Article

The Interplay between the 1980 Hague Convention on the Civil Aspects of International Child Abduction and Domestic Violence

Katarina Trimmings, Onyója Momoh and Konstantina Kalaitsoglou *

School of Law, University of Aberdeen, Aberdeen AB24 3FX, UK; k.trimmings@abdn.ac.uk (K.T.); onyoja.momoh2@abdn.ac.uk (O.M.)

* Correspondence: konstantina.kalaitoglou@pinsentmasons.com

Abstract: When a mother commits an international child abduction, even if she is fleeing domestic violence perpetrated by the left-behind father, she is bound to face complicated return proceedings under the 1980 Hague Child Abduction Convention. Such mothers are particularly vulnerable; apart from the costly, cross-border proceedings they face, if the court issues a return order, they risk returning to the abusive setting they fled from. This article explores avenues for safeguarding the protection of abducting mothers in return proceedings. The authors provide a range of potential avenues for improving the standing of the abducting mother fleeing domestic violence, including judicial and legislative interventions. The article delves deeper by considering the interplay between international child abduction law and international refugee law in cases involving domestic violence allegations. Particular emphasis is given to Article 20 and the growing instances of mothers defending return orders on asylum grounds pursuant to Article 20 and the flowing human rights implications. The authors point out a niche area for further research: the interplay between domestic violence and asylum claims.

Keywords: 1980 Hague Convention; domestic violence; international refugee law; 1951 Refugee Convention; best interests of the child; Article 20

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1. Introduction

This article addresses the problem of domestic violence in the context of the 1980 Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction ('the 1980 (Hague) Convention'). It is concerned specifically with the position of mothers who have abducted their child(-ren) across international borders and are involved in return proceedings under the 1980 Hague Child Abduction Convention in circumstances where the child abduction was motivated by domestic violence by the left-behind father. In doing so, the article also touches on the interplay between international child abduction law and international refugee law in cases involving allegations of domestic violence (e.g., [Hegar and Greif 1994](#); [Norris 2010](#); [Hayman 2018](#); [Al-Shargabi 2022](#)). The role of the 'best interests of the child' principle in child abductions committed against the background of domestic violence is explored before a range of possible judicial and legislative interventions to secure the protection of abducting mothers in return proceedings under the 1980 Hague Convention is examined.

2. The Problem of Domestic Violence in the Context of the 1980 Convention

The latest statistical analysis carried out by the Hague Conference on the application of the 1980 Convention showed that as of 2015, 73% of the taking persons were mothers, noting an increase of 4% compared to the earliest set of data of 1999 (See [Permanent Bureau of the Hague Conference on Private International Law \(2017b\)](#), pp. 3 and 7). Further, the number of abducting fathers, which had been reported to be 30% in 1999, had reduced to

only 24% in 2015.¹ With hindsight, the 1980 Convention effectively established a global scheme for the return of abducted children under which fathers regularly request return and find themselves successful in approximately half of cases ([Permanent Bureau of the Hague Conference on Private International Law 2017b](#), p. 11). Today, abducting mothers regularly report the existence of domestic violence directed against them, the child or both by the left-behind parent in return proceedings under the 1980 Convention (e.g., [Weiner 2000](#); [Brown Williams 2011](#); [Hale 2017](#); [Trimmings and Momoh 2021](#); [Masterton et al. 2022](#)). Although there are no comprehensive statistics, it is suspected that domestic violence is a present issue in as many as 70% of the total parental child abduction cases ([Trimmings and Momoh 2021](#), p. 5; [Pérez-Vera 1982](#), p. 34). Abducting mothers who flee domestic violence and face return proceedings find themselves in a particularly vulnerable position; they are faced with complex and costly cross-border proceedings, and if they do not wish to return, as is the case most times, they must prove to the court that the domestic violence they experienced at the hands of the left-behind father presented a ‘grave risk of harm’ for their child or otherwise placed him or her in an ‘intolerable situation.’² If the court mandates the return of the child, the now returning mother is likely to return to the unsafe situation she fled from, become financially dependent on the left-behind father or in more extreme cases, face homelessness ([Masterton et al. 2022](#), pp. 376–81).

In some cases, the abducting mother escaping domestic violence may apply for a refugee status under the 1951 Convention Relating to the Status of Refugees (‘the 1951 Refugee Convention’) ([Zimmermann 2011](#))³ in conjunction with its 1967 Optional Protocol Relating to the Status of Refugees (‘the 1967 Optional Protocol’). At the European Union level, additional legal instruments may come into play.⁴ Additionally, soft law instruments such as the principles and guidelines on the human rights protection of migrants in vulnerable situations, which focus on the human rights situation of migrants who may not qualify as refugees but who are nevertheless in vulnerable situations and therefore in need of protection by international human rights law, can also be invoked ([Office of the High Commissioner for Human Rights 2018b](#)). Return proceedings under the 1980 Hague Convention may be initiated by the left-behind father either during the asylum proceedings, leading to complex interaction between international family law and refugee law, or after the conclusion of the asylum proceedings, potentially raising the question of whether the principle of non-refoulement⁵ can be undermined by a return order granted in favour of the left-behind father under the 1980 Hague Convention.

3. The Role of the Best Interests of the Child

One of the obvious challenges in the operation of the Hague Convention is ensuring that at the heart of the decision-making process the interests of children prevail, especially in cases involving allegations of domestic violence. Where intra-EU cases are concerned,

¹ Other abducting relatives such as grandparents or other increased from 1% in 1999 to 3% in 2015. See [Permanent Bureau of the Hague Conference on Private International Law \(2017b\)](#).

² In the sense of Article 13(1)(b).

³ UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, [137].

⁴ E.g., Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast); Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection; and Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted (recast). For a comprehensive analysis of the EU asylum law see [Tsourdi and De Bruycker \(2022\)](#).

⁵ The principle of non-refoulement guarantees that ‘no one should be returned to a country where they would face torture, cruel, inhuman or degrading treatment or punishment and other irreparable harm’. ([Office of the High Commissioner for Human Rights 2018a](#), p. 1).

it was observed that the Brussels IIa Regulation⁶ carried particular emphasis on the best interests of children (Kruger and Samyn 2016, p. 155).⁷ That being said, Kruger and Samyn went further and suggested that the Regulation would be clearer, stronger and more credible if it referred explicitly to the United Nations Convention on the Rights of the Child (UNCRC).⁸ The Brussels IIa Recast Regulation⁹ now in force appears to go further, emphasising in its preamble that matters of parental responsibility shall be ‘shaped in the light of the best interests of the child’. This is significant, because over a decade after the adoption of the 1980 Hague Convention, Dyer made a comparison between the number of ratifications of the United Nations Convention on the Rights of the Child and the Hague Convention (Dyer 1993, p. 273).¹⁰ At that stage, there were 30 Contracting States to the Hague Convention which was ‘less than one fourth’ of the UNCRC ratifications.¹¹ Dyer suggested that ‘an obvious point’ was that the obligations under the Hague Convention ‘are more precise and constraining than the obligations described in an “umbrella” Convention like the UNCRC’ (Dyer 1993, p. 273). The argument follows that the provisions of the Hague Convention place a heavier burden on Contracting States, being both stricter and more specific in its objectives. Therefore, the ‘execution of this obligation requires discipline on the part of the courts’ and an ‘acceptance of new points of view by both judges and populations’ (Dyer 1993, p. 274). In contrast, the UNCRC upholds principles on the rights of children that one would expect to be universally acknowledged, and therefore, there is an ease for States to commit themselves to meeting those obligations. We are now at a stage where these treaties cannot be seen in isolation, a preference for one over the other is un compelling.

In cases under the 1980 Hague Convention, it is also important to distinguish between the concepts of the best interests of the child generally and the interests of a child involved in return proceedings.¹² In terms of the terminology, the preamble to the Hague Convention refers to the ‘interests of children, and the Convention’s core philosophy¹³ is that it is not in the interests of children to be wrongfully removed or retained across international borders; it is generally thus not in the ‘best interests’ of children to be abducted.¹⁴ The Explanatory Report reiterates that ‘the right not to be removed or retained’ demonstrates one of the

⁶ Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [2003] OJ L338/1.

⁷ See also *Re E (Children)* [2011] UKSC 27 reiterated that the current Hague Convention procedure complies with the UNCRC and ECHR, stating that ‘both the Hague Convention and the Brussels II revised Regulation have been devised with the best interests of children generally, and of the individual children involved in such proceedings, as a primary consideration’.

⁸ See footnote 6.

⁹ Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (hereafter “the Recast Regulation”).

¹⁰ As of 1 September 2023, the 1980 Hague Convention has 103 contracting parties. See Status Table <<https://www.hcch.net/en/instruments/conventions/status-table/?cid=24>> accessed 1 September 2023.

¹¹ United Nations Human Rights, Status of Ratification: Interactive Dashboard <<http://indicators.ohchr.org>> accessed 16 June 2023. See Convention on the Rights of the Child: as at 9 March 1993, the CRC received 131 ratifications; as of 16 June 2023, the number of ratifications had reached 196.

¹² The Hague Convention, preamble which provides that signatory States are ‘firmly convinced that the interests of children are of paramount importance in matters relating to their custody’. Compare with the provisions under the UNCRC, Article 3.1 stating that ‘the best interests of the child shall be a primary consideration’. See also Pérez Manrique (2012, p. 34) and Freeman and Hutchinson (2007), stating that the Convention is premised on the best interests of children generally which requires their future to be determined in their country of habitual residence and not on the best interests of the individual child.

¹³ The Hague Convention, Article 1. See (Fiorini 2016, pp. 403–7), the exceptions to the Hague Convention, some of which are meant to protect the best interests of the individual child.

¹⁴ E.g., case law such as *Re R (Minors) (Wardship: Jurisdiction)* (1981) 2 FLR 416 [425] (Ormrod LJ) and *Zaffino v Zaffino* [2005] EWCA Civ. 1012, [2006] 1 FLR 410, citing *Re S (A Minor) (Abduction: Custody Rights)* [1993] Fam 242, [251] (Balcombe LJ). See also *Lozano v. Alvarez* 697 F.3d 41 (2d Cir. 2012), [53] where it was stated that the Hague Convention is shaped in the light of the best interests of the child: ‘simply put, the Convention is not intended to promote the return of a child to his or her country of habitual residency irrespective of that child’s best interests; the Convention embodies the judgment that in most instances, a child’s welfare is best served by a prompt return to that country’.

objective examples of the interests of a child and that the two objectives under Article 1 of the Hague Convention embody the best interest of the child (Pérez-Vera 1982, paras. 24–25; Chamberland 2012). The Explanatory Report further states that the ‘true interests’ of a child are ‘inspired’ by a desire to protect children against the harmful effects of international child abduction (Pérez-Vera 1982, para. 24). However, in cases involving domestic and family violence, a departure from this principle may not only be justified but necessary.¹⁵ Article 13(1)(b) provides an exception to the return of a child where there is a grave risk of physical harm, psychological harm or an otherwise intolerable situation. Accordingly, in return proceedings involving allegations of domestic violence under Article 13(1)(b), it has often been argued that to return a child in such circumstances would be contrary to their best interests (Chamberland 2012, pp. 27–30).¹⁶ In recent times, the publication of the HCCCH Guide to Good Practice on Article 13(1) (b) has sought to address head on the issues around the proper and consistent application of the grave risk of harm exception, though it would be premature to assess its utility and impact. Having said that, it has not abated concerns that the grave risk of harm exception is not doing enough to protect victims fleeing from domestic violence and their children. Some may argue that the concerns raised by Vesneski, Lindhorst and Edleson in their research remains true today (Pretelli 2021). Vesneski, Lindhorst and Edleson have argued that court decisions under Article 13(1)(b) were frequently ‘against the interests of even battered women and their children’¹⁷ and that ‘abused women arguing grave risk face a more difficult path’ (Vesneski et al. 2011, p. 17).¹⁸ A stronger view advanced by Weiner is that the Hague Convention has become a ‘substantial barrier to some women’s ability to escape domestic violence’ (Weiner 2003, p. 799). Weiner takes the view that it is rarely in a child’s best interest to return in the face of serious allegations of domestic violence, arguing that the Hague Convention ‘offers too little hope for the domestic violence victim who flees with her children’ (Weiner 2003, p. 703).¹⁹ Norris also asserts that in cases involving the grave risk of harm exception the courts should ‘apply the best interests of the child as its guiding criterion, rather than the need for prompt return’ and to ensure that a decision to return a child is not harmful (Norris 2010, pp. 185–86 and 194–95). In recent times, Pretelli weighs in on the concern, arguing that current legal framework ‘places women in an impossible situation, in a double bind’ (Pretelli 2021, p. 376). One of Pretelli’s concluding remarks reflects on the pursuit of achieving universal principles such as the best interests of children including in child abduction cases (Pretelli 2021, p. 393). On the other hand, an opposite view held by Browne is that the best interest enquiry should be avoided as it ‘threatens to invite the type of gender stereotype prevalent in custody disputes’ (Browne 2011, p. 1222). Nevertheless, any consideration afforded to the best interests of the child principle in Hague Convention proceedings is by no means intended to invoke a detailed examination of welfare issues or

¹⁵ See Pérez-Vera (1982, p. 24) ‘(...) children must no longer be regarded as parents’ property but must be recognized as individuals with their own right and needs’. Black LJ (as she then was) in *O (Children)* [2011] EWCA Civ 12, [8], citing the UK House of Lords case of *Re M (Abduction: Zimbabwe)* [2007] UKHL 55, [24] which makes clear that the individual circumstances of the particular child are what matters.

¹⁶ Cf (Browne 2011, p. 1202; U.S. Department of State (1986, para. 10,510) that ‘the 13(b) exception “was not intended to be used by defendants as a vehicle to litigate (or relitigate) the child’s best interests”’. Referring also to the Ninth Circuit in *Cuellar v. Joyce*, 596 F.3d 505, 509 (9th Cir. 2010) (quoting *Gaudin v. Remis*, 415 F.3d 1028, 1035 (9th Cir. 2005)) that ‘[t]he exception ‘is not license for a court in the abducted-to country to speculate on where the child would be happiest’.

¹⁷ The qualitative study examined women who were domestic violence victims in Hague Convention cases in the US. The study found that ‘U.S. courts are reluctant to employ Convention provisions that could prevent children from being returned to their mother’s barterer’: p 1 and that the US’ courts interpretation of Article 13(1) (b) ‘frequently leads to court decisions against the interests of even severely battered women and their children.’ In the US jurisdiction, see also Norris (2010) and Sthoeger (2011, p. 530).

¹⁸ In comparing the differing standards, that ‘clear and convincing’ is a significantly greater burden than preponderance.

¹⁹ Weiner goes further to suggest a reform that would stay the remedy of return and enable the taking parent to participate from abroad whilst custody proceedings are initiated in the child’s country of habitual residence [698]–[703]. It is stated that this reform would promote a child’s best interests under the Hague Convention by providing safety to the taking parent and avoiding a return to their habitual residence if the ultimate outcome in that country would permit the child to be taken abroad [703].

a merits exercise of the custody dispute (Beaumont and Walker 2013; Silberman 2011; Pérez Manrique 2012).²⁰

4. Safeguarding the Protection of Abducting Mothers in Return Proceedings

When determining whether an exception to return under the 1980 Convention applies, ‘it is the situation of the child which is the prime focus of the inquiry’;²¹ the Convention has no explicit regard to the safety of the abducting mother upon the return. Although it is not mandatory for the abducting mother to return together with the child, the mother (in particular if she is the primary carer,) will typically accompany the child back to the State of habitual residence, even if it means that she has to compromise her own safety. The lack of consideration for the abducting mother’s safety in return proceedings involving allegations of domestic abuse is concerning.²² It highlights the pitfalls of applying the 1980 Convention in isolation from international human rights law—an approach which is contrary to the wider trend towards a more pronounced confluence of private international law and public international law (e.g., Mills 2009). In this context, it has been rightly remarked that as both the public and the private international systems coordinate human behaviour, the values that inform both systems should be the same (Maier 1982). In addressing the problem, this section analyses relevant case-law, whilst making suggestions for judicial interpretations and legislative interventions that have the potential to assist in securing the protection of abducting mothers in return proceedings in child abduction cases committed against the background of domestic violence (See also Trimmings et al. 2023).

4.1. Case-Law Analysis and Suggestions for Appropriate Judicial Interpretations

4.1.1. The ‘Grave Risk of Harm’ Exception (Article 13(1)(b)) (See (Permanent Bureau of the Hague Conference on Private International Law 2020, paras 57–59))

Article 13(1)(b) contains the ‘grave risk of harm’ defence, which, at its core, will exempt the abducting parent from returning the child to the State of his/her habitual residence if there is a grave risk that on return the child would be exposed to a ‘*physical or psychological harm*’ or be otherwise placed in ‘*an intolerable situation.*’ It is typical for abducting mothers who have fled domestic violence to seek to rely on Article 13(1)(b) to resist a return application by the left-behind father. In 2015, the ‘grave risk of harm’ defense was the ‘most frequently relied upon ground for refusal’ and was amongst the reasons for judicial refusal in 25% of applications (Permanent Bureau of the Hague Conference on Private International Law 2017b, p. 16). Despite being frequently invoked, Article 13(1)(b) contains integral key terms such as ‘grave risk’ and ‘intolerable situation’ which are undefined by the Convention, thus relying on domestic courts for interpretation (Brown

²⁰ See debate relating to the *Neulinger & Shuruk v. Switzerland* (Application no. 41615/07) Grand Chamber [2010]: Re E (Children) [2011] UKSC 27, [26]; see also *Re M & Anor* [2007] UKHL 55. Browne has argued that to blur the best interests standards as between custody cases and the Hague Convention would undermine the rights of the left-behind parent; see Browne (2011, p. 1196). A distinction has been drawn in case law as to considerations of the best interests of the child in Hague Convention proceedings and a wider comprehensive welfare assessment: e.g., *Whallon v. Lynn* 230 F.3d 450 (1st Cir. 2000). Alternatively, the best interests of the child principle has been considered as part of a discretionary/balancing exercise as distinguished, e.g., by Thorpe LJ in *Cannon v. Cannon* [2004] EWCA Civ 1330 [2005] 1 FLR 169 [38]: ‘for the exercise of a discretion under the Hague Convention requires the court to have due regard to the overriding objectives of the Convention whilst acknowledging the importance of the child’s welfare (particularly in a case where the court has found settlement), whereas the consideration of the welfare of the child is paramount if the discretion is exercised in the context of our domestic law’.

²¹ See Permanent Bureau of the Hague Conference on Private International Law (2017a, paras. 52 and 132) and Domestic and Family Violence and the Article 13 Exception (Permanent Bureau of the Hague Conference on Private International Law 2011b, para. 140).

²² It is no exaggeration to say that the disregard for the safety of the returning parent has caused serious trauma to countless mothers whose children have been ordered to return to their State of habitual residence in circumstances involving a pattern of violent behaviour by the left-behind father against the abducting mother. Information based on correspondence received by the authors from abducting mothers from a variety of jurisdictions. See also resources available at Filia, ‘Hague Mothers: A Filia Legacy Project’, available at: <<https://www.hague-mothers.org.uk/>> accessed 21 July 2023.

Williams 2011, p. 62).²³ Through years of application and with knowledge of the drafters' intention that Article 13(1)(b) should have restricted application, courts have discerned the a number of principles pertaining to the interpretation and application of this defence (Pérez-Vera 1982, paras. 7 and 34; Trimmings and Momoh 2021).

The Correlation between Domestic Violence Directed towards the Mother and a Grave Risk of Harm to the Child (See (Permanent Bureau of the Hague Conference on Private International Law 2020, paras 57–59))

Most courts have adopted a 'literal interpretation' and only in the past decade did the UK Supreme Court draw a connection between domestic violence directed towards the mother and a grave risk of harm to the child (Hale 2017, p. 7; Quillen 2014, p. 632; Brown Williams 2011, p. 62).²⁴ Internationally, not all courts acknowledge that the former is directly related to the latter (Zashin 2021, p. 585).²⁵ Accordingly, the existence of domestic violence alone is insufficient to satisfy the grave risk of harm defence (Trimmings and Momoh 2021, p. 6). Instead, 'the key question is whether the effect of domestic violence on the child upon his/her return' will have such an impact as to place him/her in grave risk of harm (Trimmings and Momoh 2021, p. 6). The Article's limited reach is particularly manifested in the word 'intolerable' which has been interpreted to denote 'a situation which this particular child in these particular circumstances should not be expected to tolerate',²⁶ and which is beyond the 'tumble, discomfort, and distress' that is acceptable for a child to tolerate.²⁷ An 'intolerable situation' could be one where the child is harmed by exposure to domestic violence in the form of physical or psychological abuse towards a parent (Permanent Bureau of the Hague Conference on Private International Law 2020, para. 58).²⁸ The Hague Conference Permanent Bureau of the Hague Conference on Private International Law 2012 on Article 13(1)(b) further includes the potential risk of harm upon the return of the child and circumstances where the grave risk of harm manifests itself in the form of 'significantly impairing the ability of the taking parent to care for the child' (Trimmings and Momoh 2021, p. 5; See also Permanent Bureau of the Hague Conference on Private International Law (2020, para. 57)).

Additionally, the UK Supreme Court has held that it is irrelevant whether the risk is the result of objective reality or of the abducting mother's subjective perception of reality.²⁹ Accordingly, anxieties of an abducting mother about a return with the child which are not based on objective risk to her but are nevertheless of such intensity as to be likely, if returned, to affect her mental health so as to destabilise her parenting of the child to a point where the child's situation would become intolerable, can found the grave risk of harm defence under Article 13(1)(b).³⁰ It is not important whether the mother's anxieties are reasonable or unreasonable.³¹ This means that if the court concludes that there is a grave risk of harm to the child, the source of the risk is irrelevant. Therefore, the grave risk of harm defence may successfully be established, for example, "where a mother's subjective

²³ The undefined terms have led to inconsistent interpretations.

²⁴ Prior to this development, domestic violence directed to the mother was a bifurcated issue to domestic violence directed to the child, and only the latter was relevant to 'grave risk of harm' in the context of Article 13(1)(b). In the case of *Yemshaw v. London Borough of Hounslow* [2011] UKSC 3 [2011] 1 WLR 430, a connection between the two was drawn.

²⁵ "Commentators have found that only in "a few Hague Convention cases have judges accepted that children's exposure to their mother's [sic] victimization at the hands of an abusive partner represents a grave risk of harm to the children". See Quillen (2014, p. 632).

²⁶ *Re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51 ('Re D') [52]; *Re S (A Child) (Abduction: Rights of Custody)* [2012] UKSC 10, [27].

²⁷ *Re E*, note 8, [34].

²⁸ *Ibid*, [34] and [52]; This interpretation is in line with the *travaux préparatoires* of the Convention. See the Domestic and Family Violence and the Article 13 "Grave Risk" Exception in the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: A Reflection Paper (Permanent Bureau of the Hague Conference on Private International Law 2011b, p. 35).

²⁹ *Re E*, note 8, [34]; and *Re S*, note 27, [31].

³⁰ See footnote 29.

³¹ *Re S*, note 30, [34].

perception of events leads to a mental illness which could have intolerable consequences for the child.³² The court shall, however, examine an assertion of intense anxieties not based upon objective risk very critically, and shall consider whether it can be dispelled through protective measures.³³

Assessment of Allegations of Domestic Violence in Return Proceedings (See [\(Permanent Bureau of the Hague Conference on Private International Law 2020, paras 43–48 and 50–54\)](#))

When assessing the granting of a (non)-return order under Article 13(1)(b), courts in the UK³⁴ and internationally³⁵ have mainly followed the so-called ‘protective measures approach’ or variants of it. The said approach is a two-step assessment and at the first instance, involves the court considering the following question: ‘If [the domestic violence allegations] are true, would there be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation?’³⁶ If the court answers in the affirmative, the court ‘will consider whether protective measures to mitigate the harm are available in the requesting State’ ([Trimmings and Momoh 2021, p. 6](#)). The court will grant a non-return order ‘only if the protective measures cannot ameliorate the risk’; in all other circumstances, the court will entrust the resolution of the merits of the issues to the courts of the requesting State, assuming that they are best-suited to deal with the substantive questions ([Trimmings and Momoh 2021, p. 6](#)).

The ‘protective measures approach’ suffers from pitfalls that typically jeopardise domestic violence victims. By design, the approach is paradoxical in that it ‘relies on the availability of adequate and effective measures as a substitute for determining facts’ ([Trimmings and Momoh 2021, p. 7](#)). An assessment of ‘grave risk’ and available protective measures cannot reasonably come before exploring whether domestic violence exists and if it does, what risks it encompasses ([Trimmings and Momoh 2021, p. 9](#)).

An alternative approach, which is considered more appropriate, has been termed as the ‘assessment of allegations approach’ ([Trimmings and Momoh 2021, p. 7](#)).³⁷ Under this approach, the court will first seek to determine, to the extent possible within the confines of the summary nature of the return proceedings, the merits of the disputed allegations of domestic violence. Once the assessment of allegations has been carried out, the court will determine whether a grave risk of harm exists. Only afterwards, as part of the exercise of discretion,³⁸ the court will assess availability of protective measures. This approach is based on the premise that it is necessary to assess the disputed allegations in order to evaluate the risk. Admittedly, this approach may raise concerns over the length of the proceedings; however, speed should not take priority over the proper assessment of risk and consideration of the safety of the child and the abducting mother. Indeed, the emphasis

³² See footnote 27.

³³ *Re S*, note 30, [27].

³⁴ *Re E*, note 8. The ‘protective measures approach’ has been referred to with approval and/or explicitly followed in a number of cases that involved allegations of domestic violence, both in England and Wales (High Court and Court of Appeal) and Scotland (Court of Session). These cases included *In the Matter of A (A Child) (Hague Abduction; Art 13(b): Protective Measures)* [2019] EWHC 649 (Fam), *H v K (Abduction: Undertakings)* [2017] EWHC 1141 (Fam), *TAAS v FMS* [2017] EWHC 3797 (Fam), *B v P* [2017] EWHC 3577 (Fam), *CH v GLS* [2019] EWHC 3842 (Fam), *Z v D (Refusal of Return Order)* [2020] EWHC 1857 (Fam) and *AX v CY* [2020] EWHC 1599 (Fam); England & Wales; *Re F (A Child)* [2014] EWCA Civ 275; *In the Matter of M (Children)* [2016] EWCA Civ 942; and *GCMR Petitioner* [2017] CSOH 66. See also [Trimmings and Momoh \(2021, p. 6\)](#).

³⁵ The UK is not the only jurisdiction following the ‘protective measures approach;’ other jurisdictions, such as the US, have followed identical or highly similar methodologies. For instance, in the case of *Blondin v. Dubois* 189 F.3d 240, 248 (2d Cir. 1999), the United States Court of Appeals, Second Circuit remanded the matter ‘for further consideration of the range of remedies that might allow both (emphasis added) the return of the children to their home country and their protection from harm.’ *Blondin v. Dubois*, note 41, [10].

³⁶ *Re E*, note 8, [36].

³⁷ This approach has been sanctioned by the English Court of Appeal: *Re K (1980 Hague Convention) (Lithuania)* [2015] EWCA Civ 720 and *Re C (Children) (Abduction Article 13(B))* [2018] EWCA Civ 2834 and has also been endorsed also by the English High Court: *Uhd v McKay* [2019] EWHC 1239 (Fam).

³⁸ The leading UK authority on the exercise of discretion is the Supreme Court decision in the case of *Re M (Children) (Abduction: Rights of Custody)* [2007] UKHL 55.

on speed may encourage judges to minimise or ignore allegations of domestic violence rather than determining them, leaving thus an unassessed risk of harm. Importantly, this approach seems to be supported by the jurisprudence of the European Court of Human Rights, specifically the case of *X v Latvia*³⁹ where the Grand Chamber introduced the concept of ‘effective examination’ (Beaumont et al. 2015; Momoh 2019, pp. 650–56). As Judge Albuquerque explained in his concurring opinion, ‘effective examination’ means a ‘thorough, limited and expeditious’ examination. Accordingly, it is recommended here that a ‘thorough, limited and expeditious’ examination of disputed allegations of domestic violence be carried out by the judge in return proceedings.⁴⁰

Protective Measures (See [Permanent Bureau of the Hague Conference on Private International Law 2020](#), paras 43–48)

There is a further note to be made regarding the scope of ‘protective measures’ available, as their robustness is what the domestic violence victim and the child will rely on upon their return. In the UK, the Practice Guidance on case management of child abduction cases ‘distinguishes between protective measures that “are available” and protective measures that “could be put in place,” making clear the potential extensive scope of the exercise’ (Munby 2018; Trimmings and Momoh 2021, p. 11). In England and Wales, when assessing the availability and effectiveness of ‘protective measures’ the courts have included ‘general features’ of the requesting State’s legal system such as ‘access to courts and other legal services, state assistance and support, including financial assistance, housing assistance, health services, women’s shelters and other means of support to victims of domestic violence’ (Trimmings and Momoh 2021, p. 11).⁴¹ The expansive understanding of ‘protective measures’ may mean that the court’s assessment is not focused on the measures that can facilitate the protection to a returning domestic violence victim such as ‘decisions of courts and/or other competent authorities (as appropriate)’.⁴²

In the extent of ‘protective measures’ available, common law courts will further include the so-called ‘undertakings’, which may be defined as ‘promises’ sometimes granted by the left-behind parent that aspire to address the reasons behind the taking parent resisting return (Trimmings and Momoh 2021, p. 12; Brown Williams 2011, p. 66; Zashin 2021, p. 577). ‘The concept of undertakings is a judicial creation and is not included or defined in the 1980 Convention’ (Zashin 2021, p. 577). In reality, undertakings are not effective because they are regularly breached by their grantors⁴³ and suffer from limited enforceability since they are not recognised in civil law jurisdictions (Trimmings and Momoh 2021, p. 13). Therefore, in deciding what weight should be given to protective measures, the judge must take into account the extent to which they will be enforceable in the State of habitual residence. In intra-EU child abduction cases recognition and enforcement of protective measures can be facilitated by either the Brussels IIa Recast Regulation and/or the Protection Measures Regulation.⁴⁴ Outside of the EU, in cases where the State of habitual residence and the State of refuge are both contracting parties to the 1996 Hague Convention,⁴⁵ this Convention

³⁹ *X v Latvia* (GC) Application no. 27853/09 (EctHR, 26 November 2013).

⁴⁰ For related practical matters such as evidence, burden of proof, and factors to consider, see POAM Project Team, [POAM Project Team](#) (2020), para. 5.1.3).

⁴¹ *In the Matter of A (A Child)* (Hague Abduction; Art 13(b): Protective Measures), note 40.

⁴² See footnote 41.

⁴³ A research study conducted by a UK child abduction charity ‘Reunite’ revealed that ‘undertakings were issued in just over half of the cases studied’. The majority (67%) of undertakings were breached, and non-molestation undertakings had been broken in 100% of the representative sample of cases in which they had been given. The study also showed that left-behind parents were often instructed by their lawyers to agree to the undertakings that were sought in the return proceedings because the legislation in the requesting State was different and ‘undertakings mean nothing’. See Freeman (2003, pp. 31 and 33). See also Brown Williams (2011, p. 67) and Trimmings and Momoh (2021, p. 12).

⁴⁴ Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters 2013 OJL 181 4 (hereafter ‘Protection Measures Regulation’).

⁴⁵ Hague 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 (adopted 19 October 1996, entered into force 1 January 2002) HCCH 34 (hereafter ‘1996 Hague Convention’).

should be utilised to facilitate cross-border recognition and enforcement of protective measures in return proceedings. However, where the State of habitual residence is not a party to the 1996 Convention, extreme caution should be exercised by the judge when protective measures are sought.

Even where a legal mechanism for cross-border circulation of protective measures exists, judges should be guarded when considering making a return order conditioned on such measures. In particular, they should be wary of the fact that protection orders are often breached, and that satisfactory follow-up measures by relevant authorities in the State of habitual residence may be lacking. In any case, employment of protective measures with a view to making a return order should never be considered in cases where it has been established that there is a future risk of severe violence.

Evidence-Related Matters (See [\(Permanent Bureau of the Hague Conference on Private International Law 2020, paras 50–54\)](#))

Abducting mothers pleading ‘grave risk of harm’ also grapple with more practical issues. The burden of proof that ‘grave risk of harm’ exists, rests with the party resisting return. However, there is no internationally agreed standard required for the purposes of Article 13(1)(b), and many times evidence of harm caused is unavailable or uncorroborated. This is an issue exacerbated by the fact that in many jurisdictions domestic violence directed to the mother is a bifurcated issue from harm caused (directly) to the child ([Brown Williams 2011, p. 65](#)). Even if evidence is recoverable, the policy of immediate return under the Convention contravenes the need of the court to assess the evidence, a procedure that would require time ([Brown Williams 2011, p. 66](#)). Nevertheless, the POAM project Best Practice Guide on the protection of abducting mothers in return proceedings sets out detailed guidance for courts and other authorities on matters related to evidence as they arise in return proceedings involving allegations of domestic violence, including an ‘evidence roadmap’ separately for documentary evidence, oral evidence and on navigating the evidence types.⁴⁶

4.1.2. The ‘Child Objections’ Exception (Article 13(2))⁴⁷

Article 13(2) states: *‘The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views’.*

In cases involving allegations of domestic violence, the ‘grave risk of harm’ defence is often invoked, and in some cases successfully made out, in conjunction with the ‘child’s objections’ defence under Article 13(2) of the Convention ([Trimming et al. 2020, p. 85](#); [Honorati 2020, p. 3](#)). The defence of child objections can of course be made out also independently of the ‘grave risk of harm’ defence.

Judges in all contracting states should be open to listening to children in return proceedings more frequently⁴⁸ and, when reaching a decision on the return application, should attach importance to the child’s account of the incidents of domestic violence that occurred prior to the abduction and the impact of these incidents on him/her and/or the abducting mother. For example, in the UK, children as young as seven and half are routinely given the opportunity to be heard in return proceedings. This approach can be traced back to a 2006 House of Lords decision in the case of *Re D (Abduction: Rights of Custody)*⁴⁹ and is recommended here as a model to follow by judges in other contracting states.

⁴⁶ For detailed guidance see [POAM Project Team \(2020, para 5.1.3\)](#).

⁴⁷ It should be noted that Contracting States take different approaches to child participation in child abduction cases. See European Parliament, ‘The Child Perspective in the Context of the 1980 Hague Convention’, 2020, p. 15. Available at: [https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/659819/IPOL_IDA\(2020\)659819_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/659819/IPOL_IDA(2020)659819_EN.pdf) accessed 1 September 2023.

⁴⁸ In the UK, this approach can be traced back to a 2006 House of Lords decision and is recommended here as a model to follow by other contracting states. *Re D*, note 30.

⁴⁹ See footnote 48.

4.1.3. Human Rights Considerations (Article 20)

The product of a “laudable attempt” to compromise and resolve opposing views by the Convention’s drafters, Article 20 is no mere public policy clause (Pérez-Vera 1982, para. 33; Trimmings and Beaumont 2014; Weiner 2004). It transcends academic arguments on the rule of law and erosion of comity, developing a unique evaluation of factual circumstances when international human rights agreements may disrupt the Convention’s objectives. The exception under Article 20 of the 1980 Hague Convention provides that *‘the return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.’* Even so, decades since the operation of the 1980 Hague Convention, Article 20 is seldomly utilised and, as it turns out, rarely successfully.⁵⁰

Article 20 confirms that a refusal to return on human rights grounds is based on the internal laws of the requested state; that is to say that the source and foundation of ‘the fundamental principles of the requested state’ is to be found in national laws. But in reality, the national laws on human rights of Contracting States to the 1980 Hague Convention are influenced by, if not completely founded on, international treaties. There is a level of certainty and uniformity in human rights standards. The most obvious being the body of international human rights treaties⁵¹ created under the auspices of the United Nations as well as the European Convention on Human Rights⁵² (‘ECHR’). Often interconnected with the laws on immigration, these provisions may be invoked on the basis that the protection of human rights and fundamental freedoms are threatened by war zones, persecution on the basis of race, religion, political stance, nationality or membership of a particular group. There is also a scope to engage other international human rights treaties, such as the 1951 Refugee Convention and the 1967 Optional Protocol and the Council of Europe Convention on preventing and combating violence against women and domestic violence (‘the Istanbul Convention’).⁵³ In summary, human rights principles applicable in a Contracting State are more likely than not to be a mirror of international agreements.

The majority of available cases⁵⁴ that engage Article 20 show that the provision is often an anchor to core arguments based on the grave risk of harm or a child’s objections. This is because grounds based on domestic violence (on the basis of the abducting parent being a female) and the gravity and impact on the child are usually pleaded under Article 13(1)b.⁵⁵ Similarly, grounds based on unsettled political environments for example, may be pleaded under the grave risk of harm. Indeed, the Guide to Good Practice on Article 13(1)b highlights that risks associated with circumstances in the State of habitual residence such as political, economic or security situations may fall under asserted grave risks of harm (Guide to Good Practice on Article 13(1)(b) 2020, para. 61). As such, reliance on Article 20 is generally sparse in comparison to the other exceptions.

⁵⁰ See for example (Lowe and Stephens 2017a, Part I; Lowe and Stephens 2017b, Part II; Lowe and Stephens 2018, Part III). According to the Global report, the sole and multiple reasons for refusal based on Article 20 was 2 cases out of a total of 185 (see Annex 5 and 6). According to the regional report, refusal in ‘regulation’ cases amount to 1 case (and 1%), with 0% in non-regulation cases.

⁵¹ Such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, the 1979 Convention on the Elimination of All Forms of Discrimination against Women, the 1989 Convention on the Rights of the Child and the 2006 Convention on the rights of Persons with Disabilities.

⁵² In the United Kingdom, the 1998 Human Rights Act gives effect to rights and freedoms guaranteed under the ECHR.

⁵³ The Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul, 11/05/2011.

⁵⁴ See INCADAT, the HCCH International Child Abduction Database which contains and enables the search of child abduction case law, case law summaries and analyses, including references to house publications such as Guides to Good Practice and the Judges’ Newsletter. From a pool of 65 cases that engage Article 20, with 10 from the jurisdiction of the United Kingdom, England and Wales, and Scotland (<https://www.incadat.com>) as of 30 June 2023.

⁵⁵ Cf where a compelling argument may be made that the 1951 Refugee Convention and/or the Istanbul Convention is engaged and thus Article 20.

Of course, human rights grounds should not exclude invoking an argument based on Article 6 ECHR (right to fair hearing)⁵⁶ or Article 8 ECHR (right to private and family life), but this is not what is envisaged under Article 20. These overarching arguments have been considered in cases with courts finding that Convention objectives do take into account and allow for consideration of ECHR values.⁵⁷ What is also true is that Article 13(1)(b) in particular, when applied correctly, ensures that the court is not acting in a manner that is incompatible with human rights treaties such as the ECHR. Likewise, the 1989 Convention on the Rights of the Child ('UNCRC') has an integral role to play in upholding a child's fundamental human rights and freedoms in return proceedings, and this appears to be naturally engaged.

The position in case law on the interplay between Article 20 and the protection of human rights pursuant to the Istanbul Convention is underdeveloped with decisions at times reiterating that Article 13(1)(b) is ample to plead domestic violence. In essence, where the overarching defence is based on domestic violence and a compelling public law element cannot be made out, relying on Article 13(1)(b) should suffice. For example, in the case of *G (A Child: Child Abduction)*⁵⁸, the English Court of Appeal was concerned about unduly extending the scope of Article 20 when it was raised,⁵⁹ and this was in the context of a principal claim relating to allegations of domestic violence. The UK Supreme Court⁶⁰ in the same case reiterated that the provision should not be used 'as a way around the rigours of the other exceptions to the return of the child'.⁶¹

Nevertheless, aside from an Article 13(1)(b) case on the grounds of domestic violence, a possible subsidiary argument is that domestic violence is a form of persecution pursuant to the 1951 Refugee Convention (Momoh 2023, p. 230). Further to this, women, as a particular social group within the meaning of Article 1A of the Refugee Convention are entitled to seek refuge and rely on the principle of non-refoulement⁶² where they have fled a country that is unable to protect them or other country where their life would be threatened (UN High Commissioner for Refugees 1990). Indeed, establishing a well-founded fear requires a subjective and an objective element.⁶³ In the context of return proceedings under the 1980 Hague Convention, the fear of persecution may be the domestic violence perpetrated on the abducting mother, her gender being a protected characteristic, and the lack of adequate protection by the State of habitual residence being an objectively justifiable basis for human rights violations that give rise to an Article 20 case. Inadequate protection by the State of habitual residence has been demonstrated in cases such as *Walsh v Walsh*⁶⁴ when the First Circuit refused a return order because the father's perpetual disobedience of orders meant that any protective measures would be ineffective, or in *State Central Authority, Secretary to the Department of Human Services v Mander*,⁶⁵ where consideration was given to the left-behind father's behaviour, including a history of disobeying orders and violating undertakings in the home country. In *Friedrich v Friedrich*⁶⁶ it was opined that there may be

⁵⁶ See for example, *Re M*, note 44, *Re K (Abduction: Psychological harm)* [1995] 2 FLR 550 (of note, in *Re K* Article 20 had not yet been enacted into English domestic law until the 1998 Human Rights Act came into force in 2000).

⁵⁷ *Re M*, note 44.

⁵⁸ *G (A Child: Child Abduction)* [2020] EWCA Civ 1185.

⁵⁹ *Ibid.*, para. [41].

⁶⁰ *G v G (international child abduction)* [2021] UKSC 9.

⁶¹ *Ibid.*, para. [155].

⁶² 1951 Refugee Convention, Article 33 (Prohibition of Expulsion or Return). Article 33 states: 'No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'.

⁶³ *SN & HM and 3 Dependants (Divorced Women—Risk on Return) Pakistan v. Secretary of State for the Home Department*, CG [2004] UKIAT 00283, para [34].

⁶⁴ *Walsh v Walsh* 221 F.3d 204, 221 (1st Cir. 2000).

⁶⁵ *State Central Authority, Secretary to the Department of Human Services v Mander*, No. (P) MLF1179 of 2003, p. 25 (INCADAT database).

⁶⁶ *Friedrich v Friedrich (Friedrich II)* 78 F.3d 1060, 1069 (6th Cir. 1996).

circumstances where ‘the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection’.⁶⁷

As noted, Article 20 may also be engaged where an abducting parent asserts that theirs (and the child’s) human rights and fundamental freedoms are in jeopardy in the State of habitual residence. The argument follows that there is a need for protection in the country of refuge, thus claiming asylum.⁶⁸ One of the core arguments that have arisen in English jurisprudence is whether such application, successful or pending, places a bar to a return order being made under the 1980 Hague Convention.⁶⁹ English court precedent is, arguably, significant in shaping a position that makes clear that a return order would break the principle of *non-refoulement*. In essence, that it would be impossible to make orders of a procedural nature (return orders) which would be in direct conflict with the substantive nature of the relief that is granted under the 1951 Refugee Convention and, indeed, the 1998 Human Rights Act.⁷⁰ This position was reiterated in the Court of Appeal⁷¹ and subsequent Supreme Court decision of *G v G (international child abduction)*.⁷² The case of *G v G* concerned the applicant father’s application for the return of the parties’ daughter (‘G’) to South Africa. The respondent mother opposed the return relying on Article 13(1)(b) (grave risk of harm) and Article 13(2) (child objections). Although not formally pleaded in legal arguments, Article 20 was raised on her behalf. The mother relied on facts that included allegations of domestic violence including sexual and racial abuse and aggressive and controlling behaviour, compounded by a vulnerability as a result of her mental health. The mother was also found to be HIV positive, the source of which was a matter of dispute. During the return proceedings, the mother revealed that she had feelings for women but had been brought up to believe that homosexuality was a sin. The mother applied for asylum in England, including the child as her dependant. At trial level, the order of Lieven J stayed the father’s return application pending the determination of the asylum application by the Secretary of State for the Home Department. On appeal, it was found that children who have been granted refugee status or have pending asylum applications are protected by the principle of *non-refoulement*; however, it was determined that because G did not have an independent asylum application, a return order could be made. This was overturned by the Supreme Court, which held that a child named as a dependant on a parent’s asylum application is also protected from refoulement. This meant that even if a court made a return order, the principle of *non-refoulement* applied so as to prevent the implementation of such an order. The Supreme Court in *G v G* also considered practical and desirable steps to take in future cases where the two Conventions apply. This included acknowledging that the Secretary of State has sole responsibility for both examining and determining claims for international protection. As a result of the decision in *G v G*, the Secretary of State has set up a Specialist Asylum Team to expedite such cases ([Home Office 2021](#)).

Despite the suggested uniformity across jurisdictions on the basis that internal laws have drawn inspiration from similar international treaties, a level of discord had previously arisen. Distinguishable from the English jurisdiction were decisions in the US and Canadian courts, where effectively the Hague court got another bite at the cherry. For example, in the Canadian decision of Court of Appeal (Ontario) in *AMRI v KER*⁷³, it was found that even though refugee status had been granted to the mother and daughter, the Hague court may revisit and make a return order, bearing in mind what was considered a mere ‘rebuttable presumption’ as opposed to a bar to return. In the US Court of Appeal (first

⁶⁷ See footnote 66.

⁶⁸ To include an application in respect of the child, either individually or as a dependant.

⁶⁹ See *FE v YE* [2017] EWHC 2165 (Fam), *E v E (Secretary of State for the Home Department intervening)* [2017] EWHC 2165 (Fam); [2018] Fam 24; *F v M* [2018] EWHC 2106 (Fam); [2018] 3 FCR 301; *Cf In re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27.

⁷⁰ *FE v YE* [2017] EWHC 2165 (Fam), paras 14, 17–21.

⁷¹ *G (A Child: Child Abduction)*, note 66.

⁷² *G v G (International Child Abduction)*, note 68.

⁷³ *AMRI v KER* [2011] ONCA 417.

circuit) in the decision of *Sanchez v RGL*⁷⁴, it was also found that the grant of asylum was not determinative in return proceedings.⁷⁵ More recently, however, the Ontario Court of Appeal's decision in the case of *M.A.A v D.E.M.E.*⁷⁶ found that family courts cannot issue return orders for children if their applications for asylum are still pending. This is an encouraging progress across the Atlantic that aligns with the developments in the English courts and, it is hoped, will become the norm. Evidently, Article 20, like all the other exceptions to return, ought to be interpreted in a restrictive fashion. Having said that, arguably, where friction arises between parental child abduction law and international refugee law, it should be approached from a humanitarian perspective, where due regard is had to the substantive (rather than procedural) nature of the relief sought. It would not open the floodgates as indeed the anchoring of Article 13(1)(b) and Article 20 reminds courts that protection from a well-founded fear of prosecution amply qualifies as a grave risk of harm.

4.2. Legislative Interventions

Legislative interventions can be contemplated at the global level or the domestic level.

4.2.1. Global Level

Amending the 1980 Hague Convention

At the global level, the most extreme but, admittedly, least practicable solution would be for the Hague Conference on Private International Law as the global law-making body in the area of private international law to amend the wording of the 1980 Convention to take account of the concerns over the safety of abducting mothers in return proceedings. This could take, for example, the form of a separate exception to return on the grounds of domestic violence or a wholly separate 'pathway' for applications involving allegations of domestic violence, including provisions related to evidentiary matters; legal aid; the availability of alternative dispute resolutions methods; channels for direct judicial communication; and the availability of psychological and other support services to the abducting mother during the return proceedings. However, as alluded to above, this solution lacks feasibility as the process of amending an international convention is complex in itself and becomes even more challenging where a large number of contracting parties is involved as is the case of the 1980 Hague Convention.⁷⁷

Amending an international convention refers to the formal modification of the convention provisions affecting all the contracting parties. Such alterations must be effected with the same formalities that attended the original formation of the treaty. Where the convention does not lay down specific requirements to be satisfied for amendments to be adopted (as is the case with the 1980 Hague Convention), amendments require the consent of all the parties.⁷⁸ The 'stone tablet quality' of international conventions makes it extremely unlikely that the contracting parties to the Convention would come down in favour of a revision of the instrument (Thorpe 2006, p. 10).

Adopting a Protocol to the 1980 Hague Convention

An alternative option would be the adoption of a Protocol to the Convention.⁷⁹ This form of legislative intervention is more pragmatic than amending the Convention;

⁷⁴ *Sanchez v RGL* (2015) 761. F.3d 495.

⁷⁵ See also *GB v VM*, 2012 ONCJ 745; and *Gonzalez v. Gutierrez*, 311 F.3d 942, 947 (9th Cir. 2002).

⁷⁶ *M.A.A. v. D.E.M.E.*, 2020 ONCA 486, Canada.

⁷⁷ As of 19 June 2023, there are 103 Contracting Parties to the Convention. See Hague Conference on Private International Law, 'Status Table' (HCCH 2023).

⁷⁸ 1969 Vienna Convention of the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) UN Treaty Series 1155 331, Art 40.

⁷⁹ The possibility of a Protocol to amend or supplement the 1980 Hague Convention was considered by the Permanent Bureau of the Hague Conference during the Sixth Special Commission to review the operation of the Convention in June 2011. See [Permanent Bureau of the Hague Conference on Private International Law \(2011a\)](#). The idea was, however, not pursued and a soft law instrument in the form of a Guide to Good Practice

however, it has other shortcomings. Most importantly, the fact that contracting parties to the Convention are not bound to participate in a Protocol initiative would mean that the safety of abducting mothers would be guaranteed at a restricted scope only. Unfortunately, this would significantly lessen the value of the Protocol. Nevertheless, one can agree with Thorpe LJ that the Protocol would ‘at least enable like-minded States to strengthen the Convention *inter se*’ and that ‘a Protocol with a limited range of operation would be better than no Protocol at all’ (Thorpe 2006, p. 10).

4.2.2. Domestic Level

At the national level, contracting parties could adopt new or amend relevant domestic legislation to clarify that allegations of domestic violence including the safety of the abducting mother should be considered before a return order is made for the child under the 1980 Hague Convention. A recent example of such legislative intervention is an Australian piece of legislation,⁸⁰ which provides safeguards to mothers and children fleeing domestic violence when Australian courts consider cases brought under the 1980 Hague Convention (‘the 2022 Regulations’). The 2022 Regulations make clear *inter alia* that domestic violence is a consideration under the ‘grave risk of harm’ exception to return and a court does not need to be satisfied that such violence has occurred or will occur before it is taken into account (The Hon Mark Dreyfus KC MP 2022). It is recommended that domestic legislation includes also supplementary provisions to strengthen the position of abducting mothers who had fled domestic violence and are involved in return proceedings. Such provisions could pertain to matters such as legal aid, availability of ADR channels, and a legal basis for the use of and the functioning of direct judicial communication (see below ‘*Alternative avenue: ADR/mediation*’).

4.3. Alternative Avenue: ADR/Mediation

The use of alternative methods of dispute resolution (‘ADR’), and specifically mediation,⁸¹ for the resolution of domestic family disputes is an alternative avenue to court proceedings. The popularity of ADR, including mediation, has grown significantly over the past decades.

When domestic violence is involved or even suspected as the reason behind an international child abduction, mediation becomes a questionable option.⁸² Experts point out that mediation can do more harm than good in disputes involving abusive relationships. The concerns are threefold. From the victim’s perspective, participating in mediation (or any ADR mechanism) will result in delayed access to the court⁸³ and therefore court orders to protect the victim.⁸⁴ For victims that have already distanced themselves from their abuser, mediation can result in a risk of physical or mental harm or even re-traumatisation (González Martín 2014, p. 343; see also Permanent Bureau of the Hague Conference on Private International Law 2012, p. 73). Another group of concerns is related to the integrity of the mediation process. The existence of domestic violence often comes hand in hand with broken-down communication, toxic dynamics and severe power imbalance between the abuser and the victim. Accordingly, during the mediation, the victim might be unable to voice concerns equally to the abuser, leading to a potentially disadvantageous or coerced result. In the context of international child abduction, there are additional dimensions

was drafted instead. See Guide to Good Practice on Article 13(1)(b) (2020, pars 57–59). Unfortunately, domestic violence is addressed only marginally in three brief paragraphs.

⁸⁰ Family Law (Child Abduction Convention) Amendment (Family Violence) Regulations 2022.

⁸¹ When referring to ‘mediation’ in this journal, the authors always refer to elective mediation, where the parties provide their informed consent to the process. The authors do not consider mandatory mediation to be appropriate in the context of international child abduction cases involving domestic violence.

⁸² See, e.g., *Re E*, note 8, [53].

⁸³ It must be noted that perpetrators of domestic violence can propose mediation with the ulterior motive of delay (use of mediation as a ‘delay tactic’). See, e.g., González Martín (2014, p. 322).

⁸⁴ For instance, Scottish courts, if satisfied with adequate evidence, have an array of types of Protective Orders available to help the victim into safety. See Scottish Government (2018).

that might make the mediation process more challenging; these primarily relate to the cross-border element and, in particular, the cultural diversity, potential language barriers and the need for close cooperation between the Central Authorities of the states involved (González Martín 2014, p. 343). The final type of concern is that of policy. Mediation is founded on the objective of reaching a mutually agreeable solution to a private dispute; therefore, by definition, it arguably becomes inappropriate when domestic violence is present because reaching a private agreement results in ‘no-punishment’ and even normalisation of domestic violence (González Martín 2014, p. 343; Permanent Bureau of the Hague Conference on Private International Law 2012, p. 73).

Despite the above legitimate concerns, ‘mediation has particular advantages over litigation in international child abduction cases,’ and ‘inherent benefits [...] regardless of the outcome’ (González Martín 2014, p. 322; Vigers 2011, p. 71). From the victim’s perspective, elective mediation offers a strategic route to an acceptable arrangement. Particularly in cases where the abducting mother returns with the child to the state of habitual residence, mediation can be a significantly better option to litigation. Empirical research into abducting mothers post-Hague proceedings has shown that victims of domestic violence that have fled and subsequently returned (following a return order) face a wreath of issues from returning to the abusive context they fled from, homelessness and domestic litigation on the custody and related issues regarding the child, often resulting in mother–child separation (Masterton et al. 2022, pp. 376–81; Quillen 2014, p. 641). Sometimes, returning mothers might even face ‘criminal prosecution, extradition and incarceration’ (Alanen 2008, p. 52). The findings demonstrate that victims experience multifaceted and severe consequences for child abduction despite their actions being driven by domestic violence. It is argued that mediation can help ease some of these consequences upon the return of the mother and child and make the experience of return less traumatizing. Mediation is a flexible process that allows the parties to broaden its scope beyond the child’s return to consider a broader range of issues such as custody, visitation and living arrangements. The victim can utilize the context of the mediation, and the tools made available there, to reach an agreement that, in hindsight, might be more favourable than a court order.⁸⁵ Further, ‘prosecutors (...) might drop criminal charges once the child is returned to the custodial parent or the parents have stipulated to a valid, enforceable parenting agreement’ (Alanen 2008, p. 52; Quillen 2014, p. 641; González Martín 2014, p. 337).

Apart from the more controlled outcome, elective mediation can have the opposite effect from what is feared by specific experts; instead of silencing the victim, it can empower her to make reasonable requests that will improve the entire family’s quality of life. It can be forgotten that abducting mothers are victims that have found the courage to flee, and fleeing is the first step in their journey of empowerment. Accordingly, stripping the victims of choice to mediate is counterintuitive.⁸⁶ When administered by a domestic violence-informed mediator(s), the mediation process can be tailored in multiple ways to allow space for the victim and avoid any further traumatization (González Martín 2014, p. 342). For instance, mediation may not necessarily be delivered face-to-face (Vigers 2011, p. 23). It can instead be delivered entirely online so that the victim feels physically safe. In ‘shuttle’ mediation, an experienced mediator will make use of techniques such as ‘face-saving’, whereby the mediator has private meetings with either party and puts forward the parties’ requests to each other in a controlled and strategic manner to diffuse high-emotion and promote a mutually agreeable outcome (Whatling 2012, pp. 49 and 157). The entire process is carried out without the parties coming in contact. However, even in the case of face-to-face mediation, the process can be built and tailored in a manner suitable to the specific circumstances, with as many private and joint sessions as necessary to work

⁸⁵ It must be noted that child abduction might be prosecuted as a crime and in that case, the abducting mother will not benefit from a more favourable outcome in mediation.

⁸⁶ See, e.g., Oral Evidence submitted to the House of Commons in relation to the appropriateness of mediation in cases involving domestic violence, Question 14. (House of Commons Justice Committee 2023).

through the issues.⁸⁷ In meetings where the victim and the abuser are in the same space, an experienced mediator will be mindful of power imbalance and act as an equaliser, ensuring both sides are heard. In this context, mediation becomes a safe space for ‘the victim to have a voice, to not fear repercussions’ (Kucinski 2010, p. 318). Reported accounts of past mediations administered under the auspices of Reunite International note that ‘the victim often becomes empowered and finds a voice, and grows during the [mediation] process, more so than in a courtroom’ (Kucinski 2012, p. 84).⁸⁸

Mediation cannot occur in a vacuum, and of course, not all cases will be suitable to mediate. It is pertinent that the selection process is performed by an expert who is trained to identify signs of domestic violence and is able to adapt the process accordingly. Further, it is essential that the victim receives independent legal advice on what the mediation process entails and her specific circumstances to aid in deciding. Family mediators are supportive of a case-by-case assessment of suitability; instead of a pre-determined approach, ‘informed consent and thorough assessment’ can maximise the positive impact of mediation on the lives of victims and their children.⁸⁹

5. Conclusions

Over the past nearly fifteen years, the interplay between international child abduction and domestic violence has generated attention and divided positions amongst academic commentators and judges in the Contracting Parties to the 1980 Hague Convention. The change in the profile of a typical parental child abductor, combined with better understanding of the seriousness and impact of domestic violence on the victims and, by extension, their children, has led to increased awareness of the need to safeguard protection of abducting mothers in child abduction cases committed against the background of domestic violence. This article has proposed several measures that could help achieve this objective, ranging from possible legislative interventions at the global level (e.g., a Protocol to the 1980 Convention) to judicial interventions to be employed on a case-by-case basis when applying the exceptions to return available under the 1980 Convention, in particular Article 13(1)(b), Article 13(2) and Article 20. Additionally, the role of Article 20 has been explored in the context of an interplay between domestic violence and asylum claims. This niche area of law would benefit from concentrated and comprehensive research. Nevertheless, it ought to be said that defending a return order on asylum grounds pursuant to Article 20 has earned a standing of its own right. At the very least, it engages the 1951 Refugee Convention, specifically Article 33. Further, it aligns with the observations of Professor Pérez-Vera that to invoke Article 20 is to address the contradiction between the 1980 Hague Convention and domestic human right laws, as well as establishing how such a return would breach the protective principles of human rights (Pérez-Vera 1982, para. 3).

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⁸⁷ It must be noted that the child can be equally involved in the mediation and the mediator can hold private meetings with the child to ensure the child’s voice is heard. As with the parties, the mediator is under the obligation to not disclose information the child reveals unless the mediator has his or her consent, thus fostering a safe environment. See [Vigers \(2011, pp. 23 and 78–79\)](#).

⁸⁸ See footnote 87.

⁸⁹ See, e.g., Question 14 in the Oral Evidence submitted to the House of Commons in relation to the appropriateness of mediation in cases involving domestic violence. ([House of Commons Justice Committee 2023](#)).

References

- Alanen, Julia. 2008. When Human Rights Conflict: Mediating International Parental Kidnapping Disputes Involving the Domestic Violence Defense. *University of Miami Inter-American Law Review* 40: 49–108.
- Al-Shargabi, Zhanin. 2022. The Interplay between International Child Abduction Law and International Refugee Law. Blog Post Published at Law and Internet Foundation. Available online: <https://www.netlaw.bg/en/a/the-interplay-between-international-child-abduction-law-and-international-refugee-law> (accessed on 1 June 2023).
- Beaumont, Paul, and Lara Walker. 2013. Post Neulinger case law of the European Court of Human Rights on the Hague Child Abduction Convention. In *A commitment to Private International Law: Essays in Honour of Hans van Loon*. Cambridge: Intersentia, pp. 17–30.
- Beaumont, Paul, Katarina Trimmings, Lara Walker, and Jayne Holliday. 2015. Child Abduction: Recent Jurisprudence of the European Court of Human Rights. *International and Comparative Law Quarterly* 64: 39–63. [CrossRef]
- Browne, Noah L. 2011. Relevance and Fairness: Protecting the Rights of Domestic-Violence Victims and Left-Behind Fathers Under the Hague Convention on International Child Abduction. *Duke Law Journal* 60: 1193–238.
- Brown Williams, Karen. 2011. Fleeing Domestic Violence: A Proposal to Change the Inadequacies of the Hague Convention on the Civil Aspects of International Child Abduction in Domestic Violence Cases. *John Marshall Law Journal* 4: 39.
- Chamberland, Jacques. 2012. Wither the ‘best interests of the child’ in the 1980 Child Abduction Convention? *International Family Law* 2012: 27–30.
- Dyer, Adair. 1993. The Hague Convention on the Civil Aspects of International Child Abduction—Towards global cooperation, Its successes and failures. *The International Journal of Children’s Rights* 1: 273–92. [CrossRef]
- Fiorini, Aude. 2016. The Protection of the Best Interests of Migrant Children—Private International Law Perspectives. In *Migrant Children in the XXI Century: Selected Issues of Public and Private International Law*. Edited by Giacomo Biagioni and F. Ippolito. Naples: Editoriale Scientifica, pp. 1–37.
- Freeman, Marylin. 2003. The Outcomes for Children Returned Following an Abduction. *Reunite Research Unit*, 1–47.
- Freeman, Marylin, and Anne-Marie Hutchinson. 2007. The Voice of the Child in International Child Abduction. *International Family Law* 177.
- González Martín, Nuria. 2014. International Parental Child Abduction and Mediation: An Overview. *Family Law Quarterly* 48: 319–50.
- Hale, Brenda. 2017. Taking Flight—Domestic Violence and Child Abduction. *Current Legal Problems* 70: 3–16. [CrossRef]
- Hayman, Michelle. 2018. Domestic Violence and International Child Abduction at the Border of Canadian Family and Refugee Law. *Journal of Law and Social Policy* 29: 114–32. [CrossRef]
- Hegar, Rebecca L., and Geoffrey L. Greif. 1994. Parental Abduction of Children from Interracial and Cross-Cultural Marriages. *Journal of Comparative Family Studies* 25: 135–42. [CrossRef]
- Home Office. 2021. *Operating Instruction, Hague Convention Cases*; Version 1.0. July 12. Available online: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1001180/hague-convention-cases-operating-instruction-v1.0-gov-uk.pdf (accessed on 23 June 2023).
- Honorati, Constanza. 2020. Protection of Abducting Mothers in Return Proceedings: Intersection between Domestic Violence and Parental Child Abduction—Italian National Report. *POAM Project*. Available online: https://research.abdn.ac.uk/wp-content/uploads/sites/15/2020/02/National-report_Italy.pdf (accessed on 18 June 2023).
- House of Commons Justice Committee. 2023. Oral Evidence: Government Consultation on Supporting Earlier Resolution of Private Family Law Arrangements. HC1435 19 June 2023. Available online: <https://committees.parliament.uk/oralevidence/13327/pdf/> (accessed on 23 June 2023).
- Kruger, Thalia, and Liselot Samyn. 2016. Brussels II bis: Successes and suggested improvements. *Journal of Private International Law* 12: 132–68. [CrossRef]
- Kucinski, Melissa A. 2010. Pitfalls and Possibilities of Using Technology in Mediating Cross-Border Child Custody Cases. *Journal of Dispute Resolution* 2: 297–325.
- Kucinski, Melissa A. 2012. Creating a Successful Structure to Mediate International Parental Child Abduction Cases. *American Journal of Family Law* 26: 81–85.
- Lowe, Nigel, and Victoria Stephens. 2017a. A statistical analysis of applications made in 2015 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part I, Global Report. *The Seventh Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention—October 2017*. Prel. Doc. No 11 A of September 2017. Available online: <https://assets.hcch.net/docs/d0b285f1-5f59-41a6-ad83-8b5cf7a784ce.pdf> (accessed on 26 June 2023).
- Lowe, Nigel, and Victoria Stephens. 2017b. A statistical analysis of applications made in 2015 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part II, Regional Report. *The Seventh Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention—October 2017*. Prel. Doc. No 11 B of September 2017. Available online: <https://assets.hcch.net/docs/8b567efb-31ff-46d4-8ef6-44c0ed65716f.pdf> (accessed on 26 June 2023).

- Lowe, Nigel, and Victoria Stephens. 2018. A statistical analysis of applications made in 2015 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part III, National Reports. *The Seventh Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention—October 2017*. Prel. Doc. No 11 C of July 2018. Available online: <https://assets.hcch.net/docs/6ca61ff3-5ca6-4fbc-a79a-cb6e7485f4b0.pdf> (accessed on 26 June 2023).
- Maier, Harold G. 1982. Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law. *American Journal of International Law* 7: 280–320. [CrossRef]
- Masterton, Gina, Zoe Rathus, John Flood, and Kieran Tranter. 2022. Dislocated lives: The experience of women survivors of family and domestic violence after being ‘Hagued’. *Journal of Social Welfare and Family Law* 44: 369–90. [CrossRef]
- Mills, Alex. 2009. *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law*. Cambridge: Cambridge University Press. [CrossRef]
- Momoh, Onyója. 2019. The Interpretation and Application of Article 13(1) (b) of the Hague Child Abduction Convention in Cases Involving Domestic Violence: Revisiting X v Latvia and the Principle of “Effective Examination”. *Journal of Private International Law* 15: 626–57. [CrossRef]
- Momoh, Onyója. 2023. The challenges of the Hague Convention on International Child Abduction, in particular in cases of domestic and family violence. In *Changing Families, Changing Family Law—Convergence or Divergence in Europe*. Edited by Konrad Duden and Denise Wiedemann. Cambridge: Intersentia, pp. 217–39, Forthcoming November 2023.
- Munby, James. 2018. Practice Guidance: Case Management and Mediation of International Child Abduction Proceedings. *President of the Family Division Guidance*.
- Norris, Catherine. 2010. Immigration and Abduction: The Relevance of U.S. Immigration Status to Defenses Under the Hague Convention on International Child Abduction. *California Law Review* 98: 159–95.
- Office of the High Commissioner for Human Rights. 2018a. Principles and guidelines on the human rights protection of migrants in vulnerable situations. *Tools and Resources*, April 3.
- Office of the High Commissioner for Human Rights. 2018b. Technical note: The Principle of non-refoulement under international human rights law. *Tools and Resources*, July 5.
- Pérez Manrique, Ricardo C. 2012. The principle of the ‘best interests of the child’ in the context of the 1980 Hague Convention: Guidelines concerning its interpretation. *International Family Law*, (special issue).
- Pérez-Vera, Elisa. 1982. Explanatory Report on the 1980 Hague Child Abduction Convention. *Acts and Documents of the Fourteenth Session (1980) Tome III, Child Abduction*. Available online: <https://www.hcch.net/en/publications-and-studies/details4/?pid=2779> (accessed on 1 June 2023).
- Permanent Bureau of the Hague Conference on Private International Law. 2011a. Consultations on the desirability and feasibility of a Protocol to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction—A preliminary report. *Special Commission of June 2011 on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention*, Prel. Doc. No 7 of May 2011.
- Permanent Bureau of the Hague Conference on Private International Law. 2011b. Domestic and Family Violence and the Article 13 “Grave Risk” Exception on the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: A Reflection Paper. *Special Commission of June 2011 on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention*, Prel. Doc. No 9 of May 2011.
- Permanent Bureau of the Hague Conference on Private International Law. 2012. Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction—Mediation.
- Permanent Bureau of the Hague Conference on Private International Law. 2017a. Draft Guide to Good Practice on Article 13(1)(B) of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. *The Seventh Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, October 2017*, Prel. Doc. No 3 of June 2017.
- Permanent Bureau of the Hague Conference on Private International Law. 2017b. Part I—A statistical analysis of applications made in 2015 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction—Global report. *The Seventh Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention—October 2017*, No 11 A of February 2018—Revised.
- Permanent Bureau of the Hague Conference on Private International Law. 2020. Guide to Good Practice under the HCCH Convention of 25 October 1980 on the Civil Aspects of International Child Abduction—Part VI—Article 13(1)(b).
- POAM Project Team. 2020. Best Practice Guide: Protection of Abducting Mothers in Return Proceedings: Intersection between domestic violence and parental child abduction. *POAM Project*. Available online: <https://research.abdn.ac.uk/poam/resources/guide-to-good-practice/> (accessed on 1 June 2023).
- Pretelli, Ilaria. 2021. Three Patterns, One Law: Plea for a Reinterpretation of the Hague Child Abduction Convention to Protect Children from Exposure to Sexism Misogyny and Violence Against Women. In *Liber Amicorum Monika Pauknerová*. Edited by Magdalena Pfeiffer, Jan Brodec, Petr Bříza and Marta Zavadilová. Strašnice: Wolters Kluwer ČR, pp. 363–93. [CrossRef]
- Quillen, Brian. 2014. The New Face of International Child Abduction: Domestic-Violence Victims and Their Treatment under the Hague Convention on the Civil Aspects of International Child Abduction. *Texas International Law Journal* 49: 621–43.

- Scottish Government. 2018. Protective Orders for People at Risk of Domestic Abuse: Consultation. In *Justice Directorate—Law and Order*. Available online: <https://www.gov.scot/publications/consultation-protective-orders-people-risk-domestic-abuse/pages/2/> (accessed on 27 June 2023).
- Silberman, Linda J. 2011. The Hague Convention on Child Abduction and Unilateral Relocation by Custodial Parents: A Perspective from the United States and Europe—Abbott, Neulinger, Zarraga. *Oklahoma Law Review* 63: 733–49.
- Sthoeger, Eran. 2011. International child abduction and children’s rights: Two means to the same end. *Michigan Journal of International Law* 32: 511–51.
- The Hon Mark Dreyfus KC MP. 2022. *Ensuring Family Safety in Australian Hague Convention Cases*; Canberra: Australian Government—Media Release. Available online: <https://ministers.ag.gov.au/media-centre/ensuring-family-safety-australian-hague-convention-cases-12-12-2022> (accessed on 1 June 2023).
- Thorpe, Matthew. 2006. The Hague Child Abduction Convention—25 Years On. *Newsletter on International Child Protection* XI: 8–10.
- Trimmings, Katarina, and Onyója Momoh. 2021. Intersection between Domestic Violence and International Parental Child Abduction: Protection of Abducting Mothers in Return Proceedings. *International Journal of Law, Policy and the Family* 35: 1–19. [CrossRef]
- Trimmings, Katarina, and Paul Beaumont. 2014. Article 20 of the 1980 Hague Abduction Convention. *Journal of Comparative Law* 9: 66.
- Trimmings, Katarina, Konstantina Kalaitoglou, and Rima Hussein. 2023. Protection of Abducting Mothers in Return Proceedings under the 1980 Hague Convention on the Civil Aspects of International Child Abduction. *Policy Brief*, July 3.
- Trimmings, Katarina, Onyója Momoh, and Isla Callander. 2020. Protection of Abducting Mothers in Return Proceedings: Intersection between Domestic Violence and Parental Child Abduction—UK National Report. *POAM Project*. Available online: <https://academic.oup.com/lawfam/article/35/1/ebab001/6247324> (accessed on 1 June 2023).
- UN High Commissioner for Refugees. 1990. The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weiss. Available online: <https://www.refworld.org/docid/53e1dd114.html> (accessed on 4 September 2023).
- U.S. Department of State. 1986. Hague International Child Abduction Convention; Text and Legal Analysis. *Federal Register* 51: 10494–516.
- Vesneski, William M., Taryn Lindhorst, and Jeffrey L. Edleson. 2011. U.S. Judicial Implementation of the Hague Convention in Cases Alleging Domestic Violence. *Juvenile and Family Court Journal* 62: 1–21. [CrossRef]
- Vigers, Sarah. 2011. *Mediating International Child Abduction Cases*. Oxford: Hart Publishing.
- Weiner, Malcolm H. 2000. International Child Abduction and the Escape from Domestic Violence. *Fordham Law Review* 69: 593–706.
- Weiner, Malcolm H. 2003. The potential and challenges of transnational litigation for feminist concerned about domestic violence here and abroad. *Journal of Gender, Social Policy & the Law* 11: 749–800.
- Weiner, Malcolm H. 2004. Stengthening Article 20. *United States Family Law Review* 38: 701–46.
- Whatling, Tony. 2012. *Mediation Skills and Strategies: A Practical Guide*. London: Jessica Kingsley Publishers.
- Zashin, Andrew A. 2021. Domestic Violence by Proxy: A Framework for Considering a Child’s Return under the 1980 Hague Convention on the Civil Aspects of International Child Abduction’s Article 13(b) Grave Risk of Harm Cases Post Monasky. *Journal of the American Academy of Matrimonial Lawyers* 33: 571–92.
- Zimmermann, Andreas. 2011. *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol*. Oxford: Oxford University Press. [CrossRef]

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Article

Protecting Mothers against Domestic Violence in the Context of International Child Abduction: Between *Golan v Saada* and Brussels II-ter EU Regulation

Costanza Honorati

School of Law, Università degli Studi di Milano-Bicocca, 20126 Milano, Italy; costanza.honorati@unimib.it

Abstract: The need to protect victims of domestic violence is becoming increasingly more important in many States. The 1980 Hague Convention on international child abduction, which in principle requires the child's return and apparently leaves little scope for protecting the child's mother, is at times perceived as being at odds with this need. The 2022 US Supreme Court's judgment in *Golan v Saada* is set to become a leading case with regard to abductions occurring against the backdrop of domestic violence. Although the USSC, out of necessity, considers the issue from the viewpoint of the US legal system, the impact of the decision will be felt well beyond the country's borders. This paper will start by analysing the legal arguments developed by the USSC in finding that ameliorative measures are not required by the 1980 Hague Convention, but lie at the discretion of the courts, as well as the general principles laid down by the USSC to guide the exercise of that judicial discretion. Furthermore, the rationale for—discretionary, but still relevant—protective measures will be measured against the Brussels II-ter EU Regulation, which has established a different legal framework for EU Member States. In contrast to the position under pure Hague cases, the EU Regulation now clearly calls on the courts of the State of refuge to guarantee the child's physical and psychological safety by directly adopting provisional measures, which will apply to the child upon return to the State of habitual residence and which are recognizable and directly enforceable in that Member State. It will be argued in this paper that ameliorative/protective measures offer a means for filling a gap that is increasingly being felt within public opinion, but that could undermine the efficacy of the 1980 Hague Convention. The best way of ensuring that domestic violence cases are not neglected, while at the same time remaining within the confines of the 1980 Hague Convention, would be to adopt expeditious, substantively well-defined, and effective protective measures.

Keywords: international child abduction; domestic violence; ameliorative/protective measures

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1. Introduction

USSC decisions in abduction cases are particularly relevant for the application and uniform interpretation of the 1980 Hague Convention. The impact of these decisions reaches far beyond the USA and impacts all Contracting States. To date, the Supreme Court has issued three decisions in abduction cases: *Abbott v Abbott*, *Monasky v Taglieri*, and the decision discussed in this paper *Golan v Saada*.¹ On closer analysis, the last-mentioned decision originates from and aims to solve an internal dispute among US courts, which adopted different positions regarding protection measures and the return of an abducted child. The most immediate effect of the decision was to reverse the directions given by the Second Circuit Appellate Court in the *Blondin* case.²

However, aside from the internal impact within the United States, the USSC decision is of great interest also beyond its borders because of the factual situation underlying

¹ *Golan v Saada*, 596 U.S. (2022).

² See below at Section 2.1.3.

the case, one involving undisputed domestic violence. At a time when the fight against domestic violence has finally started to receive the attention it deserves, the need to protect domestic violence victims' sometimes conflicts with the principal aim of the 1980 Hague Convention. This is the first time that a supreme court has been faced with the difficult task of balancing domestic victims' legitimate need for protection with the aim under the Convention of securing the prompt return of the child. By stating that consideration of ameliorative measures is not required by the Convention, the *Golan* decision may appear to suggest a conservative approach, which would appear to be outdated. Last but not least, the *Golan* decision is relevant in terms of the impact it may have on the construction of similar—but not identical—EU rules.

2. The *Golan v Saada* Case

The facts underlying the decision arise more frequently in practice than one might think when reviewing court decisions. The case also laid bare the inefficiency and inadequacy of the law. It should be pointed out that the child involved in this story, B.A.S. Saada, was abducted and taken to US in 2018 at the age of 2 and a half. Today, after four years of legal proceedings, at the age of 7, notwithstanding the numerous (in total four) return orders issued by the US Hague court, he has still not been returned to Italy, the State where he was previously habitually resident, and a final custody decision is still to be taken. It must now be concluded—in the child's best interests—that he will never be returned.

2.1. *The Facts of the Case*

Narkis Golan, a US citizen, and Isaac Saada, an Italian citizen, met in 2014 in Milan. In 2015, Golan moved to Milan in Italy, where the couple married³ and started living together. In June 2016, the couple had a child, B.A.S. The relationship appeared to be abusive from the outset. It is undisputed that Saada behaved unacceptably towards his wife. As the court found, he 'physically, psychologically, emotionally, and verbally abused' his wife; furthermore, he 'called her names, slapped her, pulled her hair, threw a glass of wine in her direction, and threatened to kill her'.⁴ While the man did not appear to have a history of direct violence or neglect towards B.A.S., much of the acknowledged behaviour was committed in the presence of the child, thus constituting what should today be regarded as indirect violence. Mrs. Golan, who felt very isolated and was apparently also subject to control and restrictions from her parents-in-law,⁵ sought protection from the Italian police, who referred the matter to the Italian social services. The Italian social services launched an investigation, which resulted in a report noting the highly concerning situation and proposing that Mrs. Golan and the child be placed in a safe house, while the matter was referred to the courts. At that point, Mrs. Golan retracted her statements, declaring that she felt able to handle the situation herself and did not want to leave her home.⁶ However, when the opportunity arose, she ran away. In August 2018, after attending her brother's wedding in New York, she disappeared and moved to a confidential domestic shelter. Since then, B.A.S., who is now 7 years old, has been in the USA.

2.2. *The Judicial Proceedings in the District and Appellate Court (Second Circuit)*

Mr. Saada promptly sought the return of his son and, in September 2018, applied for a return order before the New York District Court. The Court held that: (a) the retention was unlawful⁷; (b) there was a grave risk of psychological harm given the clear evidence of

³ The couple married in Tel Aviv in a religious ceremony, but the marriage was never registered in any country. As a result, Mrs. Golan was unable to work legally in Italy.

⁴ All quoted passages are from USDC (E.D.N.Y.) No. 18-5292 (22 March 2019).

⁵ USDC (E.D.N.Y.) No. 18-5292 (22 March 2019), p. 44a note 3, explaining how Mr. Saada's grandparents, parents, brother, and sister were living in Milan on different floors of the same building.

⁶ Further details at USDC (E.D.N.Y.) No. 18-5292 (22 March 2019), pp. 56a–59a.

⁷ The argument raised by the mother that B.A.S. was habitually a resident in the US, as this was the shared intention of the parents, was quickly rejected.

violence towards the mother; (c) the court was required under Second Circuit case law⁸ to determine whether there were any ameliorative measures or ‘undertakings’ that could minimise the risk of grave harm and allow the safe return of the child; and (d) that this was the case since Saada had agreed to the adoption of a package of measures that, taken as a whole,⁹ would alleviate any risk faced by B.A.S. upon return. On that basis, on 19 March 2019, the District Court ordered the return of the child (*Saada I*).¹⁰

On appeal, the Second Circuit vacated the District Court’s decision, finding that the ameliorative measures in question would not eliminate the grave risk of harm because they were not directly enforceable in Italy; moreover, the court had not obtained a sufficient guarantee of compliance. The Appellate Court thus instructed the District Court to consider whether the Italian court could itself issue an order prohibiting Mr. Saada from approaching Mrs. Golan or visiting B.S.A. without her consent (June 2019, *Saada II*).¹¹

On remand, the District Court liaised with Italian Central Authority and instructed the parties to petition the Italian courts accordingly. In December 2019, following an application by Mr. Saada, the Court of Milan issued a far-reaching and comprehensive protection order, addressing multiple aspects relating to the protection of the child and the mother and providing support and direction for both parents (although especially for Mr. Saada), including psychological counselling and cognitive behavioural therapy. The order was meant to take effect at the time when Mrs. Golan and B.A.S. actually returned to Italy and would remain applicable for one year, with the possibility of extension thereafter.

Satisfied with this outcome, the District Court again ordered the return of the child (May 2020, *Saada III*).¹² Mrs. Golan again appealed to the Appellate Court, which, however, again confirmed the District Court’s decision, stressing the ongoing involvement of the Italian courts, and therefore, the return of B.A.S. (October 2020, *Saada IV*).¹³

Mrs. Golan then filed a petition for a rehearing in the Second Circuit, which was denied, and a motion to vacate the District Court judgment, which was also dismissed. Having exhausted all ordinary appeals, Mrs. Golan now turned to the Supreme Court. She filed a petition for a writ of certiorari with the strong support of a number of bodies from various backgrounds. The petition was granted, and the case finally arrived before the highest court in the land. The case before the Supreme Court attracted great interest both within the legal community and amongst the wider public. No more than twelve amicus curiae briefs were filed with the court.¹⁴

2.3. *The Legal Question before the USSC: Is Seeking and Crafting Ameliorative Measures Always Required by the 1980 Hague Convention, despite a Determination of Grave Risk?*

The legal question put before the USSC by the petitioner, Mrs. Golan, was precisely defined and limited to a very specific issue. It is important that this be properly understood so as to rightly appreciate the scope of the decision. The relevant issue was

‘Whether, upon finding that return to the country of habitual residence places a child at grave risk, a district court *is required* to consider ameliorative measures that would facilitate the return of the child notwithstanding the grave risk finding’ (emphasis added).

⁸ See *Blondin v Dubois* case, which is discussed below.

⁹ These measures included: a \$30,000 allowance for Mrs. Golan; staying away from her until the Italian courts had resolved the matter; starting cognitive behavioural therapy; discontinuing any criminal or civil proceedings that could be pursued in Italy in relation to abduction. In addition to this, Mr. Saada was also required to submit the full record of the New York proceedings to the Italian court deciding on the custody proceedings and to assist Mrs. Golan in obtaining legal status and working papers in Italy.

¹⁰ USDC (E.D.N.Y.), No. 18-5292 (19 March 2019).

¹¹ USCA, 2nd Circuit, No. 19-820 (19 July 2019).

¹² USDC (E.D.N.Y.), No. 18-5292 (5 May 2020).

¹³ USCA, 2nd Circuit, No. 20-1544 (28 October 2020).

¹⁴ All documents and Amicus Curiae Briefs can be found at the USSC docket <https://www.supremecourt.gov/docket/docketfiles/html/public/20-1034.html> accessed on 1 June 2023.

The question was, therefore, not whether there had been any domestic violence, nor whether the return per se would expose the child to a grave risk. Moreover, there was no discussion as to whether or not the ‘package’ of protection measures envisaged by the District Court was adequate to protect the child. Although these questions had been discussed in the proceedings and had been addressed by various arguments, the issue referred to the Supreme Court did not concern either the interpretation or the assessment of any of them. The sole question was whether considering ameliorative measures *was a formal requirement* under the convention, or lay at the discretion of the court.

This question originated from the situation existing within the US. Courts dealing with Hague return cases are faced with conflicting case law from federal courts of appeals as to whether, after a finding that there is a grave risk of harm, a trial court *must* consider possible ameliorative measures to facilitate the return of the child.

On the one hand, the First, Eighth, and Eleventh Circuits have indicated that, having established a grave risk of harm, the trial court is *under no obligation* to consider ameliorative measures.¹⁵ In contrast, the Second, Third, and Ninth Circuits *require* a district court to consider—and craft when needed—a full range of ameliorative measures that would permit the return of the child in all situations where a grave risk is established.

The leading decision in this case is *Blondin v Dubois*, which was delivered by the Second Circuit in 1999.¹⁶ The case concerned a mother who left France with her children to escape the abusive father, who repeatedly beat her and threatened to take her and the children’s lives. The district court found that the requirement of evidence of grave risk on return was met and refused the application for return. However, the Second Circuit Appellate Court annulled that decision and remanded the case to the District Court, directing it to *consider* ameliorative measures that ‘might allow both the return of the children. . . and their protection from harm, pending a custody award in due course by a French court with proper jurisdiction’.¹⁷ The court thus referred to its own precedent in the *Blondin II*¹⁸ decision, which required that, where a district court finds there to be a grave risk of harm, it ‘must examine the full range of options that might make possible the safe return of the child’ before denying repatriation. The Court considered this rule to ‘honor the important treaty commitment to allow custodial determinations to be made—if at all possible—by the court of the child’s home country’.

This decision was subsequently relied upon by other Circuits,¹⁹ thus creating uncertainty and discrimination among petitioners, depending on where they were located when seeking refuge within the US. The petition to the Supreme Court challenged this approach and the resulting situation; not surprisingly, the USSC granted certiorari.

It is important to stress that the relevant question was only whether there may be a requirement to *consider* ameliorative measures. Even if this were to be answered in the affirmative, it would never impinge on the court’s discretion to refuse return. Whether to order return or not, and on what conditions, is always in the discretion of the court of first instance. As was pointed out by one of the few amicus curiae filings for the respondent Saada, ‘a court may always exercise its discretion to reject ameliorative measures after considering whether or not they will be effective’ ([Brief for Amici Curiae 2022](#), p. 15). The issue at stake was by contrast only whether ‘the court is *required* to consider ameliorative measures even if the court ultimately decides—as it did in *Simcox*—that undertakings or protective measures will not be effective and refuses to order the child’s return’ ([Brief for Amici Curiae 2022](#), pp. 16–17; emphasis added).

¹⁵ See, in particular, the following cases: *Danaipour v McLarey*, 386 F.3d 289 (1st Circuit, 2004); *Acosta v Acosta* 752 F. 3d 868 (8th Circuit, 2013); *Baran v Baran*, 526 F. 3d 1340 (11th Circuit, 2008); for details on decisions, see *Petition for a Writ of Certiorari, Golan v Saada*, January 2021, at 11–12.

¹⁶ *Blondin v Dubois (I)*, 189 F.3s 240 (2d Cir. 1999).

¹⁷ *Idem* at 249–250.

¹⁸ *Blondin v Dubois (II)*, 238 F.3d 153 (2d Cir. 2001) at 163 n. 11.

¹⁹ For example, *In re Adam*, 437 F 3d 381(3d Circuit, 2006); *Gaudin v Remis*, 415 F.3d 1028 (9th Circuit, 2005). See again *Petition for a Writ of Certiorari*, at 14. The Petition also points to further inconsistencies in case law of state courts at 17–18.

Once the question has been clarified this way, its answer would probably appear to be obvious in other countries. It is submitted here that the question raised is one that is highly specific to the US system because of the specific guidance given by a few appellate courts. In other Contracting States, it would probably not be disputed that a court always retains full discretion over how to handle the case (Chalas 2023).

3. Arguments of the Parties

The arguments raised by the petitioner Golan, and the amici curiae supporting her position, ran along the following lines:

(a₁) A treaty should be interpreted according to its literal text. Although this argument often appears at the outset of acts, it was not consistently applied throughout the respective reasoning.

(b₁) Ameliorative measures adopted in the form of undertakings are inefficient because they are not enforceable: They rely on the seriousness of the party making the undertaking and, therefore, on the parties' respective decisions over whether or not to comply.

(c₁) Ameliorative measures are highly inappropriate in cases involving men with a past of abusing women because abusive men are inherently unable to comply to court orders.

(d₁) In order to protect the child and the mother, crafting appropriate protective measures requires an in-depth knowledge of the case, which is at odds with the need to decide on the Hague proceedings in the most expeditious manner.

(e₁) Furthermore, ameliorative measures that are too detailed and specific conflict with the principle that the State with jurisdiction over the merits must retain competence.

The respondent Saada, and the amici curiae filed in support of his position on the return of the child argued mainly along the following lines:

(a₂) When interpreting a treaty, the analysis begins 'with the text of the treaty and the context in which the written words are used' (*Air France v Saks*, 470 U.S. 392, 397 (1985)).

(b₂) The requirement that a court must consider whether ameliorative measures are sufficient to protect the child's safety is inherent within the nature of the question and is supported by the operational framework of the Convention and the accompanying Explanatory Report.

(c₂) The United States should follow international practice, special commissions, and guides to good practice. In particular, courts in the United States should look to the *Guide to Good Practice for Article 13(1)(b)* (HCCH 2020) with regard to the assessment of 'grave risk'.

(d₂) Ameliorative measures can be effective in protecting the child, as has been shown by other international instruments.

(e₂) The mandatory *consideration* of ameliorative measures does not require the court to *adopt* ameliorative measures in order to obtain the return of the child. A court always retains full discretion over whether to order the child's return.

4. The Decision of the USSC: Ameliorative Measures Are Not Required by the Convention, and It Lies in the Court's Discretion to Decide on Them...

The Supreme Court's decision, which ran to 16 pages, is a very short one. The first eight pages set out the facts at the heart of the dispute whilst the remaining eight develop its legal reasoning.

Firstly, the Court clarified its approach to the interpretation of treaties by referring to the general principle that 'interpretation of a treaty ... begins with its text'. This is a long-established principle in the US legal tradition and is strongly felt by the USSC in its current composition, which is dominated by 'textualist' interpretations.²⁰ This approach

²⁰ The principle is also rooted in Article 31 of the 1969 Vienna Convention on the Law of Treaties, to which, however, the USA is not a Contracting Party. Article 31, after setting the general rule that a treaty 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose', first clarifies what is the context in paragraph (2). Paragraph (3) further adds that together with the context shall be taken into account: '(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty, which establishes the agreement of the parties

often lies at the heart of decisions concerning rules based on international treaties and clearly implies the rejection of any purposive (i.e., functional) or evolutive interpretation of the treaty.

Based on this understanding, the Court found that the 1980 Hague Convention imposes a general obligation to return the abducted child, but that a Hague court is ‘not bound’ to order the return of the child whenever a finding of grave risk has been made. In other words, the grave risk defence under Article 13(1)(b) ‘lifts the Convention’s return requirement, leaving a court with the discretion to grant or deny return’. ‘Discretion’ thus becomes the key to the decision, and determines its ultimate outcome.

It thus readily follows that ‘nothing in the convention’s text either forbids or requires consideration of ameliorative measures in exercising such a discretion’. Moreover, there is no doubt that ameliorative—or protective—measures are not mentioned by the Convention. Thus far, the Court’s arguing is unobjectionable and objectively sound. The following passages may, however, appear less convincing.

Responding to the arguments made by the respondent Saada, the Court analysed whether the need to put in place measures to mitigate a grave risk of harm may be considered an ‘implicit’ requirement, i.e., if the consideration of ameliorative protective measures must be assessed within and form a part of any ‘grave risk’ analysis.

In doing so, it examined the relationship between ascertaining the existence of a grave risk and the availability of ameliorative measures. The delicate question was whether these constitute two separate issues, arising consecutively, or whether they should be assessed together as one single complex but unitary issue.

This may appear to be a procedural, highly technical, question concerning only the adoption of ameliorative measures. On the contrary, given the special weight afforded to the court’s discretion following a finding of grave risk, the way in which such a relationship is construed becomes crucial (Trimmings and Momoh 2021). If the overall circumstances must be examined together, i.e., considering measures that might reduce a prospective, alleged risk before looking into the likelihood of such an allegation, this will have the effect of partly *reducing* the court’s discretion following a finding of grave risk. In fact, a court will not even conclude that a grave risk exists, because *even if* there were such a risk, it would be reduced and minimised for the purpose of returning the child. On the other hand, if the two questions are distinct and separate and the court is first required to establish whether there is a grave risk, and only then to investigate the existence of possible ameliorative measures, then there is more scope for the exercise of discretion. The need for—and efficacy of—protective measures is assessed having regard to a risk that has already been found to exist by the court.

This issue was debated at length within the Hague Conference’s Special Commission when drafting the Guide to Good Practice on Article 13(1)(b) (HCCH 2020). A first draft, released in 2017 at the Seventh Meeting of the Special Commission, offered national courts two different approaches depending on the facts of the case, national practices, and procedures (HCCH 2017). The result was seen as being complicated and confusing and the final Guide to Good Practice simplifies the position by offering a step-by-step approach. First of all, the court should consider whether the parties’ allegations could constitute a grave risk. As it is clarified, ‘Broad or general assertions are very unlikely to be sufficient’, and a unilateral statement will clearly not imply that a grave risk has been established. The second step, in fact, envisages that:

‘the court determines whether it is satisfied that the grave risk exception to the child’s return has been established by examining and evaluating the evidence presented by the person opposing the child’s return/information gathered, *and by taking into account the evidence/information pertaining to protective measures available in the State of habitual residence*. This means that even where the

regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties’. The rule may be of relevance to other States which are bound by the Vienna Convention.

court determines that there is sufficient evidence or information demonstrating elements of potential harm or of an intolerable situation, *it must nevertheless duly consider the circumstances as a whole, including whether adequate measures of protection are available* or might need to be put in place to protect the child from the grave risk of such harm or intolerable situation, when evaluating whether the grave risk exception has been established.' (..)

'In cases where the taking parent has established circumstances involving domestic violence that would amount to a grave risk to the child, courts *should consider* the availability, adequacy and effectiveness of measures protecting the child.' (HCCCH 2020, p. 31, para 40–41; 59. All emphases added)

On the face of these passages, one might conclude that, in the view of the delegations of the Contracting States that drafted and approved by consensus the 2022 Guide to Good Practice, the existence of a grave risk is dependent and conditional on whether or not 'adequate measures of protection' (i.e., according to US terminology, ameliorative measures) are available.

The US Supreme Court attached very little weight to the work and conclusions of an authoritative and attentive body such as the Special Commission of the Hague Conference, with lip-service being paid to its work in a footnote,²¹ but clearly not allowing its work to have any impact on the decision itself. Similarly, and in contrast to other USSC opinions, there is here no room for any consideration of the practice of other Contracting States to the 1980 Hague Convention. The Supreme Court concisely affirmed that 'the question whether there is a grave risk (...) *is separate* from the question whether there are ameliorative measures that could mitigate the risk'²² (emphasis added). Later on, the Court admittedly conceded that these two 'will often overlap' and that 'in many instances, a court may find it appropriate to consider both questions at once'.²³ However, this does not alter the previous finding on the breadth of the discretion available to the Hague court. Indeed the Supreme Court took the view that 'the court's discretion to determine whether to return a child (...) *includes the discretion* whether to consider ameliorative measures that could ensure the child's return'.²⁴ The point was thus quickly resolved by what appeared to be also a reproach of the Second Circuit: 'By imposing an atextual, categorical requirement that courts must consider all possible ameliorative measures in exercising this discretion', the rule affirmed in *Blondin I* in practice 'rewrites the treaty'.²⁵

5. . . . and the Guiding Principles for Exercising Such Discretion

While the above-mentioned conclusion might appear to have resolved the controversial question raised before the USSC, it did not bring the case as a whole to an end. Having acknowledged the broader scope for the court's discretion, the USSC also sought to provide guidance to direct the exercise of that discretion. This is, in the present author's view, the most important part of the decision. It must be noted, however, that strict adherence to the text of the Convention, as proclaimed at the beginning of the decision, is less evident in this second part. In fact, without mentioning it, the court appears to follow a purposive—or functional—interpretation, i.e., an interpretation of the rules that is based on the aims of the convention.

After noting that the text does not contain any reference to ameliorative measures, and having, therefore, drawn the obvious conclusion that there is '*no obligation* to consider'—and still less to order—ameliorative measures, the court went on to hold that a court '*ordinarily should address ameliorative measures* raised by the parties or obviously suggested by the

²¹ *Golan v Saada*, p. 10, footnote 7.

²² *Golan v Saada*, p. 9.

²³ *Golan v Saada*, p. 10.

²⁴ *Golan v Saada*, p. 10–11 (emphasis added).

²⁵ *Golan v Saada*, p. 11.

circumstances of the case, such as in the example of the localized epidemic²⁶ (this example was raised by the court itself a few pages before, as one where the risk could be minimised by returning the child to a different part of the country).

The lack of any reference to ameliorative measures within the text of the Convention, which was emphasised in the first part of the decision, was now supplemented and completed by a purposive interpretation of the Convention, which led to the conclusion that these measures—though not mentioned at all—should nonetheless *ordinarily* be addressed whenever they are appropriate in the given case.

The added value (but also the creative part) of the decision is to be found in section B of the decision, where the USSC elaborates on three ‘legal principles’ that should guide courts when considering/ordering protective measures. In doing so, the USSC clearly departed from a textual interpretation in favour of a more teleological or purposive one.

The purposive approach is first apparent when the USSC identifies the core aim of the Convention, which is found to lie in the ‘protection of the interests of children and their parents’. The Court also stated that return must not be pursued at all costs, again reproaching the Second Circuit for having ‘improperly elevated return above the convention objectives’.

This is a worthy statement, although it would probably have needed a few more sentences to be properly appraised. While its content is essentially unobjectionable, it is submitted here that this conclusion does not flow directly from the literal wording of the Convention but is *inferred* from its current application and understanding, especially as clarified and developed by the case law of the European Court of Human Rights after the *Neulinger* and *X* decisions (among many: [Beaumont et al. 2015](#); [Mc Eleavy 2015](#)).

Moreover, one of the difficulties in applying the 1980 Hague Convention lies in striking the right balance between the interests of children as a category, which is mainly served by their return after abduction, and the interests of the individual abducted child in a given case, which sometimes may be served by not allowing return to the State of habitual residence but rather remaining in the State of refuge. In this regard, to refer to the ‘protection of the interests of children’ does not really add much clarity or guidance but may, instead, cut both ways. Furthermore, it is submitted here that the juxtaposition between protecting the interests of a child on the one hand and ordering his/her return on the other hand may entail a risk of undermining the structure of and procedures under the 1980 Hague Convention.

Finally, to refer to the (best) interests of the child may appear to be injudicious in view of the widely experienced difficulties in convincing courts seised with return proceedings that they *should not* carry out a proper welfare-interests test before returning the child; that such a test should be limited to the reasons for refusing return; and that return to the State of previous habitual residence *is* in principle in the interest of any abducted child. In sum, as is often the case, the reference to ‘best interests’ is inherently meaningless, given its indeterminacy.

In practice, the three legal principles offered by the Supreme Court as a guide to the exercise of discretion by courts when considering the need for ameliorative measures are more useful.

The first refers to the need to ‘prioritize the child’s physical and psychological safety’.²⁷ There is no question that the child’s safety is paramount. Indeed, this is included in the idea that the court should (but need not necessarily) refuse return when it is convinced that there is a grave risk, and that grave risk cannot be minimised so as to be acceptable. Obviously enough, if the ameliorative measures proposed are ineffective or if the Court is convinced that they would not succeed in minimising the risk, then the child should not be returned.

²⁶ See footnote 25.

²⁷ *Golan v Saada*, p. 12.

The judgment then provides some examples of when such a risk can be identified. The following passage is so important that it is worth quoting in full.²⁸

‘Sexual abuse of a child is one example of an intolerable situation. See 51 Fed. Reg. 10510. Other physical or psychological abuse, serious neglect, and domestic violence in the home may also constitute an obvious grave risk to the child’s safety that could not readily be ameliorated. A court may also decline to consider imposing ameliorative measures where it reasonably expects that they will not be followed. See, e.g., *Walsh v Walsh*, 221 F. 3d 204, 221 (CA1 2000) (providing an example of a parent with a history of violating court orders)’.

From a methodological point of view, it is worth noting that all of these examples are derived from internal US practice, with no reference being made either to the *Perez Vera* Report or to the HCCH *Guide to Good Practice* (HCCH 2017), the principal aim of which was specifically to give Contracting States some directions on how to assess grave risk.²⁹ In this regard, it is a pity that one of the relevant actors on the Special Commission, and indeed one that is looked upon by other Contracting States in a search for uniformity, has missed the opportunity to support this relevant exercise of international harmony.

The second requirement is that protective measures should not impinge upon the assessment of the merits of the case and encroach upon the competence of the courts of the State of habitual residence. This limitation stems from Article 16 of the 1980 Hague Convention, which posits a clear division of competences between the Hague return proceedings and the custody proceedings to be held in the State of habitual residence. While this clarification certainly makes sense in terms of global guidance, the issue seems unrelated to the *Golan* case, where the prospective protective measures were actually adopted by the Italian court that would have been competent over the decision on custody. However, in past US practice, the courts have at times elaborated measures that have ended up being too intrusive on the substance of custody, access, or maintenance decisions, and the US Supreme Court rightly took the opportunity to clarify the position.³⁰

The third requirement, which refers to the need that consideration of ameliorative measures must not affect the expeditious nature of return proceedings was apparently more relevant to the case at hand. There is no need to emphasise here the importance of expedited proceedings when deciding the return of an abducted child. Indeed, the entire rationale of returning a child to his/her previous State of habitual residence presupposes that both the return order and the actual return will take place within a short space of time. If the child is returned after a considerable length of time, his/her return will entail a new uprooting from the place where the child was forcibly and painfully integrated.

While the principle is undisputed, its practical implementation is often overlooked and disregarded. It is clear from the return proceedings before the District Court how difficult it is to craft and put in place protective measures for the return of the child, especially because these measures need to be effective and enforced elsewhere, i.e., in the State of the child’s habitual residence. The situation is especially complex in jurisdictions, such as the US, that are not a party to any international judicial cooperation instruments that may help in ensuring the enforcement of these measures.³¹

The *Golan* case provides a good example of this. Because the Second Circuit had reversed the first decision of the District Court on the grounds that there were ‘insuffi-

²⁸ *Golan v Saada*, p. 13.

²⁹ See in particular (HCCH 2020) Section 1 on how to assess grave risk (p. 31, para 38 seq) and Section 2 providing examples of grave risk, including relevant cases of domestic violence, at para 55–76.

³⁰ Again, the USSC refers for guidance to internal practice. See the letter of 10 August 1995 sent by the U. S. Dept. of State to the United Kingdom. See *Golan*, p. 13, note 9.

³¹ The US has only signed the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. The situation may be different for jurisdictions, such as the UK or Australia, which have ratified the Convention. For the list of Contracting States, see <https://www.hcch.net/en/instruments/conventions/status-table/?cid=70> accessed on 1 June 2023. The situation is again different with regard to EU Member States applying the Brussels II-ter Regulation. See below at Section 0.

cient guarantees of performance’, on remand, the District Court carried out an extensive examination to ensure that any ameliorative measure put in place would be truly effective. The District Court, therefore, turned to Italian courts—i.e., the courts of the State of the child’s previous habitual residence—to ensure that this was the case. An Italian protective order was, indeed, quickly sought (in three months: from September to December 2019). However, another six months elapsed (until June 2020), resulting in a total of nine months, before the (second) decision on return was taken, again by the District Court. It should, however, be noted that, absent any judicial cooperation treaty, if safe return is to be guaranteed, there is no real alternative to seeking protective orders in the State of habitual residence. Considering the way in which the proceedings as a whole developed, it seems that their exceptional length was not caused by the time necessary to obtain an effective protective order in the State where it was actually needed. In order to avoid unnecessary delays, better case management could have been pursued at other stages, including during the final stage when the USSC decided to remand the case for the third time to the (same) District Court in New York.

While all of these directions are useful and relevant, one is struck by the fact that, in a case characterised by undisputed serious violence, the USSC offered only minor guidance on how to handle cases involving domestic violence. The legal reasoning on ameliorative measures is carried out with an eye on the general rule on grave risk and includes only a minor reference, amongst other hypotheses—such as the one quoted above in this paragraph—the impact of domestic violence on the child. This is probably in line with the approach embraced by the USSC in following the ‘original’ interpretation of the convention. As the 1980 Convention does not refer to such a scenario, the USSC deemed it better to develop its reasoning with regard to the general rule on grave risk. However, a number of authoritative, in particular US-based, legal scholars have long since argued that domestic violence cases deserve a special consideration and should be made the object of special attention (Weiner 2021; Trimmings et al. 2023). Given the strong and lively accusations recently levelled, objecting at how the 1980 Hague Convention is incapable of protecting abducting mothers fleeing from domestic violence, coupled with the initiatives taken to question the Convention as a whole or to establish its inadequacy (Barnett 2023³²; Trimmings et al. 2023; Weiner 2021; Pahrand 2017), this would have been an ideal opportunity for the USSC—which is a major player in the international arena—to signal its attention and consideration for a social need that can no longer be ignored.

6. The Aftermath of the Decision: The Death of Mrs. Golan and the (Still Pending) Provisional Custody Proceedings Involving B.A.S. in the US

On remand from the USSC, on 31 August 2022, the District Court issued, for the third time, an order directing the return of B.A.S. to Italy, subject to the conditions set out in that court’s original opinion (including the Italian protective order, which the court had ordered the parties to negotiate and which the Italian courts had issued). Mrs. Golan again appealed (for the fourth time) to the Second Circuit Court of Appeals.

Mrs. Golan argued before the Court of Appeals that the District Court abused its discretion by issuing the return order without taking evidence concerning a number of factors that the Supreme Court opinion indicated should be weighed when applying the Convention. These factors included the safety and well-being of her son (who was 6 years old at the time) if he were required to be returned to Italy despite the finding concerning grave risk and other developments, including the fact that the child was on the autistic spectrum. Mrs. Golan also asked the Court of Appeals to dismiss the case and to allow

³² See the Hague Mothers project (<https://www.hague-mothers.org.uk> accessed on 1 June 2023). The project’s website states: ‘Our overarching aim is to end the injustices created by The Hague Convention, specifically for mothers and children who are fleeing abusive relationships’. The aim of ‘Phase 4’ is to ‘Amend the Convention and/or the regulations to protect mothers and children who have fled violence or abuse’. National regulations have already been amended in order to take domestic violence into account in Australia, Switzerland, and Japan.

B.A.S. to remain in the United States pending the resolution of the custody issues, which the parents would address in separate proceedings.

On 19 October 2022, whilst these appellate proceedings were pending, Narkis Golan suddenly passed away. She was 32 years old; B.A.S. was 6 years old at the time (Fidler 2023).

Following Narkis Golan's death, her sister, Morin Golan, took over physical custody of six-year-old B.A.S. and filed a family offense and custody action in the New York State Kings County Family Court. On 20 October 2022, the Family Court issued an *ex parte* order directing that the child 'not . . . be removed from the care of Morin Golan until further court order', that B.A.S.'s passports be held by Ms. Golan and that the child not be removed from the jurisdiction of the Kings County Family Court. The Family Court also issued a temporary order of protection, directing the father to 'stay away' from B.A.S. and the aunt, '[s]ubject to the order of supervised visitation of the Tribunal of Milan.' The Children's Law Center (a charity based in New York) was further assigned to represent B.A.S. interests.

Arguing that the mother's death represented a substantial change of circumstances for B.A.S., Morin Golan and the guardian for B.A.S. submitted that the NY District Court consider the new and unexpected child safety concerns, and refuse his return. The Italian provisional measures were meant to take effect upon the return of B.A.S. *with the mother*. If the child would be returned alone, this would raise entirely unexpected and unaddressed new concerns.³³ These included determining where the child was to be placed; dealing with the difficulties he would experience in relating with a father he had not met in the last 4 years; settling in a country of which he had no memory and whose language he did not speak; and difficulties in adapting to a new situation, including his autistic spectrum disorder.

It is difficult to believe that returning the child after 4 years, and under the circumstances described, would be in his best interests. At the moment of the writing the (provisional) custody case is still pending, as are the Hague return proceedings. In the personal opinion of the present author, whatever the right decision would have been at an earlier stage, to return B.A.S. to Italy now would represent a grave and substantial failure of the law.

7. The *Golan* Decision Seen from the EU and Its Impact on the (Recast) EU Legal System

As mentioned above, the *Golan v Saada* opinion sets a benchmark also outside the territorial boundaries of the United States. The social and political relevance of the issue at stake, as well as the tentative guidelines offered by the USSC undoubtedly make this decision of relevance for all Contracting States to the 1980 Hague Convention, included those that are EU Member States. This paper will now focus on investigating the possible impact that this decision may have within the EU, where the legal framework is different.

While all EU Member States are Contracting States to the 1980 Hague Convention in their own right, the Convention is in some respects applied differently in relations among Member States for two reasons.

First, as is well-known, the 1980 Hague Convention was partially modified by the Brussels II-ter Regulation,³⁴ which supplements and 'complements'³⁵ Convention provisions. A partial derogation from the Convention is allowed under Article 36 of the Convention, which permits two or more Contracting States to agree between themselves 'to derogate from any provisions' of the Convention 'in order to limit the restrictions' to which the return

³³ Letter of the Children's Law Center addressed to Judge Donnelly, 3 November 2022.

³⁴ Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)—known as the Brussels II-ter Regulation.

³⁵ Article 22 Brussels II-ter Regulation.

of the child may be subject under the Convention provisions.³⁶ EU Member States have accomplished this by introducing common ‘special’ rules for intra-EU abduction cases.

While it is not possible to comment here on the Brussels II-bis and II-ter rules, it may be useful to recall that the general idea underlying the special rules enshrined in the Brussels II system is to reinforce the return obligation,³⁷ something that has been claimed to protect the interests of States more than those of children (Freeman and Taylor 2022). This is accomplished in several ways. First, a court cannot refuse return unless the person seeking the return of the child has been given the opportunity to be heard (Article 27(1) Brussels II-ter). A genuine opportunity to be heard must be offered to the child as well (Article 26 Brussels II-ter), and this will have an impact, among other things, on the application of Article 13(2) of the 1980 Hague Convention. Secondly, the use of the grave risk exception under Article 13(1)(b) is limited. Even when the court is convinced that this defence is available, nonetheless, it ‘shall not refuse to return the child’ if it is satisfied that adequate arrangements have been made to secure the protection of the child upon his or her return (Article 27(2)). Such adequate arrangements may be proposed by the party seeking the return of the child, or by the court on its own initiative. Thirdly, even when the court in the State of refuge refuses the return, the court in the State of habitual residence may make use of the special mechanism under Article 29, empowering that court to adopt a decision on custody entailing the return of the child. Any such decision will override the decision on non-return in the State of refuge and must be enforced, subject only to limited exceptions.

The following analysis will focus on the role and special responsibility borne by the court in the State of refuge, as established by Article 27(3) and (5). These two provisions direct the State of refuge to ensure that adequate arrangements are taken in the State of habitual residence or to issue provisional protective measures enforceable in that State in order to safeguard the return of the child. Such measures will accompany the return of the child to his or her place of habitual residence and will produce effects and be enforced there.

Before turning to the legal analysis of the technical rules, however, it is important to note another key difference between the Regulation and the Convention. In contrast with the Convention, the Regulation sets out rules for both return proceedings and custody proceedings. Based on this structure, the Regulation creates a special relationship between the court of the State of habitual residence and the one in the State of refuge. Courts in different EU Member States are united by reciprocal trust in the level of legal protection granted in other Member States as well as the common effort to ensure the best solution for the child’s welfare. It is important to emphasise that EU Member States share common values, a similar level of protection for fundamental rights and comparable standards in the administration of justice. They also share and agree on common policies that have an impact on the application of the Convention, such as, for example, mainstreaming policies for the protection of children and protection against domestic violence. This circumstance qualifies the approach of EU Member States when dealing with intra-EU abduction cases. It is probably easier to order the return of a child if the sending court trusts the ability of the receiving court to assess the best interest of the child against standards similar to those that the sending court applies in its own forum.

Some twenty years have not passed since the EU became involved in combating violence against women, and only the most relevant instruments can be noted here. Following a request made by the European Parliament in 2010,³⁸ the Commission proposed the

³⁶ Article 36 of the 1980 Hague Convention provides that: ‘Nothing in this Convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction.’

³⁷ See generally the system of Regulation No 2201/2003 (Brussels II-bis) and its recast Regulation No 2019/1111 (Brussels II-ter), insofar as the rules of the two instruments are inspired by the same rationale. The following paragraph will focus on the rules currently in force under Brussels II-ter.

³⁸ The European Parliament resolution of 26 November 2009 on the elimination of violence against women, [2010] OJ EC 285/53 of 21 October 2010; the European Parliament resolution of 5 April 2011 on priorities and outline of a new EU policy framework to fight violence against women, [2012] OJ EC 296/26 of 2 October 2012.

adoption of Directive 2011/99/EU on the European protection order (EPO)³⁹ as well as Regulation No 606/2013 on mutual recognition of protection measures in civil matters.⁴⁰ While both instruments are more general in scope, they were clearly aimed at providing protection to women who are exposed to intimate/domestic violence. Subsequently, as part of the Gender Equality Strategy 2020–2025,⁴¹ measures were announced to prevent forms of violence against women and domestic violence, protecting victims and prosecuting offenders. In 2022, the EU Commission launched a proposal for an EU directive on combating violence against women and domestic violence,⁴² which is currently passing through approval procedures. Finally, the Istanbul Convention on Preventing and Combating Violence Against Women and Domestic Violence⁴³, which was signed by the EU as early as 2017, was finally approved by the Council on 1 June 2023 and will enter into force for the EU on 1 October 2023.⁴⁴ The topic clearly remains at the top of the EU agenda.

On a different level, legal studies and research projects dealing with domestic violence in general, or more specifically, with the interaction between domestic violence and abduction,⁴⁵ have in recent years contributed to increasing awareness and exploring more efficient solutions. Without repeating what has already been discussed elsewhere, one might summarise the following common arguments:

- i. Domestic violence is being alleged with increasing frequency as a reason for leaving the State of common residence and relocating to a different Member State. When the woman is the primary caregiver, she will usually take the child/children with her, thus committing child abduction.
- ii. Providing convincing evidence of domestic violence, including its more subtle forms, such as financial abuse or coercive control, may prove to be extremely difficult, especially within the ambit of Hague return proceedings, as they involve summary proceedings with limited scope for investigation.
- iii. Even when domestic violence is committed against the mother and the child has not been physically harmed, the child is always an ‘indirect’ victim, having been exposed to the effects of domestic violence against the mother. This violence will undermine the psychological health and emotional well-being of the mother and thus her ability to parent and care for the child.

³⁹ Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order.

⁴⁰ Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters.

⁴¹ COM(2020)152 final.

⁴² COM(2022) 105 final of 8 March 2022. The proposal focuses more on a criminal law approach, even though violations of human rights and forms of discrimination are also considered. On the proposal and for further references, see (Bergamini 2023).

⁴³ The Convention is promoted by the Council of Europe and was opened for signature on 11 May 2011; it is currently in force today in 37 Contracting States. It has been signed by all EU Member States, and 21 of them have also ratified it in their own right. (see <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatyid=210> accessed on 1 June 2023). For the position of the EU see below.

⁴⁴ Council Decision (EU) 2023/1075 and Council Decision (EU) 2023/1076 of 1 June 2023, on the conclusion, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence, respectively, with regard to institutions and public administration of the Union. The underlying rationale for the two decisions is that both the EU and Member States have competence in the fields covered by the Convention, and the EU can only adopt the Convention with regard to its own sphere of competence. Furthermore, a Code of Conduct was also adopted, setting out the internal arrangements for practical cooperation and cooperation between the EU and the Member States on various aspects of the implementation of the Convention (ST/8113/2023/INIT, in [2023] OJ C 194/03). The decision of the Council authorising the ratification is supposed to put some pressure on the six remaining EU Member States: Bulgaria, Czechia, Hungary, Latvia, Lithuania, and Slovakia.

⁴⁵ See the POEM (Mapping the legislation and assessing the impact of Protection Orders in the European Member States) and the POAM (Protection of Abducting Mothers in Return Proceedings: Intersection between Domestic Violence and Parental Child Abduction) projects. The results of the former are accessible here: <http://poems-project.com/> accessed on 1 June 2023, and those of the latter here: <https://research.abdn.ac.uk/poam/resources/reports/> accessed on 1 June 2023 and in Trimmings et al. (2022)). See also POAM Best Practice Guide 2022.

- iv. Although the 1980 Hague Convention protects (only) the child from the risk of harm upon return, it is now recognised that witnessing domestic abuse causes substantial harm that can have long-term effects on the welfare and development of children, leading to post-traumatic stress disorder and behavioural issues. This amounts to a psychological harm or an intolerable situation for the child, which is covered by Article 13(1)(b).⁴⁶

Against this backdrop, the Brussels II-ter Regulation seeks to strike a balance between taking account of the need to protect the child and the mother, and the opposite need to comply with the Convention's obligation to return the abducted child, both building on and innovating beyond the previous experience of the Brussels II-bis Regulation.

8. The Responsibility of the State of Refuge under Brussels II-ter: From 'Adequate Arrangements' to 'Provisional and Protective Measures'

As with the Convention, the burden of the legal obligation and responsibility to decide whether or not to return the child lies with the State to which the child is removed. However, in contrast with the Convention, the Regulation requires that, when complying with this obligation, the court shall always ensure that the return of the child is 'safe'. The concept of 'safe return' must be construed differently from that of the best interests of the child. Assessing the best interests of the child over the long run is not the primary concern of the courts of the State of refuge, and this task should be left to the courts of the State of habitual residence.

In order to do so, the Regulation equips the courts in the State of refuge with two additional tools, which are not expressly provided under the Convention: assessing adequate arrangements that could potentially be put in place in the State of habitual residence under Article 27(3), and directly adopting provisional protective measures under Article 15, which, according to Article 27(5), will be recognised and enforced exceptionally in the State of habitual residence.

Article 27(3) Brussels II-ter is modelled on the previous Article 11(4) Brussels II-bis and provides that, where a court considers refusing to return a child solely on the basis of Article 13(1)(b) of the Hague Convention, it cannot do so:

'if the party seeking the return of the child satisfies the court by providing sufficient evidence, or the court is otherwise satisfied, that adequate arrangements have been made to secure the protection of the child after his or her return.'

Recital (45) clarifies what qualify as 'adequate arrangements' for the purposes of the rule. These include a court order from the State of the child's habitual residence prohibiting the applicant from coming close to the child; a provisional and/or protective measure allowing the child to stay with the abducting parent who is the primary carer until a decision has been made on the merits in relation to custody; the indication of available medical facilities for a child in need of medical treatment.⁴⁷ Other examples are mentioned in the 2022 Practice Guide ([Practice Guide 2022](#), p. 125 at 4.3.5.1.2), such as secure accommodation for the parent and the child, the termination of criminal proceedings against the abducting parent, and covering the abducting parent's living costs. These measures must be properly put in place in the given case, and not simply generally available under the law of the State of habitual residence ([Practice Guide 2022](#), p. 125 at 4.3.5.1.2, further clarifying that judicial measures only need to be enforceable but not necessarily final).

While the content and breadth of such measures may depend on the circumstances of each individual case, a typical feature of all 'adequate arrangements' is that they must be adopted by an authority—a court, a child welfare authority, a social service—in the State

⁴⁶ As the UK Supreme Court held in *Re E (Children)* [2011] UKSC 27, 'it is now recognised that violence and abuse between parents may constitute a grave risk to the children'. A child should thus not reasonably be expected to tolerate 'exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent' (para. 52 and 34).

⁴⁷ Useful reference can also be made to HCCH 2020, paras 43 et seq.

of habitual residence of the child. In practice, these measures are mostly sought by the party seeking the return of the child or are offered by the Central Authority of the State of habitual residence. They may also be suggested by the court of the State of refuge on its own motion, but even in this case, the court has no power to craft or order them and must rely on arrangements made by and in the State of habitual residence.⁴⁸ On the other hand, such measures do not raise any PIL issue with regard to their recognition or enforcement, as they are ordered by an authority of the State where they will be enforced.

On the contrary, it falls within the competence and duties of the court in the State of refuge to assess whether the proposed arrangements are ‘adequate’, i.e., effective for the purpose of securing a safe return.⁴⁹ Interestingly, the State of refuge is not under any obligation to establish adequate arrangements, which by contrast are simply one of the various legal tools the court can—but not necessarily needs to—rely on in order to comply with the State’s international obligations (for a different view, see [Chalas 2023](#)). The point is not addressed in the Regulation itself and has never been analysed by the CJEU. However, the 2022 *Practice Guide* clearly affirms that ‘Adequate arrangements *may* be considered by the court of first instance or by the court of the higher instance in the Member State of refuge’ (*Practice Guide 2022*, p. 125 at 4.3.5.1.2). In sum, in many respects, including this last relevant point, ‘adequate arrangements’ may be said to correspond to the ‘ameliorative measures’ within US legal practice noted above.

Article 27(5), by contrast, will have a much more powerful impact. This provision should be regarded as one of the most significant innovations introduced by the Brussels II-ter Regulation in the area of international child abduction. This new rule vests the courts in the State of refuge with an exceptional power to take protective measures that have extraterritorial effects and are enforceable in all EU Member States.⁵⁰ The gap in protection that is inherent to the Hague Convention,⁵¹ and which also existed under the previous Brussels II-bis Regulation, which did not allow such protective measures to circulate, has now been filled by the new provisions of the Brussels II-ter Regulation ([Wilderspin 2022](#)).

The rule is often described as a further attempt to deter the courts of the State of refuge from refusing to return the child because of a grave risk of harm (*Practice Guide 2022*, p. 124 at 4.3.5). This is, however, only one side of the story. In the present author’s view, it is not only the obligation to return the child notwithstanding the existence of a risk of harm that is reinforced. Far more than this, it is the obligation to ensure that the child’s return is actually safe that is spelled out. The provision imposes a *positive obligation* on the court of the State of refuge *to take steps to protect the child* ([Honorati 2022](#), p. 159). In other words, rather than expecting the State of habitual residence to take adequate arrangements, or waiting for

⁴⁸ This does not mean that the Court in the State of refuge is entirely passive. Indeed, it may play an active role in the establishment of such measures, and it can also act *ex officio*. However, there is no formal requirement to do so. The situation is pretty much similar to the one faced by the USSC in the *Golan* case.

⁴⁹ Article 27(4) provides that, for the purposes of investigating the adequacy of any adequate arrangement, the court ‘may communicate with the competent authorities of the Member State where the child was habitually a resident before the wrongful removal or retention’ either directly or with the assistance of Central Authorities (see, however, recital (45), which advises that the court ‘should primarily rely upon the parties.’). The 2022 *Practice Guide*, p. 125 at 4.3.5.1.3 acknowledges that ‘It may be difficult for the judge to establish what possible arrangements exist in the Member State of origin, if they have been de facto taken and whether they are adequate to deal with the circumstances that could develop after the return’.

⁵⁰ This result does not stem clearly from the rule but is reached indirectly through a rather cumbersome referral to the definition of ‘decision’. According to Article 2(1)(b), for the purposes of recognition and enforcement, the notion of decision includes ‘provisional, including protective, measures ordered by a court, which by virtue of this Regulation has jurisdiction as to the substance of the matter or measures ordered in accordance with Article 27(5) in conjunction with Article 15’ (emphasis added). On the other hand, provisional measures taken pursuant to Article 15 by a court that has no jurisdiction as to the substance of the matter will not have any effect outside that State. It must be noted however, that provisional measures will be recognised and enforced in another Member State provided that the party against whom they are taken has been summoned to appear, or at least the decision containing the measure was served on that party prior to enforcement.

⁵¹ In the *Golan* case, for example, the Court of Appeals for the Second District initially vacated the District Court decision as ‘many of the undertakings the District Court imposed [on the petitioner Saada] are unenforceable because they need not—or cannot—be enforced until after B.A.S. is returned to Italy’, and they were, therefore, considered insufficient to protect the child (USCA, 19 July 2019).

the parent left behind to provide sufficient evidence that such measures are in place, the court must assess the child's needs and, where appropriate, take any necessary protective measures itself. This also implies that when such measures are not available, either because they are not possible in concreto or because they are not effective as they would not be capable of sufficiently reducing the risk of harm, then the court has no alternative but to refuse the return of the child.

Content-wise, provisional measures will very much resemble adequate arrangements (Wilderspin 2022, p. 185). Recital (46) clarifies that such measures can, for example, provide that, once returned, the child will continue to reside with the primary caregiver, or specify how contact with the parent left behind should take place after the child's return. Other examples that have been given include measures akin to anti-molestation/anti-harassment orders (for example, 'not to use violence or threats towards the mother, nor to instruct anybody else to do so, or not to communicate with the mother directly'), orders related to the occupancy of the family home (for example, to vacate the family home and make it available for sole occupancy by the mother and the child), orders related to financial support (for example, to pay for the return tickets for the mother and the child or to provide financial support/maintenance to the mother and the child upon their return), and orders related to residence or access to the child (for example, not to seek to separate the mother from the child or not to seek contact with the child unless awarded by the court or agreed) (Momoh 2022, p. 77). Reference may also be usefully made to the *Guide to Good Practice on Article 13(1)(b)* (HCCCH 2020, para 43), according to which protective measures can cover a broad range of existing services, assistance, and support, including access to legal services, financial assistance, housing assistance, health services, shelters, and other forms of assistance or support to victims of domestic violence. It should be noted that, in a similar manner to the caution called upon by the USSC in the *Golan* decision, recital (46) recommends that protective measures should not 'undermine the delimitation of jurisdiction between the court seised with the return proceedings under the Hague Convention and the court having jurisdiction on the substance of parental responsibility under this Regulation.'⁵²

All in all, in contrast to what occurs in a purely Conventional situation, the new legal framework established by the Brussels II-ter Regulation not only allows but, indeed, *requires* the court of the State of refuge to take positive action—and responsibility—in order to protect the child from any kind of harm that he or she may suffer upon return.

Notwithstanding this new approach, however, there still is an important gap in terms of protection. This concerns the person who is exposed to domestic violence. The clear wording of Article 13(1)(b) leaves no doubt that the risk of physical and psychological prejudice must apply to the child, not to the mother. Although psychological studies show beyond any reasonable doubt the devastating impact of domestic violence on children, even if they have not witnessed the violence (among many: Lindhorst and Edleson 2012; Katz 2022; POAM Best Practice Guide 2022),⁵³ according to a literal interpretation of Article 27(5), doubts may arise as to whether this provision allows for the adoption of protective measures with regard to a situation involving primarily the mother. It is regrettable that, despite calls from particularly attentive scholars (Trimming 2013, p. 154), EU lawmakers have not taken the opportunity to clarify this matter. A reference to domestic violence could, at least, have been included in a recital. Instead, although it does provide examples of possible protection measures, recital (46) does not refer, even implicitly, to situations that could involve the mother. As has been noted elsewhere:

'the mother is left alone to face a terrible dilemma: either return with the child and go back to the situation of violence she had escaped from, or stay safe and protected, but abandon her child'. (Honorati 2022, p. 160)

⁵² A point also underlined by the 2022 Practice Guide at 4.3.5.2.

⁵³ On the EU level, see the Opinion of the European Economic and Social Committee on Children as indirect victims of domestic violence, [2006] OJ C 325, pp. 60–64.

While legal scholars who have tackled the issue have supported the view that the rule should be construed as also envisaging measures for the protection of the mother (Wilderspin 2022, p. 186; Honorati and Ricciardi 2022, p. 252; and also, although with a different approach Requejo Isidro 2006; Ripley 2008), the current lack of a clear indication and the subsequent flaw in the instrument will only result in the confirmation of the existing tendency before the courts. In most cases, in fact, Hague courts tend to overlook the effects of domestic and intimate violence on mothers and rarely recognise the psychological harm suffered by the child(ren). The sparse research that has investigated how courts use adequate arrangements in practice show that these have been used only in a limited number of cases, especially when compared to the high proportion of cases involving allegations of domestic violence (Trimmings 2013, p. 155 et seq.; Honorati 2020, p. 817).⁵⁴

This situation should, instead, be handled and considered by the law. It is submitted here that, under the current legal framework, *in most cases where there is an allegation of domestic violence*, the State of refuge should *always consider*—and possibly adopt—some kind of protective measure in order to accompany the child (and the mother) back home safely. This should become part of a settled routine before the courts. Where the court is not fully convinced of the existence of a grave risk of harm but still cannot exclude that the situation may entail some kind of additional risk, the possibility of so-called ‘soft landing’ measures should be considered. What is important is that the Hague court—which is often a specialised court that deals, mainly or exclusively, with abduction cases—refrains from dismissing an allegation of domestic violence on the mere assumption that such a court should focus on the child only.

9. How Protective Are ‘Protective Measures’?

Before proceeding to the conclusions, an additional disclaimer must be made. The consideration of ameliorative measures or the ordering of protective measures will not always be sufficient to resolve the case. Sometimes they will not be enough.

This issue engages two different levels of analysis. The first one is purely legal. It considers how protective measures can be legally binding and effective—or better: enforceable—in a State different from the State that adopted them. As seen, this issue is now addressed and resolved within the EU by the new Article 27(5) Brussels II-ter Regulation. Outside the EU, courts will need to use some creativity as the 1980 Hague Convention does not deal with the recognition of decisions and, hence, does not provide for a solution. The more obvious solution is to use other international treaties on the recognition of decisions that may be in force between the relevant States. If, for example, both States are Contracting States to the 1996 Hague Convention, Article 11 may be invoked. In other cases, courts may either use mirror-orders—i.e., orders with the same content that are issued in both the State of refuge and the State of habitual residence; or safe harbour orders—i.e., orders issued by the State of refuge or by the State of habitual residence stipulating certain conditions for a safer and less disruptive return of the child. Courts may thus call upon the parties (or the Central Authority) to ask the courts in the State of the child’s habitual residence to adopt adequate measures. This is what happened in the *Golan* case, where both parties applied to the Court of Milan seeking a package of measures to be applied upon the return of B.A.S.

Besides the legal issues, however, there is a second level of more substantial concern, which in the opinion of the present author has not been sufficiently considered by legal scholars. This relates to the fact that in some cases, with regard to specific situations involving serious domestic violence, *there is no way* to protect the victim because the tortfeasor is incapable of controlling his behaviour and complying with a binding court

⁵⁴ Reference should also be made to the *Parent Survey* conducted under the aegis of the POAM project from February to April 2021 and investigating cases of alleged domestic violence (at <https://research.abdn.ac.uk/poam/how-to-get-involved/> accessed on 1 June 2023). The survey found that, in 83% of the cases investigated, protective measures were not available, advised, or discussed. It also found that the mothers interviewed felt quite strongly about this professed injustice (*Parent Survey Report* para 22).

order. This argument was repeated in Narkis Golan's defence and in some of the Amici Curiae Briefs (such as [Brief for Amici Curiae 2021](#)). In particular, it has been stressed that

'Domestic abuse is sometimes mistakenly understood as a series of discrete violent acts, when in fact it is most often an insidious pattern of physical and psychological abuse marked by an ever-present exploitation of control. [...]

Perpetrators of domestic abuse use a combination of tactics to maintain and gain power and control over their target, including but not limited to physical, sexual, psychological, emotional, economic, and immigration-related abuse. Using a combination of these modes of abuse, perpetrators gradually begin to exert an insidious but powerful kind of manipulative control over their victims, known as "coercive control". [...]

Efforts to craft ameliorative measures are based on the often-erroneous assumption that the abuser, [...] will reform and start to live consistent with a set of conditions wholly out of step with the abuser's past conduct. In reality, serious and persistent abusers generally *do not abandon their abusive conduct*, especially when there is no criminal penalty imposed or close monitoring of their behavior.' ([Brief for Amici Curiae 2021](#), pp. 7, 9)

This is not the appropriate place to define the terms and standards that determine whether and when a violent and abusive man is capable of changing and complying with a court order. It is also acknowledged that this may be a difficult task for a legal scholar. It cannot be denied, however, that there are cases in which there is no appropriate legal protection against an abuser seeking to 'punish the victim's efforts to escape and to re-establish control through even stronger means' ([Brief for Amici Curiae 2021](#), p. 10). It must, instead, be recognised that, in such cases, the only possible defence for the victim is to escape as far as possible. It is certainly not an easy task for a court to separate these particular cases (which are potentially limited in number) from the majority of cases in which a protected return would be the appropriate solution. There is no doubt that a greater awareness not only of the effects of domestic violence on women and children but also of the behavioural dynamics of abusers would be of great help to courts in this difficult task.

10. Conclusions—Advancing the Protection of the 1980 Hague Convention: A Lost Opportunity for the USSC, and a Bad Example for the EU

The issue addressed in this article, i.e., how to deal with abduction cases that are motivated by domestic violence, seems to divide legal scholars into two mainstream camps. On one side, there are 'feminist' lawyers, sometimes also criminal lawyers mostly active in advocating domestic violence cases, who at times appear to overlook or undervalue the merits and structure of one of the most successful conventions, which is in force among an exceptionally high number of States. On the other side, we have 'internationalist' scholars or Hague Convention 'purists' who appreciate the overall structure and consider domestic violence cases as one single piece in the broader puzzle, which must not undermine the solidity of the general framework.

The time has now come to bridge the gap between the two extremes and the needs associated with each of them. Each and any reasonably supported allegation of domestic violence *must* (and not only should) *always* be taken into consideration by the courts. It is today no longer acceptable that a defence, which is based on alleged domestic violence and shows some piece of evidence, is overlooked or not seriously taken into consideration by the courts, even where this occurs within summary return proceedings and even where (or rather especially where) the evidence provided is poor. Courts are under a duty to guarantee the safety of the child—not only physical safety but also psychological safety as resulting from the emotional balance of the primary caregiver—and this outcome should not be made dependent on the ability of the abducting mother's counsel to argue or to provide sufficient evidence of the case.

Against this backdrop, it is submitted here that this gap could be bridged by relying on ameliorative/protective measures. In most cases (though by no means not in all cases), expeditious, substantively well-defined, and enforceable protection measures will offer the best guarantee that domestic violence cases are not neglected, showing consideration for the risk alleged by the abducting/escaping mother, while at the same time moving within the scope of the 1980 Hague Convention. Of course, a key consideration is that such measures must be effective and enforceable in the State of habitual residence. As has been noted:

The need for cross-border protective measures in return orders has become an essential part of the fabric of 1980 Convention proceedings, and ensuring that we have the right tools for recognition and enforcement is key'. (Momoh 2022, p. 81)

While under the new Regulation this is already the case within the EU, something more needs to be done for other Contracting States. The solution potentially envisaged by the USSC in the *Golan* case is legally sound and should be endorsed—as no Convention provisions formally require any ameliorative or protective measures. Nonetheless, the wrong message may have been given overall, namely that ameliorative measures are not necessary/useful and, at the same time, that domestic violence is not a priority issue for the courts. It is submitted here that the USSC lost the opportunity to send out a clear message that domestic violence is a plague that needs to be fought at all levels and also to provide clearer directions on how to do so within the framework of the Hague Convention. Making continuous references to a literal interpretation of international agreements may have dangerous secondary effects, as this may promote the interpretation that violence committed against the mother is irrelevant. Instead, this would have been a good opportunity to show how to keep this fundamental convention up to date with a changing society and to 'nurture' (Freeman and Taylor 2023) it accordingly so as to stand up for the protection of women.

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References

- Barnett, Adrienne. 2023. *The Hague Abduction Convention: What Needs to Change?* Available online: <https://www.hague-mothers.org.uk/2023/02/25/what-needs-to-change-a-hague-mothers-position-paper/> (accessed on 1 June 2023).
- Beaumont, Paul, Katarina Trimmings, Lara Walker, and Jane Holliday. 2015. Child Abduction: Recent Jurisprudence of the European Court of Human Rights. *International and Comparative Law Quarterly* 64: 39–63. [CrossRef]
- Bergamini, Chiara. 2023. The proposal for a EU directive on combating violence against women and domestic violence. In *Migrant Women and Gender-Based Violence in the International and European Legal Framework*. Edited by Angela Di Stasi, Raffaele Cadin, Anna Iermano and Valentina Zambrano. Napoli: Editoriale Scientifica, p. 487 ss.
- Brief for Amici Curiae. 2021. Brief for Amici Curiae Individuals and Organizations Advocating for victims of Domestic Violence in Support of Petitioner. Available online: <https://www.supremecourt.gov/docket/docketfiles/html/public/20-1034.html> (accessed on 1 June 2023).
- Brief for Amici Curiae. 2022. Brief for Amici Curiae, Professors of Law Linda J. Silberman, Robert G. Spector, and Louise Ellen Teitz, in Support of Respondent. Available online: <https://www.supremecourt.gov/docket/docketfiles/html/public/20-1034.html> (accessed on 1 June 2023).
- Chalas, Christelle. 2023. Les mesures de protection de l'enfant illicitement déplacé et le risque grave de danger: Comparaison de l'office des juges américains et européens. *Revue Critique de Droit international Privé* 1: 37–84.
- Fidler, Nicole. 2023. In Memory of Narkis Golan. *Family Law Quarterly* 56: 271–73.
- Freeman, Marilyn, and Nicola Taylor. 2022. Domestic violence as an aspect of 1980 Hague Child Abduction Convention return proceedings. In *Domestic Violence and Parental Child Abduction: The Protection of Abducting Mothers in Return Proceedings*. Edited by Katarina Trimmings, Anatol Dutta, Costanza Honorati and Mirela Župan. Cambridge: Intersentia Ltd., pp. 39–65.
- Freeman, Marilyn, and Nicola Taylor. 2023. Contemporary Nurturing of the 1980 Hague Convention. *Laws* 12: 65.
- HCCH. 2017. *Draft Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part VI, Article 13(1)(b)*. Prel. Doc. No 3 of June 2017. Available online: <https://assets.hcch.net/docs/0a0532b7-d580-4e53-8c25-7edab2a94284.pdf> (accessed on 1 June 2023).

- HCCH. 2020. *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part VI, Article 13(1)(b)*. The Hague: HCCH Permanent Bureau.
- Honorati, Costanza. 2020. Il ritorno del minore sottratto e il rischio grave di pregiudizio ai sensi dell'art. 13 par. 1 lett. b della Convenzione dell'Aja del 1980. *Rivista di Diritto Internazionale Privato e Processuale* 4: 796–842.
- Honorati, Costanza. 2022. Jurisdiction to take protective measures in the State of refuge in the context of child abduction. In *Domestic Violence and Parental Child Abduction: The Protection of Abducting Mothers in Return Proceedings*. Edited by Katarina Trimmings, Anatol Dutta, Costanza Honorati and Mirela Župan. Cambridge: Intersentia Ltd., pp. 139–60.
- Honorati, Costanza, and Giovanna Ricciardi. 2022. Violenza domestica e protezione crossborder. *Rivista di Diritto Internazionale Privato e Processuale* 2: 225–56.
- Katz, Emma. 2022. *Coercive Control in Children's and Mothers' Lives*. Oxford: Oxford University Press.
- Lindhorst, Taryn, and Jeffrey Edleson. 2012. *Battered Women, Their Children, and International Law: The Unintended Consequences of the Hague Child Abduction Convention*. Boston: Northeastern University Press.
- Mc Eleavy, Peter. 2015. The European Court of Human Rights and the Hague Child Abduction Convention: Prioritising Return or Reflection? *Netherlands International Law Review* 62: 365–405. [CrossRef]
- Momoh, Onyoja. 2022. The need for cross-border protective measures in return proceedings. In *Domestic Violence and Parental Child Abduction: The Protection of Abducting Mothers in Return Proceedings*. Edited by Katarina Trimmings, Anatol Dutta, Costanza Honorati and Mirela Župan. Cambridge: Intersentia Ltd.
- Pahrand, Mishal. 2017. Not Without my Children: The Need for the Modification of International Child Abduction Laws. *Family Court Review* 55: 139–51. [CrossRef]
- POAM Best Practice Guide. 2022. Best Practice Guide—Protection of Abducting Mothers in Return Proceedings, reprinted. In *Domestic Violence and Parental Child Abduction: The Protection of Abducting Mothers in Return Proceedings*. Edited by Katarina Trimmings, Anatol Dutta, Costanza Honorati and Mirela Župan. Cambridge: Intersentia Ltd. Available online: <https://research.abdn.ac.uk/poam/resources/guide-to-good-practice/> (accessed on 1 June 2023).
- Practice Guide. 2022. *Practice Guide for the Application of the Brussels IIb Regulation*. Luxembourg: EC Commission.
- Requejo Isidro, Marta. 2006. Secuestro de menores y violencia de género en la Union Europea. *Anuario Español de Derecho Internacional Privado* 6: 190–92.
- Ripley, Peter. 2008. A Defence of the Established Approach to the Grave Risk Exception in the Hague Abduction Convention. *Journal of Private International Law* 4: 443–77. [CrossRef]
- Trimmings, Katarina. 2013. *Child Abduction within the European Union*. Oxford: Hart Publishing.
- Trimmings, Katarina, Anatol Dutta, Costanza Honorati, and Mirela Župan, eds. 2022. *Domestic Violence and Parental Child Abduction: The Protection of Abducting Mothers in Return Proceedings*. Cambridge: Intersentia Ltd.
- Trimmings, Katarina, and Onyoja Momoh. 2021. Intersection between domestic violence and international parental child abduction: Protection of abducting mothers in return proceedings. *International Journal of Law Policy and the Family* 35: 1–19.
- Trimmings, Katarina, Konstantina Kalaitoglou, Pinsent Masons, and Rima Hussein. 2023. *Protection of Abducting Mothers in Return Proceedings under the 1980 Hague Convention on the Civil Aspects of International Child Abduction*. Policy Brief, July. Available online: <https://www.abdn.ac.uk/law/research/centre-for-private-international-law/index.php> (accessed on 1 June 2023).
- Weiner, Merle. 2021. You Can and You Should: How Judges Can Apply the Hague Abduction Convention to Protect Victims of Domestic Violence. *UCLA Women's Law Journal* 28: 223–332. [CrossRef]
- Wilderspin, Michael. 2022. The Potential Role of Regulation 606/2013 in Protecting the Abducting Parent in Return Proceedings. In *Domestic Violence and Parental Child Abduction: The Protection of Abducting Mothers in Return Proceedings*. Edited by Katarina Trimmings, Anatol Dutta, Costanza Honorati and Mirela Župan. Cambridge: Intersentia Ltd.

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Article

Abducted Child's Best Interests versus the Theoretical Child's Best Interests: Australia, New Zealand and the Pacific

Mark Henaghan *, Christian Poland and Clement Kong

Faculty of Law, University of Auckland, Auckland 1010, New Zealand

* Correspondence: mark.henaghan@auckland.ac.nz

Abstract: A recent trend can be seen in jurisprudence concerning the Hague Convention on the Civil Aspects of International Child Abduction, at least in the Australasia/Pacific region. Courts are now more mindful of the abducted child in particular and will investigate the true impacts of returning the child to determine what is in their best interests, particularly in cases of domestic violence. This is a departure from the long-standing emphasis on returning abducted children promptly to their country of habitual residence, after which the courts of that country will make the final decision, because it is generally in the best interests of children to deter child abduction. This article compares various jurisdictions' approaches with the lens of whether the courts are preferring the particular child over the 'theoretical' child.

Keywords: child settled exception; grave risk exception; child objection exception; human rights exception

1. Introduction

Once the applicant satisfies the jurisdiction requirements for the child's return under the Hague Convention on the Civil Aspects of International Child Abduction (hereafter the Convention), article 12 generally requires the court to order that the child return to their country of habitual residence. This recognises the 'theoretical' child and the presumption that it is generally in the best interests of children to return abducted children promptly, thereby deterring future abductions.

However, the respondent may satisfy one of the exceptions to this under the Convention. These exceptions allow for a greater focus on the individual interests of the particular child who has been abducted. Once these exceptions have been considered by the court, they are weighed against the Convention's purpose to protect children against the harm of child abduction before the court makes a final decision on whether or not to return the child.

This article discusses the shift in jurisprudence concerning the most litigated exceptions under the Convention from what is in the interests of children generally to what is in the interests of the particular child who has been wrongfully removed from their country of habitual residence. The article looks to the jurisprudence in the three countries in the Australasia/Pacific region that are signatories to the Convention: Australia, Aotearoa New Zealand¹ and Fiji (HCCCH 2022). Australia implemented the Convention into domestic law in the Family Law (Child Abduction Convention) Regulations 1986 (hereafter Australia Regulations), and Fiji did the same in its Family Law Regulations 2005 (hereafter Fiji Regulations). New Zealand initially incorporated the Convention in the Guardianship Amendment Act 1991, which was subsequently replaced by subpart 4 of the Care of Children Act 2004. The article also discusses how non-signatory countries in

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¹ Aotearoa is the Māori name for New Zealand, literally meaning 'the long white cloud'. Māori are the indigenous people of Aotearoa.

the Pacific—Samoa, Tonga, Papua New Guinea and the Cook Islands—address international child abduction cases in light of the Convention principles and the particular child’s best interests.

2. Child Settled Exception

This exception is satisfied when the child was removed more than one year before the application was made, and the respondent proves that the child is now settled in their new environment.

2.1. Australia

Australian courts have preferred not to put any particular gloss on the meaning of ‘settled’.² It is given its ordinary meaning. However, several factors that a court can consider to determine if the child is now settled include whether the child appeared content in their current environment; the child’s subjective views of their current circumstances and the weight to be given to those views; whether the respondent has ‘established a stable physical and financial environment’; how embedded the child is in their current community and the ‘nature and circumstance of each child which might impact upon an assessment of whether each child is settled’.³

Unlike New Zealand and Fiji, Australian courts do not have a residual discretion to return a child when the child settled exception is made out.⁴ This puts the particular child as paramount over the ‘theoretical’ child under the Convention. The Australian appellate court noted that New Zealand’s position was different but said that this was because of how each country has implemented the exceptions into domestic law.⁵ New Zealand’s statute puts the child settled exception on par with the other exceptions, whereas the Australian regulations separate the child settled exception from the rest.

2.2. New Zealand

Unlike Australia, New Zealand courts have discussed the meaning of ‘settled’. The question of whether a child is now settled at the date of hearing ‘involves a consideration of physical, emotional and social issues. Not only must a child be physically and emotionally ‘settled’ in the new environment, he or she must also be socially integrated’.⁶

As discussed above, New Zealand courts retain a residual discretion to return a child even when the exception is satisfied. The majority of the Supreme Court in *Secretary for Justice (New Zealand Central Authority) v H J* thought that this discretion should be exercised when ‘the best interests of the particular child [are] outweighed by the interests of other children in Hague Convention terms [so that] to decline return would send the wrong message to potential abductors’.⁷ The majority was concerned about situations where, for example, the abducting parent has concealed the child until they have become ‘settled’.⁸

Unfortunately, this approach was misinterpreted in *Simpson v Hamilton*.⁹ The Court of Appeal held that a ‘significant change of circumstances’ since the Family Court’s decision two years earlier allowed it to refuse to return the child, even though the child settled exception had not been made out, so there was no statutory discretion to do so.¹⁰ The Supreme Court agreed with this approach to reassess the exceptions in light of new evidence but clarified that the child settled exception *was* made out.¹¹ This justified the Court of

² *Director General, Dept of Community Services v M and C* [1998] FamCA 1518, (1998) 24 Fam LR 178 [52], [91].

³ *Department of Family and Community Services v Raho* [2013] FamCA 530 [244].

⁴ *Secretary, Department of Family and Community Services v Magoulas* [2018] FamCAFC 165, (2018) 61 Fam LR 117.

⁵ *Ibid*, [33].

⁶ *Secretary for Justice (New Zealand Central Authority) v H J* [2006] NZSC 97, [2007] 2 NZLR 289 [55]–[57].

⁷ *Ibid*, [50], [85].

⁸ *Ibid*, [87].

⁹ *Simpson v Hamilton* [2019] NZCA 579, [2019] NZFLR 338.

¹⁰ *Ibid*, [78]. See (Henaghan and Poland 2021, pp. 365–70).

¹¹ *Simpson v Hamilton* [2020] NZSC 42, [2020] NZFLR 37 [45].

Appeal’s ability to refuse return but rewrote its judgment in the process. It clearly thought that none of the exceptions were made out.¹²

The Court of Appeal has since opposed the ‘balancing’ approach taken by the majority of the Supreme Court in *Secretary for Justice v H J*.¹³ Instead, the Court of Appeal thought that the discretion should be exercised in the best interests of the particular child, which was Elias CJ’s dissenting view. However, the Court of Appeal made its comments during a case that raised the ‘grave risk’ exception, not the ‘child settled’ exception, so it was not bound to follow the Supreme Court’s approach.

2.3. Fiji

Wati J in *PSJ v TR* determined that the child settled exception was made out and refused to return the children.¹⁴ When they came to Fiji, they were two and three years old—but they were eight and nine years old at the time of the return application.¹⁵ A welfare report was sought, which found that the children were settled in their school environment and that it would be detrimental to remove them from their mother, close relatives and wider community.¹⁶ On the other hand, the children had to change schools regularly because of their mother’s occupation. Wati J dismissed this concern:

‘Initially to settle in a place every parent finds it difficult and there has to be some changes in living places and schools of the children. That does not mean that there is substantial instability in children’s lives because of that.’¹⁷

Once the exception was made out, the Fijian court followed the New Zealand approach, rather than the Australian approach, by determining that the courts do have a residual discretion to consider whether returning the child is appropriate or not.¹⁸ This is despite the identical structure and substance of Australia and Fiji’s respective regulations.¹⁹ Regulation 73(6) of the Fiji Regulations allows a court to make a return order even if any of the exceptions in reg 73(4) are met, but reg 73(4) does not include the child settled exception—which is instead in reg 73(2).²⁰ The Fijian courts do not seem to have justified why they have reached a different position than their Australian counterparts. The practical effect is that the particular child’s best interests must be weighed against the ‘theoretical’ child and their best interests.

3. Grave Risk Exception

Alternatively, the respondent can prove there is a grave risk that returning the child would expose them to physical or psychological harm or otherwise place them in an intolerable situation. This exception requires courts to predict what may happen if the child is returned, based on the evidence.²¹ That prediction does not need to be certain—but it does require, as the Australian courts have put it, clear and compelling evidence of a real risk of exposure to harm.²² ‘Grave risk’ is to be given its ordinary meaning, rather than any narrow or broad construction.²³

Returning a child will always involve some degree of disruption and anxiety, but the grave risk exception contemplates more than that.²⁴ However, if anyone returning

¹² *Simpson v Hamilton* (CA), note 9, [64].

¹³ *LRR v COL* [2020] NZCA 209, [2020] 2 NZLR 610 [99].

¹⁴ *PSJ v TR* [2015] FJHCDF 3 [70].

¹⁵ *Ibid*, [65].

¹⁶ *Ibid*, [66].

¹⁷ *Ibid*, [68].

¹⁸ *Ibid*, [58]; *PSJ v Lal* [2020] FJHCDF 6 [69].

¹⁹ Family Law (Child Abduction Convention) Regulations 1986 (Aus), regs 16(2)–16(3); Family Law Regulations 2005 (Fiji), regs 73(3)–73(4).

²⁰ The Australian court applied this logic to Australia’s equivalent provisions in *Magoulas*, note 4, [18].

²¹ *DP v Commonwealth Central Authority* [2001] HCA 39, (2001) 206 CLR 401 [41]; *LRR v COL*, note 13, [90].

²² *DP*, note 21, [43]; *LRR v COL*, note 13, [90].

²³ *DP*, note 21, [44]; *LRR v COL*, note 13, [87].

²⁴ *DP*, note 21, [45].

to that country would face a grave risk of harm (like warfare or civil unrest), then that is sufficient.²⁵ The welfare of the child is not the paramount consideration, and instead, Australian courts have discussed how the ‘intention’ of the Convention is to severely limit the courts of the country where the child has been taken.²⁶

Australia and New Zealand have taken a similar path regarding the grave risk exception. Historically, the courts would tend to trust the overseas court to resolve disputes and best protect the child.²⁷ The Family Court of Australia, for instance, commented:

‘There is no reason why this court should not assume that once the child is so returned, the courts in that country are not appropriately equipped to make suitable arrangements for the child’s welfare.’²⁸

Nowadays, though, both jurisdictions place greater weight on the impact on the child of the return. Although the HCCH’s *Guide to Good Practice* on art 13(1)(b), published in 2020, is aimed at guiding courts, practitioners and Central Authorities on how to strike the right balance between the particular child and the ‘theoretical’ child, it has not been cited frequently by the courts.²⁹

This section of the article canvasses the recent developments in Australia, New Zealand and Fiji regarding the grave risk exception.

3.1. Australia

The 2020 decision of *Walpole v Secretary, Department of Communities and Justice* reflects a greater understanding of domestic violence and how the primary victim being in danger can constitute a grave risk to their child.³⁰ The mother removed the children from New Zealand to Australia after suffering violence from the father and fearing for her life. As a victim of intimate partner violence, she would struggle to escape the abusive cycle if the children were ordered to return to New Zealand and she accompanied them. This was an intolerable situation for the children, as were poverty and poor living conditions.³¹ Although ‘New Zealand has sophisticated systems in place to protect victims of family violence’, the father continued to inflict violence despite protection orders and imprisonment.³² This meant the children could not be returned, which rightfully placed the children’s best interests above the Convention’s general principle to return children promptly.

The trend seen in *Walpole* was continued in December 2022 with the Family Law (Child Abduction Convention) Amendment (Family Violence) Regulations 2022. This amended the Australia Regulations to ‘provide additional safeguards to parents and children fleeing family and domestic violence’ (*Dreyfus* 2022). The amendment clarifies that when the court is considering if the grave risk exception is made out, the court may—‘regardless of whether the court is satisfied that family violence has occurred, will occur or is likely to occur’—have regard to:

- (a) any risk that returning the child would result in them being subject to, or exposed to, family violence’; and
- (b) the extent to which the child could be protected from such risk.³³

²⁵ *Genish-Grant v Director-General, Department of Community Services* [2002] FamCA 346, (2002) 29 Fam LR 51 [20].

²⁶ *Director-General of Family and Community Services v Davis* (1990) 14 Fam LR 381, FamCAFC, pp. 383–84.

²⁷ See *A v Central Authority for New Zealand* [1996] 2 NZLR 517, CA, p. 522.

²⁸ *Gsponer v Johnstone* (1988) 12 Fam LR 755, FamCAFC, p. 768. See also *Murray v Tam, Director, Family Services* (1993) 16 Fam LR 982, FamCAFC, pp. 1001–02.

²⁹ Our study of the case-law identified only a handful of New Zealand judgments in which the *Guide to Good Practice* has been discussed: *LRR v COL*, note 13, [103]; *Roberts v Cresswell* [2022] NZHC 2337 [59]; *Creek v Hodder* [2022] NZFC 11049 [12]–[13]; *Parish v McDonald* [2022] NZHC 3022 [50], [55]. To our knowledge, the *Guide to Good Practice* has not been discussed by the Australian or Fijian courts. We hope that courts begin to appreciate the helpful guidance in this document and incorporate it into the court’s reasoning.

³⁰ *Walpole v Secretary, Department of Communities and Justice* [2020] FamCAFC 65, (2020) 60 Fam LR 409.

³¹ *Ibid*, [73].

³² *Ibid*, [75].

³³ Family Law (Child Abduction Convention) Regulations 1986 (Aus), reg 16(3) Note 1. “Family violence” is defined in Family Law Act 1975 (Cth), s 4AB(1) to mean ‘violent, threatening or other behaviour by a person

If the court is not convinced that the grave risk exception is made out, the court can still impose conditions on return orders regardless of whether it is satisfied that the risks will, or are likely to, eventuate, and regardless of whether the risk has eventuated in the past or not.³⁴ When proposing that a condition be imposed, the court may take into account its proportionality, reasonable practicability of compliance, enforceability and whether it ‘would usurp the regular functions of the courts or authorities in the child’s state of habitual residence’, as well as any other matters it thinks relevant.³⁵

However, the *quid pro quo* of the amending regulations is that if that court is considering whether to refuse to return the child, and a party or the child’s lawyer raises a possible condition that could be included in the return order to reduce the risks faced by returning the child, the court must consider whether it would be appropriate to impose that condition.³⁶ The court may also consider any other measures reasonably likely to reduce the risks, as well as any other matters it thinks relevant.³⁷

These new Regulations are commendable for signalling to the courts that domestic violence is indeed a relevant and important consideration under the grave risk exception. It is disappointing, however, that they say the court *may* have regard to the risk that returning the child would result in them being subjected or exposed to family violence, rather than saying that the court *must* take into account such a risk.

3.2. New Zealand

3.2.1. LRR v COL

The New Zealand case of *LRR v COL*, decided by the Court of Appeal, was similar to *Walpole*: both courts refused to return the child because of domestic violence concerns, and new evidence was crucial to both decisions. Returning the child in *LRR v COL* would create an intolerable situation because his mother had no other viable options except returning to the father’s violence. She would struggle financially, her frail mental health and suicidal thoughts would probably relapse and her parenting capacity may have been impaired. It was therefore shown that there was a grave risk of harm and an intolerable situation if the child was returned.

While the Court of Appeal thought it was not taking a new direction, the proceeding became an extensive inquiry into the welfare of the child to determine whether the exception was made out.³⁸ The Court specifically held that the paramountcy principle *does* apply to Hague Convention proceedings in New Zealand, which is new.³⁹ This clarifies that if the applicant satisfies an exception under the Convention, they have sufficiently displaced the general presumption that a prompt return is in the child’s best interests. Therefore, at the discretion stage, the courts should now consider the child’s welfare and best interests as the *paramount* consideration, rather than weighing them against the purposes of the Convention (Henaghan and Poland 2021, pp. 373–74). The child should no longer be punished because of ‘countervailing policy objectives pertaining to general deterrence of child abduction worldwide’ (Murphy 2020, p. 43). Australian courts, however, have rejected this argument that the child’s interests can (and should) be paramount in what are ultimately questions of forum rather than the substantive proceeding.⁴⁰

The Court of Appeal also emphasised that courts need to inquire into whether protective measures by the country of habitual residence will actually work to mitigate the

that coerces or controls a member of the person’s family (the family member), or causes the family member to be fearful’, with various examples in s 4AB(2).

³⁴ Family Law (Child Abduction Convention) Regulations 1986 (Aus), reg 15(5).

³⁵ *Ibid*, regs 15(6)–15(7).

³⁶ *Ibid*, reg 16(6).

³⁷ *Ibid*, regs 16(7)–16(8).

³⁸ *LRR v COL*, note 13, [148]. See (Henaghan and Poland 2021, p. 379).

³⁹ *LRR v COL*, note 13, [83].

⁴⁰ *De L v Director-General, New South Wales Department of Community Services* (1996) 187 CLR 640, p. 658. This finding remains the case: (Chisholm and Fehlberg 2022).

grave risk, rather than assume they will.⁴¹ Finally, it would be ‘inconceivable’ to order the child’s return regardless once the grave risk exception is made out—whereas the Australian Family Court in *Walpole* still inquired into whether it should exercise its discretion or not.⁴²

3.2.2. Roberts v Cresswell

LRR v COL’s powerful emphasis of the particular child and their best interests has since been walked back somewhat by the Court of Appeal in *Roberts v Cresswell*.

The case had a turbulent path in the appellate courts. Doogue J in the High Court quashed a Family Court order to return two children to France. Her Honour recognised the importance of the Court of Appeal’s change of approach in *LRR v COL*.⁴³ Courts have previously been unduly narrow when approaching the affirmative defences, when the reality (in her view) is that the Convention puts the best interests of the children at the forefront.⁴⁴ The defences are therefore just as important to the Convention’s effective operation as the jurisdictional grounds.⁴⁵ Hague Convention cases must now be viewed in this different light post-*LRR v COL*.⁴⁶

Applying this approach to the facts, Doogue J found, with the benefit of expert evidence, that the children would find it distressing to be separated from their mother.⁴⁷ The Family Court Judge placed insufficient weight on this fact and wrongly relied on protective measures that *may* be put in place by the father to ensure the children remained in the mother’s care on return to France pending the substantive decision.⁴⁸ The father had intense business commitments that meant that the children would be in an intolerable situation where they were not in either their mother’s or father’s care, given the father’s unwillingness for the mother to care for the children pending the substantive decision.⁴⁹

These matters could have been resolved with Court orders without resorting to the affirmative grave risk defence.⁵⁰ However, the mother provided further evidence that she had been abused by the father and resultingly suffered from PTSD, which would be triggered if she had to return to France with the children. Doogue J found these violent incidents were highly plausible based on the evidence, and, with the benefit of a doctor’s report, that the mother’s mental health deteriorated in France, and this would likely be triggered upon return. The mother had few employment prospects in France, given that she was not fluent in French and she had previously only worked in the father’s business.⁵¹ She would receive State support ‘at the lower end of a standard of living index’, and she had no social network in France.⁵²

Her Honour concluded that the Family Court Judge did not apply *LRR v COL* correctly, overlooked psychiatrist evidence and instead found that the mother was a good parent in both France and New Zealand.⁵³ There was therefore a grave risk of placing the children in an intolerable situation if they were not in their mother’s care as the primary parent, as well as the consequences that would come for the children from their mother’s PTSD likely being triggered and her parenting being impaired. Of course, once the grave risk exception is made out, ‘it is impossible to conceive of circumstances in which . . . it would be a legitimate exercise of the discretion nevertheless to order the child’s return’.⁵⁴

⁴¹ *LRR v COL*, note 13, [113]–[114].

⁴² *Ibid*, [96], [119]; *Walpole*, note 30, [74]–[77].

⁴³ *Cresswell v Roberts* [2022] NZHC 1265 [65].

⁴⁴ *Ibid*, [62].

⁴⁵ *Ibid*, [60].

⁴⁶ *Ibid*, [67].

⁴⁷ *Ibid*, [108].

⁴⁸ *Ibid*, [107].

⁴⁹ *Ibid*, [102].

⁵⁰ *Ibid*, [124].

⁵¹ *Ibid*, [194].

⁵² *Ibid*, [195]–[196].

⁵³ *Ibid*, [202].

⁵⁴ *Ibid*, [57].

However, the Court of Appeal set aside Doogue J’s ruling and reinstated the Family Court order to return two children to France.⁵⁵ The father was permitted by the Court to adduce updated evidence, including evidence from a clinical psychologist that reviewed the mother’s psychiatric evidence that convinced the High Court that a return to France would trigger the mother’s PTSD. Goddard J, writing for the Court, accepted the father’s argument that the mother’s expert’s evidence was too heavily relied upon by the lower court. It did not set out the criteria it used for the diagnosis, and it lacked the balance necessary for expert evidence that is meant to assist the court rather than advocate for one party.⁵⁶ It was the mother’s lawyers’ responsibility to ensure that the evidence was suitable for use in legal proceedings, rather than the expert.⁵⁷ The mother had also since come to contemplate returning with the children to France, and that material change in circumstances was relevant for what the conditions of return would be and how tolerable they will be for the children.⁵⁸ The father applied for a modification that would ensure that the children would not be separated from the mother (their primary carer) for a prolonged period.⁵⁹

Goddard J described *LRR v COL* as a ‘deliberate shift in emphasis’.⁶⁰ This meant the mother’s family violence assertions and her psychological well-being upon return were both relevant factors not to be discounted.⁶¹ However, given the material change in circumstances on appeal, return was far more tolerable—she would not live with the father, she and the children would not be exposed to physical violence and the risk of psychological violence could be controlled.⁶² The Court refused to go into the work opportunities available to the mother in France, but there were options such as remote work, and the father agreed to financially support her and there were certain welfare entitlements available. There were counselling and mental health services available, and the French Family Court could provide further protective measures if needed—which the father would very likely comply with, unlike the father’s history of non-compliance in *LRR v COL*. Simply put, a return to France would result in significant stress for the mother, which would have ‘some adverse effects’ for the children, but that was not a grave risk of an intolerable situation for them. She remained an effective and competent parent when living with the father.

The Supreme Court declined leave to appeal.⁶³ The Supreme Court found that the proposed appeal would only challenge the Court of Appeal’s assessment of the facts, rather than how the approach in *LRR v COL* was applied to those facts.⁶⁴ However, the Supreme Court indicated that it may be open to hearing a future appeal:

‘The high point of the applicant’s proposed appeal is that the reforms reflected in *LRR v COL* are difficult and there is a need in some respects for further exposition of the relevant standard. The only one of the issues raised in this case that, in our view, may raise a question of general or public importance is that relating to the need for a wider understanding of domestic abuse, including recognition of the role of financial disparity, inequality of arms and legal processes in such abuse.’⁶⁵

Roberts v Cresswell, therefore, stands for the proposition that respondents must satisfy that the alleged grave risk does actually exist before the particular child’s best interests become compelling. Where that risk hinges on a psychiatric diagnosis, parties must be careful that their experts present their opinions in a cogent and comprehensive manner. It

⁵⁵ *Roberts v Cresswell* [2023] NZCA 36 [150]–[151].

⁵⁶ *Ibid*, [150]–[151].

⁵⁷ *Ibid*, [152].

⁵⁸ *Ibid*, [164].

⁵⁹ *Ibid*, [167].

⁶⁰ *Ibid*, [192].

⁶¹ *Ibid*, [194].

⁶² *Ibid*, [195].

⁶³ *Cresswell v Roberts* [2023] NZSC 62 [15].

⁶⁴ *Ibid*, [15].

⁶⁵ *Ibid*, [14].

would be preferable for New Zealand courts to appoint one expert (or encourage parties to agree to a joint expert) as part of good case management practice (HCCH 2020, [90]).

3.3. Fiji

In *PSJ v Lal*, Wati J utilised the same principles as Australia and New Zealand.⁶⁶ The onus of proving the exception is on the respondent, and there is a ‘very heavy’ burden of proof.⁶⁷ The harm must be ‘severe and substantial’, and the risk must be much higher than merely ‘unacceptable’.⁶⁸

Her Honour found that the grave risk exception was not met. Although the father had a protection order against him, his supervised contact with the child was positive and there was no evidence to suggest he was inherently violent.⁶⁹ Wati J also thought that conditions could be imposed to ensure the child’s safety upon return.⁷⁰ This decision, therefore, reflects the trend seen in Australia and New Zealand to treat domestic violence as a serious and relevant consideration for the grave risk defence but also to recognise the gravity of the risk required and that the risk may be properly mitigated. This matches the *Guide to Good Practice*, which requires courts to assess whether the effect on the child ‘meets the high threshold of the grave risk exception, taking into account the availability of protective measures to address the grave risk’ (HCCH 2020, [64]).

4. Child Objection Exception

Under Article 13 of the Convention, a court may refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of their views. All three jurisdictions have added another requirement to this exception: that ‘the child’s objection shows a strength of feeling beyond the mere expression of a preference or of ordinary wishes’.⁷¹ Australia and Fiji have added this in their domestic regulations, while New Zealand has imported this requirement through case law.⁷²

In New Zealand, section 106(1)(d) of the Care of Children Act 2004 phrases the exception differently. Instead of whether the child’s views should be taken into account, the question is what weight should be given to their views. However, this does not make a practical difference compared to Australia and Fiji because all three countries agree on the ‘shades of grey’ approach taken by Balcombe LJ in *Re R (Child Abduction: Acquiescence)*.⁷³ This approach assigns different levels of weight to each child’s objection, rather than Millett LJ’s ‘in or out’ approach: if a child is of sufficient age and degree of maturity then the court usually must not return the child against their wishes, but if the child is not of sufficient age or maturity then the court normally must return the child.⁷⁴

All three jurisdictions have developed similar principles for the child objection exception. For instance, the objection must be to returning to the originating country, not to a particular parent.⁷⁵ A child’s objection must be valid, reasonable, freely held and stronger than a mere preference.⁷⁶ The weight that is assigned depends on all the surrounding circumstances, including the child’s age and maturity, as well as the rationality, cogency, strength and independence of their views.⁷⁷ Judges have thought that ten-year-olds or

⁶⁶ *PSJ v Lal*, note 18.

⁶⁷ *Ibid*, [72].

⁶⁸ *Ibid*, [73].

⁶⁹ *Ibid*, [81].

⁷⁰ *Ibid*, [85].

⁷¹ Family Law (Child Abduction Convention) Regulations 1986 (Aus), reg 16(3)(c)(ii).

⁷² *S v M* [1993] NZFLR 584 (FC) 591; *Karly v Karly* [2017] NZFC 10030 [52].

⁷³ *Re R (Child Abduction: Acquiescence)* [1995] 1 FLR 716, CA.

⁷⁴ *De L*, note 40, 656; *White v Northumberland* [2006] NZFLR 1105, CA, [38]; *PSJ v VK* [2018] FJHCDF 1 [84].

⁷⁵ *De L*, note 40, 655; *Karly*, note 72, [52]; *PSJ v VK*, note 74, [84].

⁷⁶ *S v M* [1993] NZFLR 584 (FC) 591; *Karly*, note 72, [52].

⁷⁷ *RCB v Forrest* [2012] HCA 47, (2012) 247 CLR 304; *S v S* [1999] 3 NZLR 513, HC, pp. 522–23; *Robinson v Robinson* [2020] NZHC 1765 [83]–[85]; *PSJ v VK*, note 74, [84]–[86].

younger are usually too young to assign their views any weight, but there are examples where considerable weight has been attached to the views of eight- and nine-year-olds (Caldwell 2008, pp. 85–86). Usually little to no weight is given to a child’s views that have been influenced by the abducting parent.⁷⁸ Finally, when exercising the residual discretion, ‘the court must balance the nature and strength of the child’s objections against ‘the Convention considerations’ like comity and deterring future abductions, also known as the ‘theoretical’ child.⁷⁹

For example, the child in *PSJ v VK* said she grew an attachment to her family in Fiji.⁸⁰ She did not enjoy living in New Zealand, as she was bullied there and suffered physical abuse and neglect from her mother.⁸¹ Despite only being seven years old, the courts acknowledged that she had a sufficient degree of maturity to freely recognise what was in her best interests.⁸² Wati J ordered that she should not be returned.⁸³

5. Human Rights Exception

The human rights exception, under article 20 of the Convention, applies when the child’s return is not permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms. However, it is not litigated often and can be misunderstood (Davies 2013). For instance, the New Zealand Family Court held that Fiji’s military coup and resulting restrictions on movement and expression did not satisfy this exception.⁸⁴ It thought that more harm was required, which conflates the exception with the grave risk exception and misunderstands that ‘[t]he breach of a right is itself a harm’ (Davies 2013, p. 237).

In *Peterson v Piripi*, the mother argued that if her tamariki Māori (Māori child) was returned to Australia, the child would no longer be surrounded and absorbed by the whānau hapū (sub-tribe), culture, whenua (lands), language and her birthright.⁸⁵ The mother was of the view that the Hague Convention was trying to usurp hapū tikanga and undermining the hapū’s right to self-determination, which was never ceded. Tikanga, the customary laws of the Indigenous Māori people of Aotearoa, is the first law of Aotearoa New Zealand and remains a part of the country’s common law.⁸⁶

Judge Howard-Sager considered this argument within the context of the human rights exception to the Hague Convention. In this case, the child had many maternal whānau (family) members in Australia who could help maintain the child’s connection with their culture until the Australian courts decide on the substantive care and contact issues. Indeed, her whānau had whanaungatanga (kinship) obligations to the child to ensure she remains engaged with her culture. This meant that the child’s right to engage with her cultural heritage should not be impacted by return.⁸⁷

As for the argument regarding hapū sovereignty and self-determination, Judge Howard-Sager was clear that the case was concerned with the child, not the hapū. It was not proven that the child was able to whakapapa (prove ancestral ties) to the hapū, nor that the child had a whāngai (customary adoption) link to the hapū.⁸⁸ Therefore, the Judge was not satisfied that the hapū’s tikanga was applicable to the child.⁸⁹ This

⁷⁸ *Director-General, Department of Child Safety v Milson* [2008] FamCA 872 [90]; *Robinson*, note 77, [84]; *PSJ v VK*, note 74, [84]–[86].

⁷⁹ *Milson*, note 78, [88]–[89].

⁸⁰ *PSJ v VK*, note 74.

⁸¹ *Ibid.*, [95].

⁸² *Ibid.*, [91].

⁸³ *Ibid.*, [108].

⁸⁴ *APN v TMH [Child abduction: grave risk and human rights]* [2010] NZFLR 463, FC.

⁸⁵ *Peterson v Piripi* [2023] NZFC 2584 [126].

⁸⁶ *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 [18]–[23].

⁸⁷ *Peterson v Piripi*, note 85, [139].

⁸⁸ *Ibid.*, [141]–[148].

⁸⁹ *Ibid.*, [149].

meant there could be no argument that returning the child would usurp the hapū's right to self-determination and breach their tikanga. The child was ordered to return to Australia.

The case provides a novel argument concerning the interplay between tikanga Māori and the human rights exception under the Hague Convention. The particular child and their particular situation and best interests demanded that they not be returned because this would be contrary to their hapū's sovereignty, tikanga and cultural heritage. The Convention, however, required that the child be returned because none of the Convention exceptions could be satisfied to the evidentiary levels required by Western courts.

This raises a sensitive issue about filing whakapapa evidence, which is a taonga and may be considered tapū (cultural restriction).⁹⁰ It is understandable that the mother would not want to file such evidence. If such evidence was filed and accepted, it seems that the Judge may have considered that returning the child would be a breach of applicable tikanga rights and freedoms (such as sovereignty and self-determination) and so the defence would have been made out.⁹¹ However, there were also tikanga obligations (such as whanaungatanga) on the child's family to ensure the child received cultural guidance while in Australia. These obligations may have made the evidence redundant and led to the same conclusion: that returning the child to Australia would not breach the child's human rights and fundamental freedoms.

6. Approaches from Some Non-Hague Convention Pacific Countries

Fiji is the only jurisdiction in the Pacific region that has signed the Convention. However, the courts of other Pacific countries have outlined the process they take for alleged child abductions. It is interesting to analyse how each jurisdiction balances a particular child against more general and theoretical concerns with international child abduction.

6.1. Samoa

Wagner v Radke clarified Samoa's approach to international child abduction.⁹² First, Sapolu CJ outlined that it is appropriate to apply the principles and policy of the Convention and have regard for the common law. The principles were incorporated as a matter of customary international law, which automatically forms part of Samoa's domestic law even if Samoa was not a signatory to the Convention.

At common law, the question is whether it is more appropriate for the court of habitual residence to determine the matter, or if the current court is the appropriate forum to consider orders other than returning the child immediately.⁹³ Crucially, the welfare of the child is the *paramount* consideration. Under the Convention, the general rule is that abducted children are returned promptly to their country of habitual residence. This does not necessarily align with the welfare and best interests of the child.

Nonetheless, Sapolu CJ's mixed approach first allowed him to consider whether Samoa was the appropriate forum. However, all the relevant witnesses were overseas, and the family's permits to remain in Samoa had expired so any custody order from the Samoan courts would be short-lived. The Convention encourages the child's prompt return, and none of the exceptions were satisfied. Ultimately, it was in the welfare and best interests of the child for the German courts to determine custody.

The Samoa Family Law Commission is currently undertaking a review of family law. The Ombudsman and National Human Rights Institution have recommended that Samoa become a signatory to the Convention. This would 'reinforce and solidify the bearing of such international law locally'.⁹⁴

⁹⁰ Ibid, [142].

⁹¹ Ibid, [152].

⁹² *Wagner v Radke* [1997] WSSC 6, (2005) 1 PHRLD 67.

⁹³ Ibid, referring to *Re L (Minors) (Wardship: Jurisdiction)* [1974] 1 WLR 250, CA; *Re F (A Minor) (Abduction: Custody Rights)* [1991] Fam 25, CA; and *Re A (Minors) (Abduction: Custody Rights)* [1992] Fam 106, CA.

⁹⁴ Office of the Ombudsman/National Human Rights Institution Samoa, *Submission on the Review of Family Laws of Samoa* (9 February 2021) 4.

6.2. Tonga

Another approach was taken by the Supreme Court of Tonga in *Gorce v Miller*.⁹⁵ Unlike Samoa, the Court reinforced Tonga's intention to not sign the Convention. Instead, the Supreme Court of Tonga applied English case law decided before 1985 (as *Wagner v Radke* discussed). The Court did not apply case law from after 1985 because the United Kingdom had ratified the Convention from then on, so case law from after 1985 would embody principles that Tonga had not subscribed to itself. Although the Convention and its general principle to promptly return the child was not applicable, it was in the child's best interests for them to be returned.

6.3. Papua New Guinea

Instead of adopting the common law or Convention's approach, the courts of Papua New Guinea utilised its own legislation to justify returning an abducted child. Charmain Backhouse was successful in her child being returned to Australia using the Lukautim Pikinini Act 2015, which has the purpose to promote and protect the welfare of the child (Fox 2020).⁹⁶ This is the only instance where this statute has been used in a child abduction case. The Act has a broader focus on the best interests of that particular child generally with no particular guidelines regarding child abduction, which has left the courts with wide discretion.

6.4. Cook Islands

Lastly, in *Marsters v Richards*, the Cook Islands High Court did not conclusively decide if the Convention principles were applicable or not.⁹⁷ Either way, returning the child was in their welfare and best interests, which is the paramount consideration under the Infants Act 1908 (NZ). The general presumption is to return the child, as this is usually in the child's best interests. The courts should take international law into account, and it was possible that the Convention formed a principle of customary international law against child abduction.

7. Conclusions

The law on international child abduction in the Australasia/Pacific region is constantly evolving, and a consistent pattern can be seen where courts are more concerned with the particular child involved in the proceedings.

When exercising residual discretion once an exception to return is made out, New Zealand courts have not clarified what weight should be given to the child's welfare and best interests. The New Zealand Supreme Court in *Simpson v Hamilton* preferred to balance the general concerns of upholding the Convention against the welfare and best interests of the particular child, and on the facts, it was in the child's best interests for the child to remain in New Zealand. However, the Court of Appeal in *LRR v COL* thought that the paramountcy principle applies to Convention proceedings. The *LRR v COL* case was in the context of proven allegations of violence, where courts are less reluctant to move away from the purposes of the Convention. This issue remains open for debate, as although the Supreme Court declined leave to appeal in *Roberts v Cresswell*, it signalled that it was open to hearing future cases in this area.

A key area for the Convention in the future is the grave risk exception, especially as it is the most litigated and successfully used exception, accounting for 25 percent of judicial refusals globally (Lowe and Stephens 2018), and because of the HCCH's development of the *Guide to Good Practice* on the grave risk exception.

Historically, courts tended to defer to the overseas court to make the final decision. This meant that the child was normally returned because it is in the best interests of children

⁹⁵ *Gorce v Miller* [2003] TOSC 46, (2005) 1 PHRLD 8.

⁹⁶ Lukautim Pikinini Act 2015, s 5(1).

⁹⁷ *Marsters v Richards* DP 4/2008, (2011) 3 PHRLD 8.

generally to deter child abduction. Now, cases like *Walpole* in Australia and *LRR v COL* in New Zealand showcase a fresh approach that investigates the true impacts of returning the child to a grave risk or intolerable situation. This aligns with the *Guide to Good Practice*'s advice in cases involving domestic violence allegations to focus on 'the effect of domestic violence on the child upon his or her return' (HCCH 2020, [58]). However, cases such as *Roberts v Cresswell* in New Zealand and *PSJ v Lal* in Fiji remind us that 'courts should consider the availability, adequacy and effectiveness of measures protecting the child from the grave risk' (ibid., [59]).

The welfare and best interests of the particular child have entered the analysis, which is a positive development because the particular child should not suffer because of the 'theoretical' child (Murphy 2020, p. 43). The Convention's role of deterring child abduction is less overriding when it comes to ensuring the best interests of the particular children involved (ibid.). This is also the approach taken by all four non-signatory Pacific countries discussed in this article. They have the child's welfare and best interests at the heart of the inquiry because they are not bound to follow Convention procedures. However, they still recognise that child abduction is wrong and that children should be returned where practicable.

Cases involving grave risks to children and intolerable situations, particularly where the child's primary caregiver experienced violence, are now rightly given individual attention to ensure that each particular child who faces these circumstances does not suffer any harm. As a general rule, if the children are suffering a risk of harm, they are not returned because their individual interests are given more weight than the traditional policy of the Convention, which is to return children in most cases on the assumption that the authorities in their country will protect them.

This article has shown that it is inevitable that the wording and thrust of the Convention will be interpreted differently, even between countries like Australia and New Zealand that have much in common yet still have different approaches. The approaches are likely to be even more diverse between countries of different histories or cultures. The article also highlights the need for the Convention to remain fit for purpose, with the practice continuing to evolve to reflect changing circumstances and the nature of abductions. For example, children's views have emerged as an essential part of family law decision-making, but the child objection exception has been interpreted narrowly and does not reflect current thinking on child participation.

Finally, non-signatory states, such as the Pacific countries mentioned in this article, generally follow the Convention principles. Efforts should continue to be made to encourage and support these countries to sign on to the Convention, although it could be argued that the Convention is outdated and unnecessary given modern advances in technology. The courts in the country of habitual residence could instead conduct a remote hearing to determine the care and contact issue while the child remains overseas. This would prevent proceedings from dragging on, with potentially multiple courts hearing the Convention case and then multiple courts hearing the substantive case regarding care and contact. It would also satisfy the often-touted 'purposes of the Convention'—such as deterring future child abductions and preventing forum-shopping—because the case would always be heard by the most appropriate forum, namely the courts of the country of habitual residence. The interests of the particular child would govern the outcome of the dispute from the get-go.

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References

- Caldwell, John. 2008. The Hague Convention and the “child objection” defence. *New Zealand Family Law Journal* 6: 84–93.
- Chisholm, Richard, and Belinda Fehlberg. 2022. The High Court and family law: The Hague child abduction cases. *Australian Journal of Family Law* 35: 39–67.
- Davies, Jessica. 2013. Untapped Potential: Rethinking the Human Rights Defence in International Child Abduction. *New Zealand Family Law Journal* 7: 235–47.
- Dreyfus, Mark. 2022. Ensuring family safety in Australian Hague Convention cases. In *Attorney-General’s Department*; December 12. Available online: <https://ministers.ag.gov.au/media-centre/ensuring-family-safety-australian-hague-convention-cases-12-12-2022> (accessed on 6 July 2023).
- Fox, Liam. 2020. Australian woman gains custody of her son five years after he went to PNG with his father. *ABC News*, January 28. Available online: <https://www.abc.net.au/news/2020-01-28/australian-woman-gains-custody-of-child-in-png-after-five-years/11905932>(accessed on 21 June 2023).
- HCCH. 2020. *Guide to Good Practice under the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Part VI, Article 13(1)(b)*. The Hague: The Hague Conference on Private International Law—HCCH Permanent Bureau.
- HCCH. 2022. Status Table. Available online: www.hcch.net/en/instruments/conventions/status-table/?cid=24 (accessed on 21 June 2023).
- Henaghan, Mark, and Christian Poland. 2021. How New Zealand Courts Approach Difficult Hague Convention Cases. In *International Survey of Family Law 2021*. Edited by Margaret Brinig. Cambridge: Intersentia, pp. 357–80.
- Lowe, Nigel V., and Victoria Stephens. 2018. Global Trends in the Operation of the 1980 Hague Abduction Convention: The 2015 Statistics. *Family Law Quarterly* 52: 349–84.
- Murphy, Clare. 2020. International child abduction and the rights of those abducted: Is New Zealand honouring its commitment to children? *New Zealand Family Law Journal* 10: 37–46.

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Article

Concurrent Convention and Non-Convention Cases: Child Abduction in England and Wales

Rob George ^{1,2,*} and James Netto ^{3,*}

¹ Faculty of Laws, University College London, London WC1E 6BT, UK

² Harcourt Chambers, London EC4Y 9DB, UK

³ The International Family Law Group, London EC2V 6AA, UK

* Correspondence: rob.george@ucl.ac.uk (R.G.); james.netto@iflg.uk.com (J.N.)

Abstract: The courts of England and Wales permit applicants in 1980 Hague Convention child abduction proceedings also to bring concurrent applications for the return of the child to their state of habitual residence based on a summary welfare assessment, which can be issued and heard alongside the Hague application. Given the different nature of these two applications, having them heard concurrently raises a number of challenges for the parties in terms of the evidence required and for the court in terms of the analytical process being undertaken. This article explores the nature of the two applications, the reasons why they might be brought concurrently, and the challenges that can arise in such cases.

Keywords: abduction; 1980 Hague Convention; non-Convention abduction cases; court procedure; concurrent applications

1. Introduction

When it applies, the 1980 Hague Convention on the Civil Aspects of International Child Abduction provides a robust and effective legal remedy to child abduction.¹ It operates as a sort of ‘forum’ convention, where the welfare of the particular child concerned is not the court’s paramount consideration.² By contrast, in abduction cases where the Convention does not apply—colloquially termed ‘non-Convention cases’—the court in England and Wales applies a welfare jurisdiction and determines, often based on a *summary* assessment of welfare, whether the child should be returned to the previous home country or not. While there is no presumption in favour of a return order in non-Convention cases, such orders are not unusual; judges are instructed that they ‘may find it convenient to start from the proposition that it is likely to be better for a child to return to his home country for any disputes about his future to be decided there’.³ Crucially, although the classic case for this non-Convention approach to be applied is where the relevant other state is simply not a signatory to the 1980 Convention, it can also be used even when the Convention is applicable to the case, with the non-Convention application heard either concurrently with the Hague application or subsequently.

Our interest in this article is not with considering the general case law in England concerning either Convention or non-Convention cases, but in examining cases where an applicant runs their case under *both* of these jurisdictions concurrently. While the number of *reported* cases addressing this issue is relatively modest (we think there are about a dozen

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¹ In a continuation of a long-standing pattern, in 2015 England and Wales returned 57% of children in applications under the Convention against a global average ‘return rate’ of 45%: (Lowe and Stephens 2018).

² The welfare of children *generally* is safeguarded by the operation of the Convention; the Preamble to the Convention states that parties to the Convention are ‘[f]irmly convinced that the interests of children are of paramount importance in matters relating to their custody’.

³ *Re J (Abduction: Rights of Custody)* [2005] UKHL 40, [2006] 1 AC 80, [32].

reported decisions, though they are difficult to search for), our experience in practice⁴ is that it is common for cases to be pleaded simultaneously under both legal routes.⁵ More often than not, when deployed simultaneously, our experience is that the Hague application becomes the firm focus of the case, and the non-Convention return is given little more than cursory attention. However, with both applications live, litigants are able to rely on both as the case develops.

As we set out below, the English approach appears to be very unusual when seen in an international context. The English approach of allowing concurrent applications to be made demonstrates an important power of domestic law to supplement the provisions of the 1980 Hague Convention in responding to international child abduction, and the fact that similar provisions are not deployed in other states is notable. There are also serious challenges, though. One view is that a parent whose child has been wrongfully removed or retained should be able to deploy any remedy available to them as swiftly as possible, noting the long-term harms caused to children by child abduction (Freeman 2006, 2014). Against that, as we identify in this article, there are significant challenges that arise from the concurrent approach. Concurrent applications raise questions about the fairness of the procedure in individual cases, rely on intellectually different exercises and ask fundamentally different questions, and consequently can create practical difficulties in marshalling and analysing appropriate evidence for two applications. The particular challenge is that a court focused on a 1980 Hague case may find itself making a welfare decision with an inadequate evidential basis and where, had the case been run fully grounded on the individual child's welfare, different procedures might have been adopted and a different outcome reached.

2. Non-Convention Child Abduction Cases

It is trite to observe that international child abduction is a problem that existed long before the 1980 Convention, the Convention being, of course, a response to a problem that had been identified many years earlier. The pre-Convention approach of the English courts drew on the High Court's powers in wardship and under its inherent jurisdiction, based on a welfare assessment.⁶ Though grounded in the individual child's best interests, the courts not only permitted but were broadly favourable to return orders being made, requiring children to be returned to their previous home country following an abduction. While some cases have approached these applications on the basis of a full welfare enquiry,⁷ the modern approach to non-Convention cases generally focuses on a summary procedure whereby the court considers little or no oral evidence and determines the welfare issue on a summary basis.⁸ Welfare evidence is provided to the court in the form of written statements and, often, a welfare report from a social worker at Cafcass (the Child and Family Court

⁴ Because this issue is often pleaded but not often reported, we rely to some extent on our experience in practice. James Netto is a Partner at the International Family Law Group in London; his practice focuses on international children cases and he typically runs and oversees dozens of child abduction cases each year. Rob George is a barrister practising from Harcourt Chambers; his practice also focuses on international children cases, and he is involved with around 20 child abduction cases each year, instructed by numerous solicitors. Both authors have also spoken with colleagues who practise in child abduction law in England and Wales, to broaden our understanding beyond our own direct experience.

⁵ See, e.g., *W v Z* [2023] EWHC 469 (Fam); unlike the cases we focus on in this article, in that case the applicant mother accepted that the court would address the Hague application first and, only if that application was unsuccessful, then move on to consider her application under the inherent jurisdiction at a later hearing. See also the earlier examples of *W and W v H (Child Abduction: Surrogacy) (No 2)* [2002] 2 FLR 252: the intended parents in a surrogacy arrangement had earlier lost their Hague Convention return application ([2002] 1 FLR 1008), but Hedley J subsequently ordered the child's return to California pursuant to the inherent jurisdiction.

⁶ *Re L (Minors) (Wardship: Jurisdiction)* [1974] 1 WLR 250.

⁷ *Re L*, *ibid.*, involved (as the headnote puts it) 'a full investigation of the facts with evidence from both parties' heard over two days. It remains possible for the court to consider a return order application on full evidence: the authors acted in a non-Hague abduction case that involved a 10-day fact-finding hearing and a further 3-day welfare hearing in 2021: *F v M* [2021] EWHC 553 (Fam).

⁸ As Moylan LJ has pointed out, this process is often termed 'summary return', but that phrase is inapt. The descriptor is an inaccurate 'shorthand for a return order made after a summary welfare determination': *Re A and B (Children) (Summary Return: Non-Convention State)* [2022] EWCA Civ 1664, [3].

Advisory and Assessment Service), assessed by the judge following submissions from the parties' lawyers.

This approach is not without its critics,⁹ but is designed to allow the court to respond speedily to child abduction cases and minimise the extent to which the passage of time becomes a significant factor in the welfare determination. While there may be some passing similarity between this approach and the position of summary return orders under the 1980 Convention, the more recent authorities have stressed that non-Convention cases are not to be approached on the same basis as Convention cases. In Baroness Hale's words, '[t]here is no warrant, either in statute or authority, for the principles of The Hague Convention to be extended to countries which are not parties to it'.¹⁰ More generally, Moylan LJ has stressed that 'the exercise in which the court is engaged when the court is determining an application for a return order under [the court's powers outside the 1980 Convention] ... is *not* the same as when the court is determining an application for the return of a child under the 1980 Convention'.¹¹ Lord Wilson went perhaps further in saying that the court's approach under the Convention is 'entirely different' from an assessment under the inherent jurisdiction.¹² The reason for this difference of approach stems from the nature of the 1980 Convention. The decision of a State A to sign up to the Convention's rules, and the separate decision of each existing signatory state¹³ to accept State A's accession, involves an acceptance of the Convention's rules and a presumptive mutual respect for the legal processes of the other state. This separate system and reciprocity do not exist in child abduction cases outside the Convention, and so the approach to Convention cases cannot be extended to non-Convention situations.

Despite the fact that the Convention approach plainly does not apply to non-Convention cases, the English courts nonetheless take the view that return orders, based on a summary assessment of the child's welfare, should be made in many cases. The English approach to non-Convention cases appears to be relatively unusual by international standards. The International Academy of Family Lawyers (IAFL) surveyed its members from 17 jurisdictions in 2019 (Scott 2019). Their responses found that many jurisdictions do not consider return applications to non-Convention states at all, and of those that do, most are 'generally sparing in the use of this power' (Scott 2019, para. 6(iii)). Going further and considering concurrent or consecutive applications specifically, the Irish High Court has held that if an abduction falls within the scope of the 1980 Convention (in the sense that both relevant states are signatories to it), an application under the inherent jurisdiction would be contrary to principle: 'To use the inherent jurisdiction to make an order returning these children to Australia after holding that they are habitually resident in Ireland would be to circumnavigate the content and the principles of the Hague Convention'.¹⁴

3. Mechanisms under Which the Non-Convention Application Can Be Made

There are numerous possible legal responses in English law to a child abduction case outside the 1980 Convention.¹⁵ Some of these relate to other international law mechanisms,

⁹ See, e.g., Holman J in *EF v LC* [2019] EWHC 3791 (Fam), [6], in the context of a case concerning serious allegations of sexual abuse: 'I have, frankly, found this an increasingly unsatisfactory procedure or process as the hearing has progressed. I am being asked to make a welfare judgment on the basis of very partial evidence and a relatively perfunctory inquiry.'

¹⁰ Re J, [22].

¹¹ *Re A and B (Children) (Summary Return: Non-Convention State)* [2022] EWCA Civ 1664, [3] (original emphasis). See also the explanation of the different processes by Holman J in *EF v LC* [2019] EWHC 3791 (Fam), [2]–[4].

¹² *Re NY (Abduction: Jurisdiction)* [2019] UKSC 49, [2019] 3 WLR 962, [24].

¹³ Or, in the case of EU states, the collective decision of the European Union: *Opinion 1/13 of the Court* (Grand Chamber) dated 14 October 2014.

¹⁴ *KW v PW* [2016] IEHC 513, O'Hanlon J.

¹⁵ The same is true in some other states. In New Zealand, for example, an application can be brought: (i) as a form of relocation application pursuant to the powers under the Care of Children Act 2004; (ii) as an argument in relation to forum conveniens, such as in the unreported case of *AMD v MMN*, 8 July 2011, Judge E Smith sitting in Christchurch; (iii) by the equivalent to wardship proceedings, having children placed in the guardianship of the High Court and then summary return orders made, as in *SG v DSG* [2019] NZHC 1015 (there, return

such as the 1996 Hague Child Protection Convention¹⁶ or the European Convention on the Recognition and Enforcement of Decisions concerning Custody of Children and on the Restoration of Custody of Children 1980,¹⁷ but our interest in this paper is in the intersection of 1980 Hague cases and English domestic law remedies. As we go on to show, there are two main domestic law remedies—an application under the Children Act for (usually) a specific issue order under s 8, or an application invoking the High Court’s inherent jurisdiction or wardship powers. As it is of some relevance to the argument, we pause briefly to note that each of these applications is made on a different form. An application under the Hague Convention is made on Form C67; an application under the inherent jurisdiction is on Form C66; and an application under the Children Act for a private law remedy is under Form C100. Forms C66 and C67 can be issued *only* in the High Court;¹⁸ conversely, a C100 can be issued *only* in the Family Court (though the proceedings can then be *transferred* to be heard in the High Court).¹⁹ In practice, this technicality should make little difference as Judges of the High Court can sit as Judges of the Family Court, and the court rooms at the Royal Courts of Justice in London are courts of both the High Court and the Family Court.

It is also possible for orders to be made without any formal application, if the court is otherwise seised of proceedings in relation to the family. The court (either the Family Court or the High Court) can make a private law order under the Children Act of its own motion in any ‘family proceedings’;²⁰ family proceedings include any application under the inherent jurisdiction but do *not* include a 1980 Hague application.²¹ Separately, the High Court²² can invoke the inherent jurisdiction of its own motion, seemingly in any proceedings before it including 1980 Hague proceedings, though this is not stated in any Act or court rules.²³

Domestic Law Remedies

By far the most common is an application under domestic law for one of two orders: a specific issue order under s 8 of the Children Act 1989, or an order under the powers of the High Court’s inherent jurisdiction.²⁴ As this is our main concern in relation to what we term concurrent applications, we set this out here in some detail.

An application under the Children Act 1989 is for a specific issue order pursuant to the court’s powers in s 8. This type of order can be used to regulate any aspect of parental responsibility in relation to a child. Orders can be made in relation to any child up to the age of 18, but orders in relation to 16 and 17 year olds should be made only if the circumstances are ‘exceptional’.²⁵ There is clear authority at the highest level that a specific issue order

orders from India to New Zealand); and (iv) by application for writ under the Habeas Corpus Act 2001, as in *Olsson v Culpán* [2017] NZHC 215 (summary return from New Zealand to Abu Dhabi) and *Kaufusi v Klavenes* [2010] NZHC 1555.

¹⁶ *Re J* (1996 Hague Convention: Morocco) [2015] EWCA Civ 329, [2015] 3 WLR 747 makes clear that the 1996 Convention can, in the right circumstances, be used to respond to child abduction.

¹⁷ The specific powers in relation to cases of what it terms ‘improper removal’ are under Article 8 and 9. For an example, see *T v R* (Abduction: Forum Conveniens) [2002] 2 FLR 544.

¹⁸ FPR 2010, r 12.45 and 12.36, respectively.

¹⁹ FPR 2010, r 5.4.

²⁰ Children Act 1989, s 10(1)(b); ‘family proceedings’ are defined in s 8(3)–(4).

²¹ Children Act 1989, s 8(3) and (4).

²² The Family Court cannot invoke the inherent jurisdiction.

²³ *Re NY* [54].

²⁴ These powers are also used in relation to so-called outward abduction cases, where a child has been removed from England and Wales to another state. Separately, in a different use of the phrase, the inherent jurisdiction is sometimes used to justify the English court’s claim to having jurisdiction in relation to an abducted child who is no longer within England and Wales based on the child being a British national, but this is not our concern in this article.

²⁵ Children Act 1989, s 9(6).

can be used to effect the return of a child following an abduction,²⁶ and indeed that this should be the preferred legal route unless there are reasons to adopt an alternative path.²⁷

The inherent jurisdiction is the name used for the High Court's ancient powers to make orders for the care or protection of children; these powers include the ability to make a child a ward of court, though the powers are wider than that (Lowe and White 1986). Although reinforced by some statutory provisions,²⁸ the powers are derived from the Crown's claimed right and duty to defend its citizens. There is no statutory code and, while there are restrictions on the exercise of the inherent jurisdiction's powers,²⁹ the actual powers themselves are said to be 'theoretically limitless'.³⁰ There is no doubt that the scope of the inherent jurisdiction includes making order for the return of a child following an abduction,³¹ and indeed in our experience this remains the most common legal route used in the English courts.

In many ways, applications under s 8 or under the inherent jurisdiction are interchangeable, although specific practical considerations may apply, as explored in more detail below. In our experience, there is often no particular legal reason why one is chosen rather than the other;³² Though a focus on the inherent jurisdiction may flow from the greater access to legal aid for those applications (which we address later), along with '[t]he instinctive reaction of the English lawyer in these circumstances . . . to reach for the inherent jurisdiction'.³³ However, both legal routes allow the court to make an enforceable order for the immediate return of a child from one country to another, which may or may not also involve a determination of child arrangements issues concerning the care of the child or contact with a parent following that return. While the English court uses these orders in relation both to children who have been abducted to England and Wales and those abducted from it to another country,³⁴ our interest with concurrent application cases is only with children who have been wrongfully brought to this country.

The question of whether it was permissible to use the inherent jurisdiction when there was a statutory remedy available under the Children Act was subject to specific consideration by the Supreme Court in *Re NY (Abduction: Jurisdiction)*.³⁵ Contrary to the appellant's arguments,³⁶ Lord Wilson held that it was permissible to bring an application under either route. In rejecting the argument that, where a specific issue order could be sought, it should not be permissible to apply under the inherent jurisdiction, Lord Wilson said:

²⁶ The leading authority on non-Hague child abduction is *Re J (Abduction: Rights of Custody)* [2005] UKHL 40, [2006] 1 AC 8, where the order in question was a specific issue order under s 8.

²⁷ *Re NY (Abduction: Jurisdiction)* [2019] UKSC 49, [2019] 3 WLR 962; *Re N (A Child)* [2020] EWFC 35.

²⁸ Senior Courts Act 1981, s 41 and Sched 1, para. 3(b)(ii), for example.

²⁹ *HB v A Local Authority and the Local Government Association* [2017] EWHC 524 (Fam), [50].

³⁰ See, e.g., *Re X (Wardship: Jurisdiction)* [1975] Fam 47, 57 (Lord Denning MR), 60 (Roskill LJ) and 61 (Sir John Pennycuik), though all referring to the limitations on the court in terms of whether it will exercise that jurisdiction; see also *Re W (Medical Treatment: Court's Jurisdiction)* [1993] Fam 64, 81 (Lord Donaldson MR).

³¹ The classic authority is *Re L (Minors) (Wardship: Jurisdiction)* [1974] 1 WLR 250; See generally Lowe and White (1986, chp. 17). On the history of the English court's approach, see Lowe and Nicholls (2016, para. 30.6 et seq).

³² There are some differences, though, which can matter in other contexts. For example, in an outward abduction where the English court's jurisdiction may be in doubt, an application for a s 8 order will be caught by the jurisdictional rules of the Family Law Act 1986, whereas an application under the inherent jurisdiction for a 'bare' return order will not unless it also includes an application in relation to the custody, care and control, or education of the child concerned. See *A v A (Children: Habitual Residence)* [2013] UKSC 60, [2014] AC 1, [28], though it is a question of substance rather than of form, with the court looking both at the application and at the applicant's substantive statement to determine whether what s/he is seeking falls within the 1986 Act's jurisdictional rules or not: see *Re A (A Child) (Habitual Residence; 1996 Hague Child Protection Convention)* [2023] EWCA Civ 659, [62].

³³ *Re J (1996 Hague Convention: Morocco)* [2015] EWCA Civ 329, [2015] 3 WLR 747, [74].

³⁴ The law and procedures are the same: *Re N (A Child)* [2020] EWFC 35, [3].

³⁵ [2019] UKSC 49, [2019] 3 WLR 962.

³⁶ The authors acted for the appellant in the Supreme Court in *Re NY*, together with Mark Twomey KC and Alex Laing.

... if the issue could have been determined under the 1989 Act as, for example, an application for a specific issue order, the policy reasons to which I have referred will need to be addressed. At the first hearing for directions the judge will need to be persuaded that, exceptionally, it was reasonable for the applicant to attempt to invoke the inherent jurisdiction. It may be that, for example, for reasons of urgency, of complexity or of the need for particular judicial expertise in the determination of a cross-border issue, the judge may be persuaded that the attempted invocation of the inherent jurisdiction was reasonable and that the application should proceed. Sometimes, however, she or he will decline to hear the application on the basis that the issue could satisfactorily be determined under the 1989 Act.

The three reasons given by Lord Wilson as to why the inherent jurisdiction should be available in these cases—urgency, complexity, the need for High Court expertise in cross-border cases—do not stand up to much scrutiny (George and Laing 2020, pp. 275–76). First, not all abduction cases have these qualities, yet it remains common that cases are brought under the inherent jurisdiction. Second, other cases that are brought concurrently, such as a medical treatment cases,³⁷ do not have the cross-border element to them. Third, other types of case where these characteristics are present, such as some international relocation cases, are not eligible for an application to be made under the inherent jurisdiction. Finally, it is never explained why these characteristics make a case unsuitable for hearing as an application under the Children Act for a s 8 specific issue order, allocated to a judge sitting at High Court level.³⁸ While some judges have endeavoured to interpret *Re NY* as saying that applications should be brought under the specific issue order route unless there are particular, expressed reasons why the inherent jurisdiction is needed,³⁹ looking at the reported cases one continues to find a plethora of decisions in this area all made under the inherent jurisdiction.⁴⁰

In reality, the inherent jurisdiction is often preferred because legal aid is more readily available for an applicant issuing an application under the inherent jurisdiction. Under the current legal aid regime, an application in relation to child abduction made by way of Form C66 invoking the court's wardship or inherent jurisdiction powers is eligible for means- and merits-assessed legal aid without any kind of preliminary threshold being met; the respondent would also be eligible to apply on the same bases. By contrast, an application for the same substantive remedy made by way of C100 seeking a specific issue order would face the additional threshold hurdle of needing to demonstrate either that the applicant was at least prima facie the victim of domestic abuse⁴¹ or that the case justified 'exceptional case funding'.⁴² delay can bedevil complex funding arrangements, which is contrary to the need for speedy resolution of child abduction cases. Moreover, even if an applicant can

³⁷ For criticism of the use of the inherent jurisdiction in these cases, on the basis that an adequate remedy under the Children Act exists, see *Re JM (Medical Treatment)* [2015] EWHC 2832 (Fam), [2016] 2 FLR 235 per Mostyn J; R George, 'The Legal Basis of the Court's Jurisdiction to Authorise Medical Treatment of Children', in Goold et al. (2019); Bridgeman (2017).

³⁸ Mostyn J makes the same point in robust language in *Re N (A Child)* [2020] EWFC 35, [9]: 'I have referred above to the need to establish exceptionality if the path chosen is an application to the High Court under its inherent powers. It is hard to conceive of circumstances where this would be justified. The matters referred to by Lord Wilson, namely urgency, complexity or judicial expertise can be fully accommodated by allocating the matter upwards within the Family Court, if necessary to High Court judge level.' (Emphasis added.)

³⁹ See e.g., Mostyn J in *Re N (A Child)* [2020] EWFC 35, [9] Peel J made similar comments in an inward return case where a child aged 16 years and 7 months had been removed to the USA, and the application was brought under the inherent jurisdiction: *Re DD (Inward Return Order)* [2021] EWHC 607 (Fam).

⁴⁰ There are at least 11 cases reported on Bailii in 2021–2022 that use the inherent jurisdiction to seek the return of an abducted child. Our experience is that at least half of the final decisions given by the High Court in these cases are not made available on Bailii.

⁴¹ The criteria for demonstrating this are also immensely unhelpful for an international case. For example, a report of domestic abuse to any police force within the United Kingdom will be accepted as adequate evidence, but a report to any foreign police force will not.

⁴² It is difficult to secure 'exceptional case funding': since 2015–2016, an average of only 152 family law cases per year have been granted exceptional case funding in England and Wales: Ministry of Justice (2022) *Legal Aid*

meet this threshold, it is unlikely that a respondent would do so. This difference of legal aid availability presumably arises from a lack of understanding on the part of the drafters of the legal aid rules, but creates a serious disincentive for parties to use the available statutory remedies when the consequence of doing so will be to remove the possibility of legal aid to support their proceedings.

4. Why Would Concurrent Applications Be Made?

The provisions of the 1980 Convention envisage explicitly that there will be cases where the remedies under the Convention itself are not complete. Article 18 says in terms: ‘The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.’ While this provision does not confer any new powers on the court,⁴³ it makes clear that the fact that an application is brought under the Convention does not limit the court’s ability to rely on other, non-Convention powers to respond to the case before it. As Baroness Hale explained, Article 18 shows ‘that the provisions of the Convention do not limit any *other* power which the court may have to order the child’s return. It is contemplating powers conferred by the ordinary domestic law rather than by the Convention itself.’⁴⁴ That in itself says nothing about *concurrent* applications, rather than (as we understand the approach in other states to be) *consecutive* applications.

Nonetheless, there are a number of reasons why an applicant might want to argue their case both under the Convention and outside it. In practice, experienced practitioners will often simply add a line to their applicant Hague statements, highlighting that, in the alternative, the applicant seeks the child’s return pursuant to the inherent jurisdiction. Our experience is that there may be a fleeting and unremarkable reference to the inherent jurisdiction in the headers of documents, and perhaps a short concluding paragraph of counsel’s written summary (‘position statement’) before a first hearing noting the option of an alternative case being made under the inherent jurisdiction. Very occasionally, a C66 (inherent jurisdiction) application form is filed alongside the usual C67 (1980 Hague Convention) and C1A (allegations of harm) forms, but otherwise the issue rarely occupies much further thought until during (or after!) the final hearing.

4.1. Cases Where an ‘Element’ of the Convention Is in Doubt

It is not uncommon for an applicant to issue a 1980 Convention case knowing that one or more aspect of what we term the ‘elements’ of the case—that is, the requirements of Article 3: habitual residence, rights of custody that were being exercised, and breach of those rights amounting to a wrongful removal or retention—is in doubt. Early cases tended to relate to unmarried fathers where the applicant might technically lack rights of custody,⁴⁵ but there are numerous other examples. In *Re KL*, the father’s case was brought on the basis of a 1980 Convention case that ‘depend[ed] upon whether K was still habitually resident in Texas on [the relevant date]’, and—to safeguard against a negative answer to that question—also ‘asserted that the court should exercise its inherent jurisdiction to return the child even if not required to do so under the terms of the Convention’.⁴⁶ In *Re KL*, therefore, a child who had become habitually resident in England and Wales prior to the date of wrongful retention was nonetheless returned after a summary determination of welfare using the court’s domestic powers under the inherent jurisdiction.

Statistics Quarterly: April to June 2022: [gov.uk/government/statistics/legal-aid-statistics-quarterly-april-to-june-2022](https://www.gov.uk/government/statistics/legal-aid-statistics-quarterly-april-to-june-2022), Table 8.2.

⁴³ *Re M (Abduction: Rights of Custody)* [2007] UKHL 55, [2008] 1 AC 1288, [7] and [21]; *Perez-Vera* (1980, para. 112).

⁴⁴ *Re M (Abduction: Rights of Custody)* [2007] UKHL 55, [2008] 1 AC 1288, [21].

⁴⁵ See, e.g., *Hunter v Murrow (Abduction: Rights of Custody)* [2005] EWCA Civ 976, [2005] 2 FLR 1119; in *T v R (Abduction: Forum Conveniens)* [2002] 2 FLR 544, concurrent applications were made under the 1980 European Convention and the inherent jurisdiction, with no application under the 1980 Hague Convention ‘because it was accepted that the mother’s removal of the child from Sweden was not wrongful within Art 3 because at that time the mother had sole custody of the child under an order of a Swedish court.’

⁴⁶ *Re KL (Abduction: Habitual Residence)* [2013] UKSC 75, [2014] AC 1017, [13].

Re NY can be seen as another such case,⁴⁷ though the issue there arose in a procedurally irregular way. The application by the father for the return of the child to Israel was brought only under the 1980 Convention. However, at first instance MacDonald J, in ordering return under the Convention, commented in passing that in addition he would also have ordered the child to be returned under the inherent jurisdiction.⁴⁸ On appeal, the Court of Appeal held that the 1980 Convention was not applicable on the facts of the case, because the mother's retention of the child in England and Wales was not 'wrongful' and therefore the Convention did not 'bite'.⁴⁹ However, relying on MacDonald J's passing comments, the Court of Appeal went on to make an order for return under the inherent jurisdiction on their summary assessment of welfare. Moylan LJ added that he would 'caution against applications under inherent jurisdiction being made save in circumstances when there are real doubts as to whether the 1980 Convention applies'.⁵⁰ It is less clear why the court issued this warning; while we identify in this paper the complications of concurrent applications, there seem to be distinct advantages as well. The Court of Appeal's own return order was subsequently overturned by the Supreme Court,⁵¹ which criticised not only on the procedural unfairness of the Court of Appeal's approach (making an order for which there was no application and indeed no warning to the mother that it was in contemplation), but also the inadequacy of the evidential foundation available to the court. Because the parties had only ever filed evidence relevant to the 1980 Hague Convention proceedings, the court was ill-equipped to consider a welfare-based order. As we explore elsewhere in this article, the scope of the evidence before the court is crucial. Because the 1980 Hague Convention is expressly not about the individual child's best interests, even in cases where the court gains a discretion about the return of the child because an exception has been successfully invoked,⁵² the evidential focus of a Convention case is quite different from a welfare case. Consequently, while the Supreme Court's judgment is open to criticism,⁵³ we agree that the court's focus on the evidence available to the court was crucial.

4.2. Cases Where a Child Is Over the Age of 16

By virtue of Article 4 of the 1980 Hague Convention, the provisions cease to apply to children once they reach the age of 16. Applicants therefore who are seeking the return of an older child (either alone or as part of a sibling group) may therefore need to consider a non-Hague mechanism for return.⁵⁴ Where the two relevant states are both parties to the 1996 Hague Convention, that instrument will usually provide a remedy in relation to the wrongful removal or retention of a child aged 16 or 17.⁵⁵ Outside the 1996 Convention, recourse is again had to the English court's domestic remedies.

This was the approach adopted in *Re Q and V (1980 Hague Convention and Inherent Jurisdiction Summary Return)*,⁵⁶ regarding an application for the return of two children to Poland. The child 'V' was 13, whose return was sought pursuant to the 1980 Hague Convention, while 'Q' was 17, where the application was pursuant to the inherent jurisdiction. Williams J rejected the arguments for any exceptions under the 1980 Convention in relation to V, in particular under the 'grave risk/intolerability' provisions of Article 13(b), and ordered that he should be returned. In relation to Q, the judge held it was in his welfare

⁴⁷ [2019] UKSC 49, [2019] 3 WLR 962.

⁴⁸ [2019] EWHC 1310 (Fam), [52] and [73].

⁴⁹ [2019] EWCA Civ 1065, [59].

⁵⁰ *Ibid.*, [64].

⁵¹ [2019] UKSC 49, [2019] 3 WLR 962.

⁵² *Re M*—the policy of the Convention remains relevant and can be balanced against welfare.

⁵³ See above, text from fn 50; see also R George and A Laing, 'Return Orders and the Inherent Jurisdiction After *Re NY*' [2020] *Family Law* 271.

⁵⁴ *Re DD (Inward Return Order)* [2021] EWHC 607 (Fam) is an example of a non-Convention application brought in relation to a young person aged 16 years and 7 months who had been removed to the USA.

⁵⁵ Unlike the 1980 Convention, the 1996 Convention applies until a child's 18th birthday: see Article 2.

⁵⁶ [2019] EWHC 490 (Fam).

interests to be returned to Poland pursuant to the inherent jurisdiction. In that case, the mother's track record of non-compliance with Polish court orders was a significant factor, and policy considerations were particularly forceful in what was a 'hot pursuit' matter. The interconnection between the factors relevant to Article 13(b) for V and the welfare arguments for Q was noted specifically by Williams J:

My discussion in the following paragraphs is of relevance to the application for V's return pursuant to the 1980 Hague Convention where the Article 13(b) and child's objections exceptions are deployed. However it is also relevant to the welfare of Q which is the paramount consideration in relation to the application for his return pursuant to the inherent jurisdiction. The interplay between the evidence, issues arising and conclusions does not facilitate clear dividing lines.⁵⁷

Williams J identifies here some important considerations which we think apply generally to concurrent applications, and which highlight the challenges that these cases can create. In *Re Q and V*, the evidence in relation to the two children under the two different legal mechanisms overlapped to a significant extent, though clearly the fact of the two separate applications in relation to two separate children will have allowed the parties to prepare evidence that was directed explicitly to both issues.⁵⁸ In other cases, the factual evidence may not so easily overlap, creating a greater challenge for a judge asked to consider both types of case simultaneously.

A further conceivable set of circumstances could involve a half-siblings or other non-subject child having been abducted as part of a family unit, where a 1980 Convention application can be brought regarding one child but not the other. The applicant may, for example, struggle to establish rights of custody in relation to this child, but nonetheless seek their return, both for its own sake but also to avoid the risk of arguments about sibling separation being made in the 1980 Convention proceedings.

4.3. Settlement Cases?

One potential reason that both applications might be made relates to 'settlement' cases, where more than a year has passed since the child was brought to this country and has subsequently become 'settled' here pursuant to Art 12(2) of the Convention. Article 12 sets out the *requirement* to return a child where an application is brought within a year of the date of the wrongful removal or retention, and then provides in sub-paragraph (2):

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

As [Lowe and Nicholls \(2019\)](#) explain in their detailed analysis of Article 12(2) cases in different jurisdictions, there is presently a divergence of views globally about the scope and interpretation of this provision.

The now-established English approach takes a wide interpretation of Article 12(2), holding that in such cases, even when a year has passed *and* the child is settled in their new environment, the court retains a discretion *under Art 12(2) of the Convention itself* to order the child's return (or not).⁵⁹ In exercising that discretion, the court considers a wide range of factors, and welfare is relevant but not determinative; the court can also consider, crucially, the policy objectives of the Convention.⁶⁰ Courts in some other jurisdictions, including the USA (though there relying in part on Article 18) and New Zealand and Japan (in both

⁵⁷ *Ibid.*, [58].

⁵⁸ Cf. the approach in *Re NY*, discussed above, where the Court of Appeal sought to use evidence prepared only in relation to Article 13(b) to support a welfare-based return order, an approach criticised by the Supreme Court.

⁵⁹ *Re M (Abduction: Rights of Custody)* [2007] UKHL 55, [2008] 1 AC 1288 ('*Re M*'), per Baroness Hale, with whom Lord Bingham, Lord Hope and Lord Brown agreed on this point—a decision that Baroness Hale held to be 'very difficult' and that she reached 'not without considerable hesitation'.

⁶⁰ *Re M*, [5] (Lord Hope) and [31] *et seq* (Baroness Hale).

cases interpreting their own domestic law) have reached the same conclusion, holding that the court retains a discretion to order the child's return even if settlement is established (Lowe and Nicholls 2019, pp. 42–44).⁶¹ This approach, as well as creating consistency of approach with the other reasons why the court might not order a child's return under the Convention, also 'avoid[s] the separate and perhaps unfunded need for proceedings in the unusual event that summary return would be appropriate in a settlement case'.⁶²

While this approach to Article 12(2) reduces the need for concurrent applications, because the court's discretion under the Convention (including consideration of policy) is likely to yield a more positive outcome from the applicant's perspective anyway, there are exceptions. In *Re B (A Child)*,⁶³ a Spanish child who had been abducted from Spain but had remained missing for over two years came to the attention of social services in London, following which the father was alerted as to the child's location. The father issued proceedings pursuant to the 1980 Hague Convention and under the inherent jurisdiction, seeking for the child's return to Spain. The judge determined the Hague Convention application first, holding (perhaps inevitably) that the child was indeed settled in England and Wales. However, following a more detailed, welfare-based evaluation (including a further Cafcass report), the judge determined that the child's welfare required a return order to be made under the inherent jurisdiction. As we go on to discuss in the next section, this case is illustrative of some of the challenges that concurrent applications can create.

The alternative, narrower view of Article 12(2) is quite different, holding that once a year has passed and the child is settled, the Convention no longer provides a mechanism to order the child's return.⁶⁴ This approach appears to accord more naturally with the wording of Article 12(2) itself (Lowe and Nicholls 2019, p. 46; Schuz 2013, p. 234). However, if this approach were adopted, the potential need for concurrent applications becomes greater, because the Convention remedy can fall away entirely if the child is shown to be settled (which experience suggests is a low bar, given that at least a year has passed since the wrongful removal or retention).

This narrower approach to Article 12(2) was taken by the Full Court of the Family Court of Australia in *Department of Family and Community Services v Magoulas*.⁶⁵ The position in Australia is slightly different, because the 1980 Hague Convention is incorporated by separate domestic law provisions, rather than being given direct effect; consequently, as Bennett J has noted in the context of the 1996 Hague Convention, 'It is [the] legislation and regulations, rather than the 1996 Convention per se, which have the force of law in Australia'.⁶⁶ In considering the Regulations that transpose Art 12(2) of the 1980 Convention into domestic law, the Full Court in *Magoulas* held that

there is nothing in Reg 16 which signals that a court is obliged, or in the exercise of some residual discretion, may order the return of a child if Reg 16(2) applies and the person opposing return establishes that the child is settled in his or her new environment.⁶⁷

As Lowe and Nicholls summarise it, if the application under the 1980 Convention is made more than a year after the date of the wrongful removal or retention, and the child has become settled in their new environment, 'the court cannot make a return order' (Lowe and Nicholls 2019, p. 42). In the Australian view, there is a discretion under the Convention

⁶¹ Citing in particular *Lozano v Montoya Alvarez* 134 S.Ct, 1224 (2014) and *Fernandez v Bailey* 2018 WL 6060380 on the US position, and *Secretary of State for Justice (as the New Zealand Central Authority) on behalf of TJ v HJ* [2006] NZSC 97 on New Zealand.

⁶² *Re M*, [31].

⁶³ [2018] EWHC 1643 (Fam).

⁶⁴ This was the view in some early English cases (see, e.g., *Re S (A Minor) (Abduction)* [1991] 2 FLR 1 (CA) and *Cannon v Cannon* [2004] EWCA Civ 1330, [2005] 1 WLR 32, [62]), and commended itself to Lord Rodger in dissent in *Re M*, [7].

⁶⁵ (2018) 57 FamLR 371.

⁶⁶ *Adel and Banes* [2019] FamCA 7, [20].

⁶⁷ (2018) 57 FamLR 371, [18].

itself only where more than a year has passed, but the child has not yet become settled. The same approach is taken in France, Germany and Hong Kong (Lowe and Nicholls 2019, p. 44).

This approach has some support from the Perez-Vera Explanatory Report (Perez-Vera 1980; see also Eekelaar 1982). Describing the bright-line rule that applies up to the anniversary of the child's wrongful removal or retention as 'perhaps arbitrary', the report comments that:

in so far as [summary] return of the child is regarded as being in its best interests, it is clear that after a child's has become settled in its new environment, its return should take place only after an examination of the merits of the custody rights exercised over it—something which is outside the scope of the Convention. (Para 107)

The Perez-Vera report goes on to note that the provisions of Article 18 may have particular relevance to a case caught by Article 12(2):

[Article 18] underlines the non-exhaustive and complementary nature of the Convention. In fact, it authorizes the competent authorities to order the return of the child by invoking other provisions more favourable to the attainment of this end. This may happen particularly in the situations envisaged in the second paragraph of article 12, i.e. where, as a result of an application being made to the authority after more than one year has elapsed since the removal, the return of the child may be refused if it has become settled in its new social and family environment. (Para 112)

These two approaches to Article 12(2) are, on the surface, quite different. However, as *Re B* shows, even when the wider approach is taken, there may be cases where a concurrent application is required, or is at least desirable, though such instances will be significantly rarer in states where the wider view of Article 12(2) is taken.

5. Challenges of Concurrent Applications

Asking a court to consider a non-welfare summary assessment under the Hague Convention and a welfare determination under either the inherent jurisdiction or the Children Act simultaneously opens up significant challenges. The intellectual exercise that the court is being asked to undertake is markedly different in the two types of case, and asking judges, litigants (and their lawyers, if they are represented) and Cafcass to consider both concurrently raises a number of concerns.

The involvement of Cafcass is one area that warrants particular attention. Cafcass is the Children and Family Court Advisory and Support Service, an independent body whose employees are social workers, employed to assist the court in making assessments in relation to children. There is a specialist 'High Court team' within Cafcass, with particular expertise in the kinds of work that arise in cases heard by High Court Judges, including international child abduction work. In Hague cases, the role of Cafcass is generally limited to objections reports for children regarding defences under Article 13(2), and for most cases involving the defence of settlement under Article 12(2).⁶⁸

By contrast, in a non-Hague case, the role of Cafcass is to advise the court broadly in relation to the child's welfare. *Re NY* specifically records the obligation to consider a Cafcass report,⁶⁹ but how is a Cafcass Officer meant to straddle both applications? Should an Officer be specifically instructed to report, or not report, on certain matters? Can a single report simultaneously be expected to address the strictly limited issue of child's objections and the broader issues relevant to a welfare assessment?

Similarly, the contrast of the two approaches may influence the evidence parents would wish to file. Whereas judges routinely highlight the summary nature of Hague

⁶⁸ *Re M (Abduction: Rights of Custody)* [2007] UKHL 55, [2008] 1 AC 1288.

⁶⁹ *Re NY (Abduction: Jurisdiction)* [2019] UKSC 49, [2019] 3 WLR 962, [62].

proceedings and stress that statements must not traverse every aspect of a child's life,⁷⁰ in non-Hague proceedings the evidence that the parents provide will likely need to address broader factors relevant to the child's family life. As the Supreme Court made clear in *Re NY*, an attempt to construct a welfare judgment based only on evidence directed to an Article 13(b) 'grave risk' defence under the Hague Convention will be an appealable error of approach.⁷¹

Intrinsically linked to issues of evidence and welfare reports is the question of findings amidst disputed allegations, often in relation to domestic abuse. For disputed allegations in Hague Convention matters, the court embarks down the well-trodden path of taking the relevant allegations "at their highest" with a view to determining the sufficiency of protective measures. In *Re S (Abduction: Rights of Custody)*, Lord Wilson went as far as saying that it would be 'entirely inappropriate' to descend into an 'in-depth' analysis of what the European Court of Human Rights had termed 'the entire family situation' in a Hague return application.⁷²

By contrast, it was Lord Wilson who, when considering an inherent jurisdiction welfare-based return order in *Re NY*, listed the need to consider 'fact-finding' as a central concern, second only to the need for 'up-to-date evidence' in his list of relevant considerations. While the court is not mandated to conduct a separate fact-finding exercise in a non-Hague case,⁷³ it is a 'major judicial determination' whether to do so or not;⁷⁴ in a Hague application, the English court would (almost) never embark on a fact-finding hearing within the Hague process. These contrasting approaches to allegations of domestic abuse highlight the challenges that we have sought to explore in this article.

Similar issues arise in other contexts, an obvious example being the question of whether Cafcass (the court's social workers) should be asked to give input by way of a full analysis of the child's welfare. Cafcass get involved in 1980 Hague cases to provide the court with evidence about child's objections or settlement, if applicable, but generally not otherwise (unless the case reaches the high threshold of the child being joined as a party⁷⁵, when a guardian from Cafcass can be appointed to represent the child's interests in the litigation). However, Cafcass's role is limited; they do not, for example, provide evidence specifically going to the full range of issues that might be relevant to the exercise of the court's discretion. By contrast, in a welfare-based decision, the court might order a full welfare analysis from Cafcass.⁷⁶ Again, this dichotomy of approaches raises challenges for cases being run concurrently.

Finally, there is also a question about the policy of the 1980 Hague Convention. We quoted earlier from the Irish High Court, where O'Hanlon J rejected the principle of concurrent applications because using a domestic remedy to order an abducted child returned after finding that the 1980 Hague Convention applied but did not require the child to be returned would be 'to circumnavigate the content and the principles of the Hague Convention'.⁷⁷ The argument is that the 1980 Convention provides both a rule (return of the child) and exceptions (sometimes termed defences), and if a respondent successfully makes out an exception to the rule, the Convention therefore provides for the child to remain in the destination country. However, we do not find this argument convincing. Article 18 of the 1980 Convention states explicitly that the Convention's provisions 'do not limit the power of a judicial or administrative authority to order the return of the child at any time'. As the Perez-Vera report explains, Article 18 'authorizes the competent authorities to order

⁷⁰ See, e.g., most recently *C v M* [2023] EWHC 208 (Fam) at [4]; see also Sir Andrew McFarlane P's *Practice Guidance: Case Management and Mediation of International Child Abduction Proceedings*, March 2023, para. 3.7.

⁷¹ *Re NY (Abduction: Jurisdiction)* [2019] UKSC 49, [2019] 3 WLR 962.

⁷² [2012] UKSC 10, [2012] 2 AC 257, [38].

⁷³ See, e.g., *Re A and B (Summary Return: Non-Convention State)* [2022] EWCA Civ 1664. Permission to appeal to the Supreme Court was refused.

⁷⁴ *K v K* [2022] EWCA Civ 468, [2022] 1 WLR 3713, [43].

⁷⁵ On joinder of children, see Part 16 of the Family Procedure Rules 2010 and Practice Direction 16A.

⁷⁶ Children Act 1989, s 7.

⁷⁷ *KW v PW* [2016] IEHC 513, O'Hanlon J.

the return of the child by invoking other provisions more favourable to the attainment of this end' (Perez-Vera 1980, para. 112). The Convention is fully committed to its primary aim—to secure the prompt return of children wrongfully removed to or retained in any Contracting State⁷⁸—and permits non-Convention means to be used to achieve that aim if they will be more effective than the Convention's own tools.

6. Conclusions

Perhaps reflective of the scant case law in this area, it is rare for a case to be run all the way concurrently under the Hague Convention and the non-Hague route. Although the Supreme Court has paved the way for dual applications to be made, this has not yet led to a notable uptick in cases being brought in this manner. The Court can only be commended for arming practitioners and left-behind parents with a further tool in its armoury for the protection and return of abducted children. That in itself is a fairly unimpeachable principle, and the court's power to bring applications in this manner is beyond reproach—even if it appears to be a uniquely English creation. However, launching concurrent applications at present risks opening a Pandora's box of unresolved issues of policy and procedure; until this is remedied, caution is needed.

It is the nitty-gritty framework of concurrent cases—e.g., the evidence, the remit of any fact-finding, the role of Cafcass, the structure of proceedings, and so on—that perhaps throws up the biggest issue, intrinsically linked with the difficulties of asking the court to undertake two separate and in some ways incompatible intellectual exercises simultaneously. Thus far, this crucial issue has attracted little guidance. As a consequence, in any concurrent application, the possibility of an appeal arising out of this less-well-trodden area of law remains, in our view, a realistic prospect. Any appeal injects an inevitable delay that can only prejudice an applicant's case; in an international abduction matter, it may even prove catastrophic and is frequently lamented by the Court of Appeal.⁷⁹

Further judicial clarity is probably needed in relation to specific evidential requirements, necessary timelines, and the structure of hearings in concurrent cases. Considered and pragmatic guidance on the structure of concurrent return applications should, we suggest, follow the broad-brush approach adopted by the Supreme Court in *Re NY*. Applicants are entitled to choose the most suitable vehicle for their case, even when the factual matrices involved border on the esoteric. They must be allowed to weigh up the risks versus the rewards of launching one or more applications, without fear of confusion or appeal. Respondents conversely have the right to challenge what is being prosecuted, and how best to set out their stall accordingly. Judges should feel empowered to proceed down this route in appropriately structured trials with the requisite evidence before them, allowing the making of a considered, unchallengeable decision. For now, cases embarking on concurrent applications may remain few in number, but if approached with sufficient care they present interesting opportunities for challenging cases.

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⁷⁸ Article 1(a).

⁷⁹ See, e.g., *Re F (Return Order: Appeal)* [2016] EWCA Civ 1253, [2017] 4 WLR 4, [28].

References

- Bridgeman, Jo. 2017. The Provision of Healthcare to Young and Dependent Children: The Principles, Concepts, and Utility of the Children Act 1989. *Medical Law Review* 25: 363. [[CrossRef](#)] [[PubMed](#)]
- Eekelaar, John. 1982. International Child Abduction by Parents. *University of Toronto Law Journal* 32: 281–314. [[CrossRef](#)]
- Freeman, Marilyn. 2006. *International Child Abduction: The Effects*. London: Reunite.
- Freeman, Marilyn. 2014. *Parental Child Abduction: The Long-Term Effects*. London: ICFLPP.
- George, Rob, and Alex Laing. 2020. Return Orders and the Inherent Jurisdiction After Re NY. *Family Law*, 271.
- Goold, Imogen, Jonathan Herring, and Cressida Auckland. 2019. *Parental Rights, Best Interests and Significant Harms*. Oxford: Hart Publishing.
- Lowe, Nigel, and Michael Nicholls. 2016. *International Movement of Children: Law, Practice and Procedure*, 2nd ed. Bristol: Lexis Nexis.
- Lowe, Nigel, and Michael Nicholls. 2019. Revisiting Article 12(2) of the 1980 Hague Abduction Convention. *International Family Law* 2019: 31–50.
- Lowe, Nigel, and Richard White. 1986. *Wards of Court*, 2nd ed. London: Barry Rose Publishing.
- Lowe, Nigel, and Victoria Stephens. 2018. Global Trends in the Operation of the 1980 Hague Abduction Convention. *Family Law Quarterly* 52: 349–68.
- Perez-Vera, Elisa. 1980. *Explanatory Report*. Offprint from the Acts and Documents of the Fourteenth Session, Tome III, Child Abduction. The Hague: HCCH.
- Schuz, Rhona. 2013. *The Hague Child Abduction Convention—A Critical Analysis*. Oxford: Hart.
- Scott, Timothy. 2019. Submissions on Behalf of the International Academy of Family Lawyers in the Matter of Re NY (A Child). IAFL. Available online: <https://www.iafl.com/media/5480/20191104-in-the-matter-of-ny-uksc-2019-0145.pdf> (accessed on 31 July 2023).

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International Child Abduction in South Africa

Zenobia Du Toit ^{1,*} and Bia Van Heerden ^{2,*}

¹ Miller du Toit Cloete Inc., Cape Town 8001, South Africa

² Faculty of Law, LLB Graduate University of the Western Cape, Cape Town 7535, South Africa

* Correspondence: zenobia@mdtcinc.co.za (Z.D.T.); zenobiavanheerden77@gmail.com (B.V.H.)

Abstract: This chapter evaluates how South Africa approaches and applies certain aspects of the Hague Convention on the Civil Aspects of International Child Abduction, the challenges it faces, and how it submits proposals to improve its application. The SA courts are the upper guardians of children in terms of the common law and uphold the best interests of the child as a paramount principle. The Chief Family Advocate (“FA”) has been appointed as the Central Authority (“CA”) and falls under the Department of Justice and Correctional Services. The Chief Liaison Judge is based in the Appeal Court and has appointed Liaison Judges in the Provincial Divisions. How SA approaches international child abduction, and applies the HC, is explored. SA has a rich jurisprudence around the practical application of the HC. The procedure in these matters; the general rules and exceptions; the voice, representation and participation of the child; and the approach to children’s best interests and measures to protect their interests are evaluated. SA’s approach in regard to HC matters could be improved. How the challenges of an independent best-interests factor, outcomes veering away from the return principles, the FA’s compromised role as the CA, and the delays in outcomes prejudice the HC’s philosophy and the application thereof are considered. Recommendations are made for the acceleration of proceedings, more certainty in the consideration of Article 13 defences incorporating protective measures in return orders, further clarity from courts or the implementation of practice directives in these matters, the use of mediation, and further guidelines/directives to be provided. Given the importance of the HC in international child abduction matters, hopefully the aims and purposes of the HC can be fully realised in SA’s future.

Keywords: voice of the child; Art 13 defences; best interests of child; Hague Convention provisions; return orders

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1. Introduction

International child abduction is a ‘global and growing phenomenon’ (Freeman and Taylor 2020, p. 154). This paper evaluates how South Africa (‘SA’) approaches and applies certain aspects of the Hague Convention on the Civil Aspects of International Child Abduction (‘HC’), the challenges it faces, and how it submits proposals to improve its application (HCCCH 1980). The HC was ratified by SA on 16 July 1995, with the Children’s Act 38 of 2005 (‘the Children’s Act’) incorporating the HC, as Schedule 2 to Chapter 17, into our law through s275. The courts in SA are ‘the upper guardians of children in terms of the common law’ and uphold the best interests of the child as a paramount principle (Du Toit 2018, p. 59). The Chief Family Advocate (“FA”) has been appointed as the Central Authority (“CA”) and falls under the Department of Justice and Correctional Services. The Chief Liaison Judge is based in the Appeal Court and has appointed Liaison Judges in the Provincial Divisions.

2. Habitual Residence

Habitual residence is not defined in the Children’s Act nor in the HC. Its meaning is determined by considering all the facts and circumstances in a specific case, with the idea of a ‘stable territorial link’ being realised through the length of time the child has lived

there or evidence indicating the child has a close connection to the place (du Toit C 2017, p. 453). *Central Authority v TK* appeared to support a child-centric approach in determining habitual residence and confirms that determining what the child's habitual residence was is a factual inquiry that considers the child's views and looks into whether the child has been there for enough time to have acclimatised or become attached and believes that they may be living there permanently or not.¹ In *Central Authority v ER*, a return order for the child to the UK was overturned on appeal.² The mother was an asylum seeker in the UK whose applications were repeatedly unsuccessful. The CA's position was that the immigration status was not relevant for the purposes of the HC. However, the judge pointed out that an asylum seeker is, by definition, seeking to change her habitual residence, and until the mother could attain some sort of immigration status, she would not acquire habitual residence; hence the mother of the child had not been habitually resident in the UK prior to the removal.³

In *Central Authority for the Republic of SA and SC v SC*, the applicants bore the onus pertaining to the habitual residence of the minor children and the respondent bore the onus in respect of the defence raised under Article 13(b) of the HC.⁴ In both instances, the parties had to prove the relevant elements on a balance of probabilities. When applying the principles to the facts, it was not possible to determine any common intention regarding habitual residence. However, it was found that the children's experiences underlay a factual connection to Texas, USA, on a 'cultural, social and linguistic level'.⁵ The case of *KG v CB* was quoted, noting that the order is linked to the return of the child and not to the 'left-behind' parent. It is not about a removal of care from one parent to another parent. Crucially, the court has to put into place protective measures so that the child will not be in a harmful situation upon return.⁶

Opperman J further noted that the HC does not define habitual residence and referred to Bridget Clark, who viewed habitual residence as without technical definition but as a question of fact in each individual case. It may be voluntarily acquired by 'assuming residence in a country for settled purpose [and] may be lost when a person leaves that country with the settled intention not to return . . .'.⁷ Habitual residence is not acquired in one day but rather in an appreciable period of time and with a settled intention to enable the person to become habitually resident.⁸

Opperman J referred to three models—namely, the dependency model, the parental rights model and the child-centred model—when determining habitual residence of a child.

'In terms of the dependency model, a child acquires the habitual residence of his or her custodians whether or not the child independently satisfies the criteria for acquisition of habitual residence in that country. The parental rights model proposes that habitual residence should be determined by the parent who has the right to determine where the child lives, irrespective of where the child actually lives. Where both parents have the right to determine where the child should live, neither may change the child's habitual residence without the consent of the other. In terms of the child-centred model, the habitual residence of a child depends on the child's connections or intentions, and the child's habitual residence is defined

¹ *Central Authority v TK* 2015 (5) SA 408 (GJ) at 34–42.

² (2014) JDR 0297 (GNP).

³ *Central Authority v ER* (2014) JDR 0297 (GNP).

⁴ *Central Authority for the Republic of South Africa and SC v SC* (2022/0001) [2022] ZAGPJHC 700 (15 September 2022) at 27.

⁵ *Central Authority for the Republic of South Africa and SC v SC* (2022/0001) [2022] ZAGPJHC 700 (15 September 2022) at 28.

⁶ *Central Authority for the Republic of South Africa and SC v SC* (2022/0001) [2022] ZAGPJHC 700 (15 September 2022) at 37.

⁷ *Central Authority for the Republic of South Africa and SC v SC* (2022/0001) [2022] ZAGPJHC 700 (15 September 2022) at 22.

⁸ SC (n7) at 22.

as the place where the child has been physically present for an amount of time sufficient to form social, cultural, linguistic and other connections'.⁹

SA courts follow a hybrid model, with the courts taking into account 'the life experiences of the child' such as whether the child has established a stable territorial link or whether the child has a factual connection to the State (e.g., culturally, socially and linguistically) and what the parents' intentions are.¹⁰ Young children's habitual residence usually follows that of the custodial parent.

3. Child Participation

A child's right to participate in any matters that affect them is entrenched in Article 12 of the *UNCRC* 1989. Article 4(2) of the *ACRWC* 1990 provides that opportunities should be given for the child's views to be 'heard either directly or through an impartial representative, as a party to proceedings' that affect the child, where the child is able to communicate their own views, and that the child's views must be considered 'in accordance with the provisions of the' applicable law (*Organization of African Unity (OAU) 1990*). In SA, there have been frequent cases of children litigating 'independently of parental guardian assistance, where the interests of the parent or guardian are adversarial' to those of the child (*Du Toit 2018*, p. 59). It can be argued that SA courts have a stronger obligation to look at the child's views and objections, given the below-mentioned Children's Act provisions, than may be the case in foreign jurisdictions' HC applications. However, in principle, the HC prevails over domestic law.

The provisions of the Children's Act deal with the voice and representation of children in matters affecting them. Section 6(2)(a) sets out that the proceedings must 'respect, protect, promote and fulfil the child's rights' as noted in the Bill of Rights, the child's best interests (s7), and the principles and rights in the Children's Act 'subject to any lawful limitation'.¹¹ All matters concerning children should follow an approach that is 'conducive to conciliation and problem solving', with confrontational approaches and delays in any decisions being 'avoided as far as possible'.¹²

A child 'must be informed of any action or decision taken' significantly affecting them (s6(5)).¹³ A child of such an 'age, maturity and stage of development' that they have the ability to take part in any matters involving them has the 'right to participate' in a manner considered appropriate, and the child's views 'must be given due consideration' (s10).¹⁴ Section 278(3) affords a child the chance to object to their return, and if they do so, then the court is obliged to 'give due weight to that objection, taking into account the age and maturity of the child'.¹⁵

Under s278(1), courts have the power to demand that the CA 'provide a report on the domestic circumstances of a child prior to the alleged abduction' in order to ascertain if there has been a wrongful retention or removal under Article 3 of the HC's meaning.¹⁶ Section 279 notes that the child must be represented by a legal representative 'in all applications' under the HC.¹⁷

S9 provides that the best interests of the child are 'of paramount importance', with s28(2) of the Constitution entrenching this.¹⁸ Children have the right to be assigned a legal practitioner 'by the State, at the State's expense in civil proceedings affecting the child, if

⁹ SC (n7) at 23.

¹⁰ SC (n7) at 23.

¹¹ Children's Act 38 of 2005.

¹² S6(4) Children's Act 38 of 2005.

¹³ (n11).

¹⁴ Children's Act. (n11).

¹⁵ Children's Act (n11).

¹⁶ (n11).

¹⁷ Children's Act. (n11).

¹⁸ Children's Act. (n11).

substantial injustice would otherwise result'.¹⁹ All children have the right to 'bring and to be assisted in bringing a matter to court'.²⁰ This seems to broaden this right of the child to be legally represented beyond the substantial injustice test. However, in practice, the ability to access State-funded legal representation is generally limited. It has been argued that the rights should not be linked to State representation and expense and the right to representation should be a separate right.²¹ NGOs such as the Centre for Child Law may intervene pro bono on behalf of the child.

4. Different Mechanisms Are Utilised to Hear Children's Voices

- The submission of an FA report regarding the child's best interests may occur and is typically assembled by a social worker in conjunction with the FA (Du Toit 2018, p. 59). The FA and the CA are the same institution, which in principle could amount to conflictual roles. Not only must the CA manage the return application, but they also have to, in their role as FAs, be investigating the child's best interests within the HC parameters—where the 'welfare principle' may show that a return is not the best solution, as Nicholson notes (Nicholson 1999, p. 240).
- Submission of a court-ordered report that incorporates 'the recommendations of a suitably qualified person' may occur (Du Toit 2018, p. 59).
- Submission of independent expert reports may also occur, which may be 'privately funded by a party to the proceedings' and might convey the child's views or wishes as perceived and assessed by this independent expert (Du Toit 2018, p. 59).
- During the course of a mediation process.
- A child may have a meeting directly with the judge. However, this happens rarely. There is a lack of specialised training and indicators in regard to the conduct of such a meeting.
- It is possible to appoint a curator ad litem to act on the child's behalf; however, they cannot act as if they are the child's legal representative. Their report would thus 'be tempered by the curator's independent view of the best interests of the child and would not just reflect' the child's views (Du Toit 2018, p. 60).
- The child's views can be presented by their guardian.²²
- The appointment of legal representatives to act on the child's behalf. *Soller NO v G* distinguished between the FA's role and the legal representative's role. The FA acts as a neutral mediator and a medium of communication between family members, whilst the legal representative presents and argues the wishes of the child in court, applying adult insight, expertise, and legal knowledge to these wishes and giving the child a voice without being just a mouthpiece.²³ The legal representative is thus not neutral and is in the child's corner. In *FB v MB*, the court confirmed that whilst the Children's Act does not prescribe the way in which a child is to be legally assisted, the 'paramount consideration' is the child's best interests.²⁴ The child's request to be independently represented by his own legal counsel was upheld, with the court noting that the child should not be placed in a worse position than the other parties who had the right of legal representation.²⁵ *Centre of Child Law v the Governing Body of Hoërskool Fochville* endorsed children's rights to representation that is separate from their parents and that this flows from their participation rights in matters that affect them, further noting that 'in every weighing of rights and interests and value judgment' that the child's best interests should be of 'paramount consideration'.²⁶

¹⁹ S28(1)(h) of the Constitution of the Republic of SA, 1996.

²⁰ S14 Children's Act 38 of 2005.

²¹ *Brossy v Brossy* 602/11 (212) ZASCA 151 (28 September 2012).

²² S18(3) of the Children's Act 35 of 2005.

²³ *Soller NO v G* 2003 (5) SA 430 (W) at 439 J.

²⁴ *FB and Another v MB* (2012) (2) SA 394 (GSJ) at 13.

²⁵ *FB* (n24) at 13.

²⁶ *Centre of Child Law v The Governing Body of Hoerskool Fochville* 4 ALL SA 571 (SCA) 2016 at 19, 26.

A child-centred approach necessitates an individualized close consideration of the exact situation and reality of the specific child involved, as well as acknowledging children's dignity, and that it would not be in the child's best interests to simply apply a predetermined formula irrespective of the situation. 'If a child is to be constitutionally imagined as an individual with a distinctive personality and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a near extension of his or her parents, umbilically destined to sink or swim with them'.²⁷ Where a child is mature enough to express their feelings accurately, or able to make an 'intelligent judgment', then due consideration should be afforded to the child's expressed preference.²⁸ Developments in case law and legislation have provided for a child's rights to participation and separate legal representation, with the Constitutional Court promoting an approach that 'respects the views, wishes and opinions of children in all matters where they are concerned'.²⁹

SA courts have denied some return orders on the basis of the child objecting. In *Central Authority v K*, the child noted they wanted to stay in SA and the court held it would be inappropriate to order the child's return.³⁰ *Family Advocate v B* held that the seven-year-old was mature enough to have an informed decision, although uncertainty around how the child's voice should be heard and weighted, with debates around the appropriate approach, was noted.³¹ Here, the child's objection to returning was instrumental in the court's decision to deny the return order.³²

Central Authority of the Republic of SA v B noted that, where the child objects, being of 'sufficient age and maturity to take his views into account', judges have to make sure that this objection is independent and not swayed by the parent that abducted them, nor is it due to them preferring this parent.³³ The objection is merely a factor to be taken into account. The court found that the child's objection is a separate defence to the grave harm objection. Return orders do not determine custody disputes. The court held that the child's views were independent and, on the basis of his strong objection, as well as the evidence, denied the return application.³⁴ However, the court noted a lack of clear guidelines around at what stage the child should have their opinion considered, and this challenge may lead to uncertainty. Furthermore, the courts still follow a contradictory approach in regard to the child's objection and Article 13(1)(b) defence being two separate issues, although the *Guide to Good Practice* has been useful in alleviating this to an extent. This case emphasised the paramountcy of the child's best interests, noting that this 'should inform understandings of the exceptions, without undermining the integrity' of the HC (*Du Toit 2018*, p. 61). These cases convey that the courts in SA take children's views and objections seriously and employ progressive approaches towards children participating in these Hague abduction cases, with courts recognising the significance of listening to the child's voice in matters that affect them. Other jurisdictions have been critiqued for dismissing the child's objections, with SA being praised for its progressive approach and inclusion of the child's voice within HC decisions (*Freeman and Taylor 2020*, p. 172). SA's approach gives effect to both the relevant sections of the Children's Act, Constitution, and HC.

Implementation of the hearing of children's voices is, however, often problematic, inter alia, due to lack of resources, skills, and adverse cultural and social attitudes around children's role in both families and communities. Advocacy, education, and awareness-raising could assist (*Freeman and Taylor 2020*, p. 171).

²⁷ *S v. M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA232 (CC) at 18.

²⁸ *McCall v McCall* 1994 (3) SA 201 (C).

²⁹ *T Boezaart Child Law in South Africa* 2ed (2017) Juta 110.

³⁰ *Central Authority for the Republic of South Africa v K* 2015 (5) SA 408 (GJ) at 52.

³¹ *Family Advocate v B* 2007 (1) All SA 602 (SE) at 28.

³² B (n31)at 28.

³³ *Central Authority of the Republic of South Africa v B* 2012 (2) SA 296 (GSJ) at 13.

³⁴ *Central Authority of the Republic of South Africa v B* 2012 (2) SA 296 (GSJ) at 20.

5. The Tension between the Child's Best Interests and the Convention

SA cases have debated the approach to international child abductions, with many questioning whether the HC's return remedy contradicts the best interests of the child. The courts have developed the application of its discretion in regard to the best-interests principle and the manner of consideration of the defences, sometimes in a contradictory manner.

Concerns Have Furthermore Been Raised Regarding the Implementation of the HC vis a vis Children

- Whether too much deference is given to the wishes of the child who may, inter alia, be uncertain, influenced by their parents and forced to make choices, struggling with psychological harm, or feeling guilty and manipulated or 'compromised by the choices' the child has to make (Du Toit 2018, p. 60). However, SA has been lauded for its child-centric approach and its paramountcy principle.
- The impact of potential control, intimidation, and harassment; uneven resources; proceedings being drawn out; lack of support for the child; psychological or physical abuse; neglect; the conflict between the parents; or being exposed to grave risk of harm to the child.
- The contradictory judgments regarding Article 13 defences and the evaluation of the child's best interests, short-term and long-term, under the HC.
- The court being unable to 'get to the bottom of factual disputes and the risks a child will face if grave harm is a reality' (Du Toit 2018, p. 60).
- Determining what protective measures are available in the country of return, as well as the 'effectiveness of or the ability to implement such measures' (Du Toit 2018, p. 60).
- Undertakings which 'are not always enforceable and may not achieve the purpose of protection', despite judges liaising (Du Toit 2018, p. 60).
- When considering whether to take into account the child's views or not, a minimum age has not been set nor is there guidance around the assessment of the maturity of a child. In developing caselaw, the discretion is not exercised consistently.
- The lack of regular and consistent training in these matters.
- SA's non-specialised justice system. However, each High Court does have liaison judges, 'appointed to specifically act' in HC matters (Du Toit 2018, p. 60).
- Long delays.

Sonderup v Tondelli considered the HC's constitutionality in light of the paramountcy of the child's best interests under the SA Constitution. It would be contrary to the intention and terms of the HC if the application were converted into a care and contact application.³⁵ Goldstone J pointed out that the court would be able to impose substantial conditions in the mitigation of interim prejudice to a child caused by a court order to the return. The ability to shape a protective order ensures a limitation to achieve the important purpose of the HC. It was argued that the HC was not aligned with the best-interests standard, as return orders did not provide for having considerations that were individualised around the child's distinctive circumstances.³⁶ The court found that the HC safeguards and acknowledges the child's long-term best interests in regard to the custody.³⁷ The short-term best interests of the child might be limited by deciding to return the child, but the court held that this was a justifiable limitation due to the HC's important purposes.³⁸ The court further noted that the HC's exceptions to the peremptory return rule conveyed that there was only a limiting of short-term best interests where this is needed to ensure the HC's aims are achieved, with the HC employing means that are proportional to the result it aims to achieve.³⁹

³⁵ *Sonderup v Tondelli* 2001 (1) SA 1171 (CC).

³⁶ *Sonderup* (n35).

³⁷ *Sonderup v Tondelli* 2001 (1) SA 1171 (CC) at 32.

³⁸ *Sonderup v Tondelli* 2001 (1) SA 1171 (CC) at 30–36.

³⁹ *Sonderup v Tondelli* 2001 (1) SA 1171 (CC) at 35.

The idea that the best interests of the child are somehow contradicted by the HC's peremptory return remedy is still debated in SA cases, despite *Sonderup* providing a good analysis around this. The *Central Authority v LC* case raised this again recently, with it being submitted that S7 of the Children's Act around best interests hierarchically trumped the HC in SA jurisdiction.⁴⁰ It was further argued that s7 should be viewed as an independent defence, and not merely one that only applies along with Article 13(1)(b).⁴¹ This argument was strongly dismissed, with the court holding that the HC and the Children's Act were not inconsistent with each other, that one does not trump the other, and that they are rather supplementary to each other.⁴² The court did note that rigidly implementing the HC might result in injustice within some specific cases. However, the court was in agreement with the *Sonderup* suggestions of the remedy for this being in the significance of making orders that are aimed at mitigating the short-term prejudicial effects of the child when the return order is given, and that extensive conditions could be incorporated into the return order where necessary.⁴³ This judgment confirms *Sonderup* and indicates that there are still disagreements around the approach to, and application of, the HC within the SA context.

Another recent case is *LD v Central Authority*, which has been critiqued for its approach of privileging the role that best interests has to play over that of a prompt return, within the context of interpreting the facts around whether the Article 13(1)(b) defence had been established or not.⁴⁴ The majority judgment noted that the order to return the child would result in disrupting and replacing a family and siblings, which they viewed as conflicting with the child's rights under the Constitution's s28(1)(b), which they considered to be inclusive of the "nurturing and support that a child receives from its immediate family group".⁴⁵ This appears to imply that an individual best-interests standard may be utilised. The minority judgment strongly disavows this by noting that that the majority went astray through their erroneous asking of whether returning the child would be in its best interests or not, as well as their problematic approach when considering "what harms might flow" from a return order from the court.⁴⁶ The minority also held that the child's best interests would not have been damaged by a return order if this order had appropriate protective measures included within it. The minority judgment reinforced *Sonderup* and noted that the 'paramountcy of the best interests of the child must inform our understanding of the exemptions without undermining the integrity of the Convention'.⁴⁷ The minority approach should arguably be the preferred approach in future HC cases. The majority judgment indicates a concerning approach in SA to the application of the HC, with it conflicting with the judgment in *Sonderup*.

This concerning trend was again noticeable in the decision of *Central Authority, Republic of South Africa v Y.R.*⁴⁸ After travelling to SA for a brief holiday, the mother (YR) refused to return with the child to Canada. The judge considered whether the Article 13 Exception to return a child to Canada raised by the abducting mother had been established. A curatrix was appointed by the court to the child and an expert appointed by the mother filed a report.⁴⁹

YR argued that the parties had a verbal and physically abusive relationship after the birth of CJ, and if she were to return to Canada, the same intolerable circumstances that plagued her before and contributed to her emotional state and post-partum depression would arise and affect CJ. CJ had settled in SA and had the support of an extended

⁴⁰ *Central Authority v LC Case 20/18381* (Gauteng Local Division) 2020 unreported at 100.

⁴¹ *Central Authority v LC Case 20/18381* (Gauteng Local Division) 2020 unreported at 96.

⁴² *Central Authority v LC Case 20/18381* (Gauteng Local Division) 2020 unreported at 105.

⁴³ *Central Authority v LC Case 20/18381* (Gauteng Local Division) 2020 unreported at 106.

⁴⁴ *LD v Central Authority (Republic of South Africa)* 2022 (3) SA 96 (SCA).

⁴⁵ *LD v Central Authority (Republic of South Africa)* 2022 (3) SA 96 (SCA) at 37.

⁴⁶ *LD v Central Authority (Republic of South Africa)* 2022 (3) SA 96 (SCA) at 62.

⁴⁷ LD (n46).

⁴⁸ *Central Authority, Republic Of South Africa v Y.R.* (061066/2022) [2023] ZAGPPHC 376 (29 May 2023).

⁴⁹ *Central Authority, Republic Of South Africa v Y.R.* (061066/2022) [2023] ZAGPPHC 376 (29 May 2023) at 16.

family group, and if returned would not have access to this extended family, which might contravene S28(1)(b) of the Constitution. Additionally, CJ's developmental problems had not been picked up by the Canadian doctors, whilst they had been by experts in SA. CJ might not receive proper medical attention in Canada and developmental problems may arise again.⁵⁰ CR argued that during YR's period of postpartum depression, she had threatened an intention to harm or abandon CJ, and he had then become intensely involved in the care for CJ, with the court noting that it appeared that CR was a 'very involved and loving parent'.⁵¹

The Judge found that the child's return would be intolerable, mainly because of the child's 'medical history' based on the findings of the medical experts in SA.⁵² It would be irresponsible to expose the child in the same circumstances and developmental delays in Canada. The Judge criticized the expert who had not dealt with the consequences of the return of the child with the mother in her report, commented that the curatrix had strayed too close to the best-interests principle and that Article 13 had to be treated as a limited and more restrictive enquiry.⁵³ The Judge therefore dismissed the application for return.

The judgment may be criticized in that it does not appear to have taken into account, nor addressed in any detail, what preventative and protective measures could be put in place and what the effectiveness thereof would be, were there to be a return of the child. It also seems as if the judgment moved in a degree to a best-interests assessment instead of implementing the prompt return policy. Despite the mother's questionable behavior in regard to the retention of the child in SA, she succeeded with her Article 13 defence.

The inconsistent approach around the paramountcy of the best interests of the child and whether this should be seen as an independent defence in HC applications is concerning. SA courts should be careful of undermining the HC's integrity when considering how to involve the child's best interests in their analysis. As *Sonderup* noted, the HC does not necessarily contradict best interests.⁵⁴

The *Guide to Good Practice* confirms, in regard to Article 13 of the HC, that in assessing whether there is a 'grave risk' that returning the child would result in their exposure to 'physical or psychological harm' or would otherwise place the child in 'an intolerable situation', the availability of effective and adequate measures to ensure protection within the State habitual residence should be included.⁵⁵ An objective approach is required, which was confirmed in *KG v CB* also quoting the UK case *Re: E* confirming the restricted application of the exception, with the onus being on the parent opposing the return to substantiate the exception on the balance of probabilities.⁵⁶ This case confirmed that the exception is narrowly interpreted and requires objectivity as well as particularity to the child and their circumstances.

Sonderup v Tondelli emphasised the grave risk and noted that harm needs to be 'of a serious nature' when considering the intolerable situation.⁵⁷ The exception and the defences have been dealt with in various cases as referred to below. In *Central Authority of the Republic of SA v JW*, the mother alleged that she had suffered emotional and physical abuse by the father, with the court finding that the children would be put into an intolerable situation if returned without their mother, as she was the primary caregiver, and thus denied the return order.⁵⁸ More recently, *Central Authority v H* also raised this exception, with the court holding that harm which is a 'natural consequence of a child's removal' from

⁵⁰ *Central Authority, Republic Of South Africa v Y.R* (061066/2022) [2023] ZAGPPHC 376 (29 May 2023) at 65.

⁵¹ *Central Authority, Republic Of South Africa v Y.R* (061066/2022) [2023] ZAGPPHC 376 (29 May 2023) at 12.

⁵² *Central Authority, Republic Of South Africa v Y.R* (061066/2022) [2023] ZAGPPHC 376 (29 May 2023) at 68.

⁵³ *Central Authority, Republic Of South Africa v Y.R* (061066/2022) [2023] ZAGPPHC 376 (29 May 2023) at 67.

⁵⁴ See (n35) above.

⁵⁵ Guide to Good Practice under the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction Part VI Article 13(1)(b) as published by The Hague Conference on Private International Law (2020).

⁵⁶ *KG v CB* 2012 (4) SA 136 (SCA), *Re E* (Children) (Wrongful Removal: Exceptions to Return) 2011 All ER 517(SC) at 31.

⁵⁷ *Sonderup v Tondelli* 2001 (1) SA 1171 (CC) at 47.

⁵⁸ *Central Authority of the Republic of South Africa v JW* 2013 JDR 1117 (GNP) at 54.

the country of habitual residence, a return order, and a challenged custody dispute would not meet the seriousness required for the exception.⁵⁹ The exception was thus applied in a restrictive manner.

Family Advocate Cape Town v Chirume noted that the ‘intolerability of the situation should be looked at from the viewpoint of the minor child and not of the respondent’ and that the grave risk should come from the child’s return, and ‘not from the refusal of the mother to accompany the child’.⁶⁰ The court upheld the high threshold when establishing a ‘grave risk’ of physical, psychological harm in order to refuse return in *Family Advocate PE v Hide*, which highlighted how mirror orders or undertakings can be important, and confirmed that the SA courts are able to set conditions for the child’s return in the court’s final order, with this order being encouraged to be made an order of the court in the country that the child is being returned to, if possible.⁶¹ Contrary to the approach above, in *Central Authority v MR*, the court noted that the exceptions under Article 13 and 20 cater to ‘cases where specific circumstances might’ allow for the child not being returned, with exceptions existing to protect the child’s welfare.⁶² Mitigation of the exception’s extent and nature should occur, with s28(2) of the Constitution being kept in mind when Article 13 is applied. The court found that it was worthwhile to consider the views of the child here, even though they were mainly related to ‘short term views and interests’ and also confirmed that the child objecting to their return was indeed a defence that is separate from the grave harm defence.⁶³

Pennello v Pennello confirmed that the person resisting the return order on the basis of Article 13(b) bears the civil onus of proof, on a preponderance of probabilities. The return application cannot be converted into a custody application. The SCA reiterated that the grave risk should require ‘clear and compelling evidence’, which must be substantial and ‘of a severity which is much more than is inherent in the inevitable disruption, uncertainty and anxiety which follows an unwelcome return to the jurisdiction of the court of habitual residence’.⁶⁴ In *Central Authority of the Republic of SA v Engelenhoven*, the siblings had disparate views about the return. The court refused a return on the basis that it would not consider the separation of the siblings, as that would, in itself, create an intolerable situation for the children.⁶⁵

Central Authority for the Republic of SA v SC discussed the interpretation of Article 13(b), and *Koch NO v Adhoc Central Authority for the RSA* was quoted, noting that the defence:

*‘looks to the future: the situation as it would be if the child were returned forthwith to his/her home country. The situation which the child will face on return depends crucially on the protective measures which can be put in place . . . Where the risk is serious enough the court will be concerned not only with the child’s immediate future, because the need for protection may persist’.*⁶⁶

6. Domestic Violence

Establishing domestic violence by a party’s behaviour is not itself sufficient reason for justifying the court holding that the child could possibly face grave risk were they to be returned, with the establishment of an ‘established pattern of domestic violence’ from the other party’s behaviour needing to be shown, as well as the definition of domestic violence needing to be met (*Trimmings and Momoh 2021*, p. 9). Allegations of domestic abuse and/or the child witnessing this abuse, should be considered and evaluated by people with extensive training relating to this. The *Domestic Violence Amendment Act 14 of 2021* defines

⁵⁹ *Central Authority (Republic of South Africa) v H* 2019 ZAGPPHC 138 at 54.

⁶⁰ *Family Advocate Cape Town v Chirume* (6090/05) [2005] ZAWCHC 94 at 36.

⁶¹ *Family Advocate Port Elizabeth v Hide* (2007) 3 All SA 248 (SE).

⁶² *Central Authority v MR (LS Intervening)* (2011) (2) (SA) (428) (GNP) at 13.

⁶³ *Central Authority v MR (LS Intervening)* (2011) (2) (SA) (428) (GNP) at 29.

⁶⁴ *Pennello v Penello (Chief Family Advocate as amicus curiae)* 2004 (3) SA 117 (SCA) at 34.

⁶⁵ *Central Authority of the Republic of South Africa v Engelenhoven* (Case No. 43352/2021) ZAGPPHC 699 at 50.

⁶⁶ *Central Authority for the Republic of South Africa v SC* (2022/0001) [2022] ZAGPJHC 700 at 38.

domestic violence as encompassing physical, sexual, verbal, emotional, or psychological abuse—and can include harassment, ‘controlling behaviour’, and exposure of children to domestic violence—with this conduct harming or inspiring ‘reasonable belief that harm may be caused to the complainant’.⁶⁷ It has been noted that SA courts have followed a wider approach in these defences, and have considered the rising cases of domestic violence as well as the child’s safety (Weideman and Robinson 2011, p. 90). Indeed, courts should consider the circumstances of each case pertaining to each individual child, with the need to avoid mechanical approaches, especially in domestic violence cases.

L v Ad Hoc Central Authority for the Republic of SA was an application for leave to appeal against a court order for the return of three children to Thailand. Allegations that the removal was wrongful in terms of Article 3 of the HC and of sexual misconduct were made. The SCA dealt with the Article 13(b) defence. The High Court order was aimed at mitigating any interim prejudice that may arise by the children being returned, with ‘built-in mechanisms and a wide range of protective measures’.⁶⁸ The order hoped to ensure the children’s protection, and included the children residing with the applicant, ‘maintenance for the applicant’, access to occupational therapists and psychologists, ‘financial commitments on the part of second respondent, and the assistance of the Thai CA’.⁶⁹ The SCA found that the High Court’s order was ‘tailored’ to meet all the children’s needs, in order ‘to achieve the objectives of the Convention’ and to ‘effectively encompass protective mechanisms’ so that the children’s best interests received protection.⁷⁰ The appeal was thus dismissed.

Central Authority for the Republic of SA v SC was an application for the return of children that the mother had brought to SA, with her alleging a s13(b) defence, inter alia, relating to a nomadic life the children had led in Texas, which had caused instability.⁷¹ Allegedly, the father was ‘manipulative, domineering and controlling. . .physically and emotionally abusive of the mother, excessively controlling of the children, and erratically employed.’⁷² Factual disputes were raised. The children’s views were represented by a curator ad litem. There was psychological evidence regarding the children’s best interests, the father’s contact with the children, and his interactions with them. The court found that there were certain intolerable aspects of the children’s family life, immediately before they had departed to SA, and was of the view that an order could not be shaped to mitigate the prejudice to the children, failing the assurance that the father would be able to ‘financially afford and otherwise comply with his undertakings’.⁷³ Cognisance was taken of the realities and the children’s best interests, without discriminating against the father. The application for return was dismissed.

In *Sonderup*, Goldstone J stated that in the application of Article 13, acknowledgement must be given to the role that domestic violence has in inducing mothers ‘to seek to protect themselves and their children by escaping to another jurisdiction’.⁷⁴ He emphasised that the impact of domestic violence on women and children should not be trivialised and indicated that, ‘where there is an established pattern of domestic violence, even though not directed at the child, it may very well be that the return might place the child at grave risk of harm as contemplated by Article 13’.⁷⁵ If Article 13 is applied restrictively and the child is returned, the mother has to make a decision about her return and the danger of further domestic violence (Freeman and Taylor 2020, p. 157). Although protective measures may mitigate risks, there is a gap between the theory of protective measures versus their

⁶⁷ S1 Domestic Violence Amendment Act 14 of 2021.

⁶⁸ *L v Ad Hoc Central Authority for the Republic of South Africa and Others* (1143/2020) [2021] ZASCA 107 at 11.

⁶⁹ *L* (n68) at 11.

⁷⁰ *L v Ad Hoc Central Authority for the Republic of South Africa and Others* (1143/2020) [2021] ZASCA 107 at 15.

⁷¹ *Central Authority for the Republic of South Africa v SC* (2022/0001) [2022] ZAGPJHC 700 at 38 at 1.

⁷² *Central Authority for the Republic of South Africa v SC* (2022/0001) [2022] ZAGPJHC 700 at 43.

⁷³ *Central Authority for the Republic of South Africa v SC* (2022/0001) [2022] ZAGPJHC 700 at 82.

⁷⁴ *Sonderup* (n57) at 34.

⁷⁵ *Sonderup* (n57) at 34.

practical implementation in the returning State (Trimming and Momoh 2021, p. 4). Indeed, ‘a thorough, limited and expeditious examination of disputed allegations of domestic violence should be carried out by court in return proceedings before the court proceeds to determining the availability of protective measures’ (Trimming and Momoh 2021, p. 9), and courts should consider the extent to which these measures will actually be enforceable in the returning State, as it seems recent SA cases have endeavoured to do.

7. Certain Measures May Be Taken to Safeguard and Protect the Child’s Best Interests

- Liaison Judges and CAs in the various jurisdictions should exchange information.
- The ‘availability of protective measures, the efficacy of its implementation and the obtaining of enforcement orders or mirror orders’ as well as the withdrawal of criminal complaints should be investigated (Du Toit 2018, p. 62).
- The provision of undertakings, which could relate to care, financial issues, custody and contact, non-prosecution, ‘protection of the parent who abducted the child’, protection of the child on their return, and ‘expedited court proceedings in the country of return’ should be considered (Du Toit 2018, p. 62).
- Access to justice for the parties should be established.
- Considering supervision of contact and whether its implementation is viable.
- Considering interdicts/non-molestation orders.
- Considering whether safe and separate housing can be provided.
- Considering ‘payment for the costs of the return, maintenance in the interim pending the proceedings in the country of return’, and accommodation (Du Toit 2018, p. 62).
- Considering if ‘counselling, treatment and monitoring (e.g., follow up by the CA, the FA, or social services) of a child are available’ (Du Toit 2018, p. 62).
- Considering ‘expedited proceedings upon the return’ (Du Toit 2018, p. 62).
- A ‘litigation kitty may be established for the returning parent in order to have more of an equal playing field to litigate’ regarding, e.g., custody and contact (Du Toit 2018, p. 62).
- Management of the child’s expectations and understanding of the process.

8. Failure to Comply with the Requirement for Expeditious Proceedings

The HC’s requirement for expeditious proceedings has been difficult to implement in SA. Regulation 23(1) to the Children’s Act sets out that ‘proceedings for the return of a child under the Hague Convention must be completed within six weeks from the date on which judicial proceedings were instituted in the High Court, except where exceptional circumstances make this impossible’.⁷⁶ Regulation 23(2) sets out the procedural steps that are taken in such proceedings. The judiciary has developed practice directives around ‘timeframes for the set down and conclusion of the hearings’ (Sloth-Nielsen 2023).

A cost order was awarded against the FA because of the inexplicable delays in their bringing of the urgent return application in *Central Authority v B*, with the child having had, at the hearing of the appeal, spent more than half of her life in SA.⁷⁷ In *KG v CB*, the child was abducted and brought to SA in early 2009, and in June 2010, the High Court ordered the child’s return.⁷⁸ The mother appealed the decision, with the appeal only being heard in February 2012.⁷⁹ The SCA highlighted the delays, finding them ‘unacceptable’ in light of the HC and also the Children’s Act requirements that HC cases be finished within six weeks from their commencement in the High Court.⁸⁰ The mother argued that there had been drastic changes to the circumstances of the child due to delays. Despite the mother’s

⁷⁶ Children’s Act 38 of 2005 Regulations Relating to Children’s Courts And International Child Abduction, 2010 Published Under Gn R250 In Cg 33067 of 31 March 2010.

⁷⁷ *Central Authority v B* 2009 (10) SA 624 (W).

⁷⁸ *KG v CB* 2012 (4) SA 136 (SCA).

⁷⁹ *KG v CB* 2012 (4) SA 136 (SCA) at 1.

⁸⁰ *KG v CB* 2012 (4) SA 136 (SCA) at 58.

arguments and immense delays, an order to return the child was surprisingly still made.⁸¹ In *Central Authority v Houwert*, the matter only reached the SCA once a period of three and a half years had passed since the abduction, and with the court upholding the principles of the HC and ordering the return of the child, despite the long delay, criticizing the systemic delays that plagued the matter.⁸²

N v The Central Authority for the Republic of SA dealt with the unlawful removal from Northern Ireland of a child retained in SA by the mother. From the date of the removal on 31 December 2012, it took until 10 May 2016 for the appeal judgment to be delivered. The judge notes that the courts are ‘held to ransom’ by both the appellant’s ‘delaying tactics’ and the respondent’s ineptitude in not making sure that the matter was speedily looked at.⁸³ The court decried the ‘dilatatory manner’ in which the SA CA had ‘handled the litigation’ and hoped that future respondents would give more focus toward finalising matters like these, since failing to finalise these speedily ‘inevitably causes psychological prejudice to the families involved’.⁸⁴ The abducting parent’s strategies exploited the time delays to establish a settled status quo, thereby creating an advantage and a complicated choice for the courts. In *LD v Central Authority RSA*, the child was removed on 4 October 2018 and the SCA judgment was given on 17 January 2022.⁸⁵ These delays are unacceptable and prejudicial within the spirit of the implementation of the HC.

Humphrey discusses the Regulations to the Children’s Act and makes certain proposals to expedite proceedings [Regulation 17(1)] (Humphrey 2023). He provides, inter alia, that the CA must bring an application to the court within ten days after the child has been located, and proposes that Practice Directives be instituted, inter alia, to allocate a special case number. The CA should be cited or served in the event of a private application. A copy of the application must be delivered to the Liaison Judge on the same date that the application is issued (Humphrey 2023). An expedited timetable should procedurally be followed, and an expedited date for argument of the application on a special opposed roll should be allocated. The Judge hearing the application shall deliver judgment and an order within a period of 3 court days from the date on which the application was argued. An application for leave to appeal should also be subject to expedited dates and procedure. The Liaison Judge should case-manage the application and any appeal thereafter (Humphrey 2023). It is suggested that mediation could also provide a helpful tool to circumvent and/or shorten litigation in these cases.

9. Mediation

SA, with its lack of resources, struggles with overburdened court rolls, drawn out litigation, and delays in finalizing matters (Ferreira 2019, p. 26). If the swift return of a child is not achieved, the philosophy of the HC may be compromised. Mediation, as part of the legal framework for family disputes, has become popular in HC disputes, and Ferreira suggests that this should not only be an alternative to the litigation but also a mandatory requirement in these matters (Ferreira 2019, p. 26). Her view is that the outcomes imposed by courts may not always be a good fit in family matters, given the personal nature of the issues necessitating comprehensive considerations, and that ADR provides faster, non-confrontational, conciliatory approaches (Ferreira 2019, p. 26). The Children’s Act also encourages conciliatory resolution of matters involving children, which would, inter alia, facilitate parent and child participation. Mediation as a tool should be publicised and education in this regard should take place.

⁸¹ *KG v CB* 2012 (4) SA 136 (SCA) at 62.

⁸² *Central Authority v Houwert* 2007 JOL 20032 (SCA).

⁸³ *N v The Central Authority for the Republic of SA* 2016 ZAKZPHC 43 at 25.

⁸⁴ *N v The Central Authority for the Republic of SA* 2016 ZAKZPHC 43 at 29–30.

⁸⁵ *LD v Central Authority (Republic of South Africa)* 2022 (3) SA 96 (SCA).

10. Mirror Orders

SA Courts have often given elaborate orders that spell out all the details of a return order. In *LD v Central Authority*, the minority judge's detailed order for protecting the child's interests conveys that mirror orders could have an important role to play in future cases.⁸⁶ Mirror orders could support such international safeguards and interim care and contact arrangements. However, many jurisdictions do not allow mirror orders, and undertakings are then relied upon instead.

Arcaro proposes that, *inter alia*, a uniform international registry system for child care and contact orders, and undertakings for return if a child goes overseas, should be considered (Arcaro 2018, p. 262). Domestic law is going to vary from country to country; thus, it is vital 'to determine if the order will be enforced as written, harmonious with foreign law, and if the order would be modifiable in the foreign country' (Arcaro 2018, p. 262), with the language being amended so that it is able to be enforced in the foreign country. Despite potential impediments arising when trying to organise and enforce these rights, these are legitimate priorities within the HC, and legal and practical implementation measures must be filed to maintain parent/child relations post Hague proceedings.

11. Proposals to Ameliorate Concerns Regarding Implementation of the Convention

- The conflicting roles of the CA and the FA should perhaps be addressed, and a solution found regarding the reporting and mediating role of the FA in HC cases.
- The Children's Act provides for parents entering into parenting plans. These should deal with the place of habitual residence, confirm that the children may only be taken to foreign countries that have acceded to the HC on holiday or if relocating, and should record that, in terms of the HC, they both have rights of custody as defined in Article 3.
- Return orders should include the obligation to register a mirror order in the country of habitual residence and, failing the ability to register such mirror orders, undertakings regarding accommodation, non-prosecution for criminal offences, maintenance, undertakings not to abuse, checks by government social services, psychological ongoing evaluations, visitation restrictions, contact, transportation details, therapy, psychological services, and so on.
- The return order should include time periods within which a custody dispute should be instituted in the court having jurisdiction, and/or within which mediation/arbitration should take place.
- The child's country of habitual residence will have exclusive jurisdiction to resolve the underlying custodial dispute and organise the litigant's rights of custody and access pursuant to the domestic law of that state.
- Therapeutic support should be provided to children that addresses their concerns and needs in crises, and connects them to both informal and formal support systems so they receive continuing support (Titi et al. 2022). There should be access to, for example, universal parenting programmes, community-based organisations, government social services, early detection of remaining issues, services, treatment, and safety in a therapeutic relationship (Titi et al. 2022). The focus in return orders should also be on the continuing life of the returning child in the country of habitual residence.
- Clarity is needed from the courts so that a consistent approach, which recognises that the HC and the best interests of the child can be supplementary, is realised. Alternately, legislation could be implemented, or regulations issued, that provide certainty through clarifying appropriate approaches with definite guidelines, regulations, and parameters around determining the factors to consider when looking at which stage the child is thought to have settled into their new environment (Nicholson 1999, p. 242). The Guide to Good Practice has been useful and notes that the defence is of 'restricted application'.⁸⁷ Judge Saldulker has also noted that some of the High Court divisions

⁸⁶ See n85 above.

⁸⁷ See n55 above.

have implemented practice directives around HC matters (Ramotsho 2019). The SCA has also attempted to set up rules that they are hoping to approach the Rules Board with, around how these matters should be handled in courts (Ramotsho 2019). Practice directives and rules could assist the various Divisions with reducing uncertainties. There is room for improvement regarding SA's approach to the role that the best interests of the child plays within return proceedings and the consideration of Article 13 defences.

12. Conclusions

How SA approaches international child abduction, and applies the HC, has been explored. SA clearly has a rich jurisprudence around the practical application of the HC. The procedure in these matters, the general rules and exceptions, the voice, representation and participation of the child, and the approach to children's best interests and measures to protect their interests have been evaluated. SA's approach in regard to HC matters could be improved. The challenges of an independent best-interests factor and outcomes veering away from the return principles, the FA's compromised role as CA, and the delays in outcomes prejudice the HC's philosophy and the application thereof. Recommendations have been made for the acceleration of proceedings, more certainty in the consideration of Article 13 defences, incorporating protective measures in return orders, further clarity from courts or the implementation of practice directives in these matters, the use of mediation, and further guidelines/directives to be provided. Given the importance of the HC in international child abduction matters, hopefully the aims and purposes of the HC can be fully realised in SA's future.

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References

Primary Sources

- Central Authority vs. MV (LS Intervening)* (2011) (2) (SA) (428) (GNP).
Central Authority for the Republic of South Africa v SC (2022/0001) [2022] ZAGPJHC 700.
Central Authority of the Republic of South Africa v B 2012 (2) SA 296 (GSJ).
Central Authority (Republic of South Africa) v H 2019 ZAGPPHC 138.
Central Authority of the Republic of South Africa v Engelenhoven (Case No. 43352/2021) ZAGPPHC 699.
Central Authority of the Republic of South Africa v JW 2013 JDR 1117 (GNP).
Central Authority for the Republic of South Africa v K 2015 (5) SA 408 (GJ).
Central Authority v LC Case 20/18381 (Gauteng Local Division) 2020 unreported.
Central Authority v TK 2015(5) SA 408 (GJ).
Centre of Child Law v the Governing Body of Hoërskool Fochville 4 ALL SA 571 (SCA) 2016.
Family Advocate, Cape Town v EM 2009 (5) SA 420 (C) at 10.
Family Advocate v B 2007 (1) All SA 602 (SE).
Family Advocate Cape Town v Chirume (6090/05) [2005] ZAWCHC 94.
FB and Another v MB (2012) (2) SA 394 (GSJ).
L v Ad Hoc Central Authority for the Republic of South Africa and Others (1143/2020) [2021] ZASCA 107.
N v The Central Authority for the Republic of SA 2016 ZAKZPHC 43.
Pennello v Penello (Chief Family Advocate as amicus curiae) 2004 (3) SA 117 (SCA).
Smith v Smith 2001 (3) SA 845 (SCA).
The Chief Family Advocate of the Republic of South Africa v IRRJ, Case No. 528/2019 1730/2019.

Re E (Children) (Wrongful Removal: Exceptions to Return) 2011 All ER 517(SC).
Constitution of the Republic of South Africa, 1996.
Domestic Violence Amendment Act 14 of 2021.

Secondary Sources

- Arcaro, Timothy L. 2018. Think Fast: Post Judgment Considerations in Hague Child Abduction Cases. *Suffolk Journal of Trial & Appellate Advocacy* 23: 237–64.
- Du Toit, Zenobia. 2018. Child Exceptions/Representation of the Child in South Africa in the Judges' Newsletter on International Child Protection. 59–62. Available online: <https://www.icflpp.com/wp-content/uploads/2019/04/Judges-Newsletter-Summer-Fall-2018.pdf> (accessed on 10 July 2023).
- du Toit C. 2017. The Hague Convention on the Civil Aspects of International Child Abduction. In *Child Law in South Africa*, 2nd ed. Cape Town: Juta and Company Ltd., pp. 448–80.
- Ferreira, Sandra. 2019. The Hague Convention on the Civil Aspects of International Child Abduction: Why Mandatory Mediation Is Necessary. *Comparative and International Law Journal of Southern Africa* 52: 22–41.
- Freeman, Marilyn, and Nicola Taylor. 2020. Domestic violence and child participation: Contemporary challenges for the 1980 Hague child abduction convention. *Journal of Social Welfare and Family Law* 42: 154–75. [CrossRef]
- HCCH. 1980. *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*. The Hague: HCCH Hague Convention.
- Humphrey, Stuart. 2023. *Justice Delayed Is Justice Denied*. Durban: KZN Liaison Judge.
- Nicholson, Caroline M. A. 1999. The Hague Convention on the Civil Aspects of International Child Abduction- Pill or Placebo? *The Comparative and International Law Journal of Southern Africa* 32: 228–46.
- Organization of African Unity (OAU). 1990. *African Charter on the Rights and Welfare of the Child*; Addis Ababa: OAU.
- Ramotsho, Kgomotso. 2019. The Hague Convention Must Be Looked at through the Eyes of a Child. Available online: <https://www.derebus.org.za/the-hague-convention-must-be-looked-at-through-the-eyes-of-a-child/> (accessed on 24 July 2022).
- Sloth-Nielsen, Julia. 2023. The International Child Abduction: Africa. In *The Research Handbook on International Child Abduction*. Cheltenham: Edward Elgar Publishing Ltd.
- Titi, Neziswa, Mark Tomlinson, Shanaaz Mathews, Lucy Jamieson, Debbie Kaminer, Soraya Seedativ, Lori Lakei, and Amelia van der Merweii. 2022. Violence and Child and Adolescent Mental Health: A Whole-of-Society Response. In *South African Child Gauge 2021/2022*. Cape Town: University of Cape Town, pp. 122–35.
- Trimmings, Katarina, and Onyója Momoh. 2021. Intersection between Domestic Violence and International Parental Child Abduction: Protection of Abducting Mothers in Return Proceedings. *International Journal of Law, Policy and the Family* 35: ebab001.
- Weideman, Jeanette, and Jacobus Abraham Robinson. 2011. The interpretation and application of article 13(b) of the Hague Convention on the Civil Aspects of International Child Abduction. *Stellenbosch Law Review* 22: 71–93.

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Article

Brazil's Experience with Recognition and Enforcement of Family Agreements in International Child Disputes

Lalisa Froeder Dittrich

Ministry of Justice and Public Security, Brasilia 70064-900, Brazil; lalifroeder@gmail.com

Abstract: Recently, there has been a greater focus on promoting amicable solutions in cross-border family disputes. Alternative dispute resolution methods such as mediation and conciliation have been used in Brazil to avoid lengthy legal proceedings and to resolve cases where concerns about the child's situation after their return arise. Parties involved in child abduction disputes can feel motivated to reach an agreement when they can decide on child support, custody, and visitation rights before the child's return. However, enforcing these agreements can be challenging. This article examines Brazil's experience with international legal cooperation requests under the Convention of 1980 on the Civil Aspects of International Child Abduction (Child Abduction Convention), where the parties faced these issues whilst trying to resolve their conflicts under one or more of the Hague Conventions. The article uses a pragmatic and empirical approach to address difficulties in recognising and enforcing agreements and available alternatives. It concludes with a suggestion for more cooperation between central authorities and with the idea that although adhering to the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children could improve the scenario in Brazil, a new international instrument would significantly enhance the resolution of cross-border disputes, especially for non-European states.

Keywords: child abduction; mediation; recognition and enforcement; voluntary agreements; Hague Conventions

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1. Introduction

Family conflicts can be emotionally and legally challenging, especially if children are involved. When a marriage between people of different nationalities or who live in countries other than theirs ends, the family may have to face, in addition to the typical difficulties of separation, the potential complexities involved in cross-border family disputes.

Take the hypothetical—but increasingly common—case of the divorce of a couple formed by a mother (Brazilian) and a father (Portuguese) who reside in the United States, where their child was born. The end of this marriage can lead to one wanting to relocate to her/his country with the child. In extreme cases, the lack of agreement between the parents can even result in one of them travelling with the child without the proper authorisation, which is considered an international child abduction. In any case, the family will need to navigate the legislation of two or more states with which they are somewhat connected to resolve issues such as custody, visitation rights, and child support.

The legal framework to deal with these conflicts is formed by several bilateral and multilateral agreements, with the most geographically comprehensive being the treaties of the Hague Conference on Private International Law (“HCCH”) that apply to international family disputes involving children. This collection of conventions comprises the Convention of 1980 on the Civil Aspects of International Child Abduction (“Child Abduction Convention”), the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children (“Protection Convention”), and the Convention of 23 November 2007 on the

International Recovery of Child Support and Other Forms of Family Maintenance (“Child Support Convention”) that are supposed to work together and complement each other. Among the standard features between them are the use of central authorities—main focal points designated by states to receive and transmit requests—and the promotion—with different degrees of emphasis—for the amicable resolution of disputes.¹

Turning back to the hypothetical case, the mother takes the child to Brazil, where she obtains an order for custody and child support. The father opposes the Brazilian court’s jurisdiction to decide about custody so as not to consent to the child’s relocation to Brazil. A request to return the child to the United States is initiated under the Child Abduction Convention. The dispute escalates. The judge in Brazil suggests mediation. During the sessions, the father reveals that he would consent to the child’s relocation to Brazil, conditioned to his free access to his daughter and the right to participate actively in the child’s upbringing. They make arrangements that cover relocation, child support, custody, and access rights—including annual visits to Portugal, where the paternal family lives. They want to ensure their agreement will be valid and enforceable in Brazil, Portugal, and the United States.

Whilst it is noticeable that greater emphasis has been placed on promoting amicable solutions in cross-border family cases in recent years, reaching an agreement is just one step towards the resolution when the dispute involves one or more jurisdictions, as the parties need the assurance that they will have more than just the other party’s word in case things do not go as planned. In this context, in 2022, the HCCH published the *Practitioners’ Tool: Cross-Border Recognition and Enforcement of Agreements Reached in the Course of Family Matters Involving Children* (“Practitioner’s Tool”, HCCH 2022)², the result of many years of work of experts from different member states. The publication was presented as a soft law instrument to assist “legal or professional advisers (e.g., mediators) who are helping families with children navigate cross-border issues through a formal agreement.” This publication was developed after several meetings and followed the Guide to Good Practice on Child Abduction Convention: Part V—Mediation (HCCH 2012a, 2012b), which also addresses the promotion of amicable resolution of family disputes in which one or more Hague conventions apply.

The *Practitioner’s Tool* was the response of the HCCH—the 130-year-old organisation whose mission is to promote the harmonisation of international law, constructing “bridges” between jurisdictions—to the difficult task of bringing more certainty and predictability to families such as the hypothetical one presented as an example. Even though the work did not result in a new treaty—which could, for example, make an agreement enforceable in several states by operation of the law, subject to its meeting determined grounds of jurisdiction, it is expected that this guide will help judges and law practitioners to take into consideration the many issues involved in the construction of realistic and viable agreements, with the help of one or more of the Hague instruments.

Notwithstanding its merits, one of the difficulties with using the new soft law instrument is that it assumes that a state must be a party to all three of the “Hague Children’s Conventions” for it to work correctly, which is still not the case for many countries. Its limited scope is understandable, given the mandate of the Experts’ Group³ and the objective of encouraging more states to become members of all the Children’s Conventions. Still, it does not resolve all issues in states such as Brazil, where only two of the Conventions—Child Abduction and Child Support—are available so far, and where creative solutions must be

¹ The Child Abduction Convention mentions in Article 7(c) that one of the duties of the Central Authority is to “secure the voluntary return of the child or to facilitate an amicable resolution”, and the Child Support Convention explicitly determines in Article 6 that it is the responsibility of Central Authorities to “encourage amicable solutions with a view to obtaining voluntary payment of maintenance, where appropriate through mediation, conciliation or similar processes”.

² The *Practitioners’ Tool* (HCCH 2022) is available at <https://assets.hcch.net/docs/c7696f38-9469-4f18-a897-e9b0e1f6505a.pdf> (accessed on 1 July 2023).

³ For a detailed account of the work of the Experts’ Group, see [Beaumont and Rubaja \(2022\)](#).

explored to promote agreements and, in some cases, to guarantee that undertakings will be respected in other states.

The main point of this article, thus, is to explore how alternative dispute resolution methods are used in cross-border disputes, focusing on the challenges presented by the recognition in other jurisdictions of family agreements obtained in Brazil. Departing from a brief explanation of how two of the family Hague Conventions in force in Brazil—the Child Abduction Convention and the newer Child Support Convention—work, four real cases will be presented to explain how the available legal framework has been used to secure voluntary agreements in the context of international legal cooperation requests handled by the Brazilian Central Authority (BCA), the Ministry of Justice and Public Security of Brazil. To this end, the methodology chosen was a literature review of the two Conventions and, more specifically, of the difficulties to recognise and enforce agreements made in the context of child abduction disputes. Except where the dispute has been widely publicised, none of the details that could lead to the identification of the parties will be disclosed.

2. The Hague Children’s Conventions of 1980 and 2007 in Brazil

Implementing the Hague Conventions played an essential role in the evolution of Brazil’s international legal cooperation system, especially regarding establishing central authorities and developing mutual assistance. These two concepts were recently incorporated into the newly reformed Brazilian Code of Civil Procedure (Brazil 2015a), in an example of how the work of the HCCH has been shaping and influencing domestic law in the country.⁴

Since 2000, Brazil has adhered to three of four HCCH conventions related to children: the Hague Convention Relating to the Protection of Children and Cooperation in Respect of Intercountry Adoption of 1993 (“Adoption Convention”), in force in Brazil since 1999; the Child Abduction Convention of 1980, in force in Brazil since 2001; and the Child Support Convention of 2007, in force in Brazil since 2017. The adherence to the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children of 1996 (“Child Protection Convention”) is still the object of discussion, as some changes in domestic legislation may be necessary for the incorporation of this treaty in Brazil.

Among these, the Child Abduction Convention, considered one of the most successful of the HCCH’s conventions, with the participation of 103 member states as of June 2023—undoubtedly is the one that stirred more controversy in Brazil, having attracted much criticism since it became more broadly known in the country⁵. Its implementation in Brazil occurred at a time when some of its fundamentals were already the object of debates in other countries, and, 20 years on, its application in Brazil is challenged by controversies involving the profile of abductors—which follows the same patterns observed worldwide, mothers and primary caretakers (Lowe 2018)⁶—allegations of domestic violence and, to a lesser extent, the need to include the child’s voice in the context of family disputes.

2.1. The 1980 Hague Child Abduction Convention

The Convention of 1980 on the Civil Aspects of International Child Abduction is a treaty that seeks a) to ensure the immediate return of a child who was unlawfully removed

⁴ Although Brazil is a member of several other Inter-American conventions, including those related to the protection of children, the argument remains, as those treaties were “clearly inspired by some of the Hague Conventions”, according to Boggiano (1992).

⁵ The turning point for the treaty to gain wider recognition (and to attract criticism) in the country was Sean Goldman’s case, which gained significant attention from the press and the public in 2008. The “Goldman Case” involved politicians and even had an intervention of the then USA President, Obama, who met with Brazil’s President, Lula. The case divided public opinion and sparked passionate debates in Brazil, where the HC80 Convention was largely unknown. Sean returned to the United States in December 2009. “Goldman v Goldman” (case 2009.51.01.018422-0, Justiça Federal do Rio de Janeiro).

⁶ In 2015, 73% of the persons taking children were their mothers and 91% of this total amount were the child’s primary caregivers. Overall, 80% of the persons taking children in 2015 were the primary or joint-primary carers of the children involved (Lowe 2018).

or retained in a contracting state other than the one where she/he has its habitual residence and b) to guarantee the respect for visitation rights in all contracting states. In a broader scope, it aims to prevent child abductions and discourage forum shopping; that is, the search for a more favourable jurisdiction by one of the parties.

The Convention on Child Abduction is highly praised for its simplicity and innovative mechanism of administrative cooperation between central authorities; according to [Elrod \(2023\)](#), it “marked a new era of global cooperation over issues relating to children”.

Under this treaty, habitual residence is the connecting factor for establishing jurisdiction for conflicts involving fundamental issues in a child’s life because it is easier to obtain evidence and elements to support a decision where the child has his/her school, family, home, and friends. Thus, a child abduction occurs when a child is wrongfully removed from her/his place of habitual residence, in breach of another person’s custody rights—custody being an autonomous concept whose meaning must adjust to the corresponding idea in the domestic legislation pertinent to the concrete case.

Therefore, custody must be understood as corresponding to the right to decide on the most relevant issues of the child’s life, including, necessarily, in this list, the right to determine, unilaterally or not, the place of her/his residence ([Pérez-Vera 1982](#)). With the choice of habitual residence as its connecting factor,

“(. . .) the Convention avoided the seemingly unresolvable issue of recognition of custody orders by shifting the focus from enforcement to cooperation. Instead of a focus on enforcing existing orders, the Convention attempts to ensure that any litigation over child custody occurs in the place in which the child has been habitually resident before the wrongful removal or retention”. ([Elrod 2023](#))

The Child Abduction Convention entered into force in Brazil in 2001, marking the country’s return to the HCCH⁷. However, only at the end of 2002 was the Brazilian Central Authority adequately established, and the first requests were filed before the Brazilian Courts ([Dittrich 2015](#)). Under Brazilian law, custody rights for the means of the Child Abduction Convention are held by parents who have not been deprived of family power over their children, even if they do not share custody. This is what can be inferred, for example, from the legal requirement ([Brazil 1990](#)).⁸ for the express authorisation of both father and mother for a child to have a passport and to leave the country unaccompanied or in the company of only one of the parents. This authorisation does not allow a parent to change the child’s residence to another state. Thus, whoever removes a child from Brazil without judicial or express authorisation from the person exercising family power will be committing an illegal removal.

The cooperation mechanism devised by the Child Abduction Convention relies on the work of central authorities. The Brazilian Central Authority for this Convention was first established at the Secretariat of Human Rights. It was then placed within the structure of the Ministry of Justice to concentrate all instruments for legal cooperation in just one governmental body, where civil service officers would then specialise in all matters relating to private international law.⁹

At the BCA, once a return request is received, the team, composed of civil servants from different backgrounds, verifies that the documentation submitted is complete and that the essential criteria for admissibility of the request are fulfilled: whether the child is under 16 years of age, whether there is any document establishing residence in the requesting country, and whether the person requesting return—known as the “left behind parent”—has presented documentation that serves as proof that he or she had custody rights over

⁷ Brazil left the HCCH in 1978 and only returned as a member in 2001.

⁸ Article 83 of the Child and Adolescent Statute—Law 8069 ([Brazil 1990](#)).

⁹ The Department of Asset Recovery and International Legal Cooperation (DRCI) is a Ministry of Justice and Public Security Department. Created in 2004, it acts as the Central Authority for international legal cooperation in criminal and civil matters.

the child. Since 2005, a letter has been sent to the person accused of having removed or detained the child in Brazil, with the primary objective of seeking a voluntary return.

In case a voluntary return or an agreement for relocation is not possible, the BCA sends the request to the Office of the Attorney's General (OAG), the public body in charge of representing the Brazilian state before a Federal Court, which is competent to judge requests based on international treaties, by article 109, III, of the 1988 Brazilian Federal Constitution. Brazil receives and sends around 200 requests per year under the Child Abduction Convention and faces, internally, the same challenges reported in other states regarding its appropriateness in responding to allegations of domestic violence and the protection of the child once a return occurs.

2.2. *The 2007 Hague Child Support Convention and the Maintenance Protocol*

The Child Support Convention aims to provide a framework for effectively enforcing child support obligations across borders. It was adopted in 2007 and has since been ratified by 47 countries. The Convention establishes a system for obtaining, recognising, and enforcing child support orders, ensuring that children and, in some cases, spouses living in different countries can receive financial assistance. This Convention applies to all children, regardless of whether they are born in or out of wedlock, an essential step towards protecting children's rights.

The other innovative aspects of this new Convention are the many kinds of requests available to both creditors and debtors and the introduction of party autonomy in its protocol for applicable law—although excluding the possibility of choice of forum in agreements involving children and vulnerable persons (González Beilfuss 2020). Moreover, whilst existing instruments (such as the 1956 UN Convention on the Recovery Abroad of Maintenance and the previous Hague Convention of 1958) focused on the obligation of states to recognise and enforce support orders, the 2007 Child Support Convention obligates contracting states to actively provide access to procedures with no costs to the parties. Thus, a creditor can, for example, request the obtention of a decision (and the establishment of paternity, if necessary), resorting to the mechanism of mutual assistance, or ask for the recognition and enforcement of an existing decision obtained in the requesting, requested, or other member state. There is also the possibility of asking for the recognition and enforcement of an agreement if the requested state did not make a reservation to Article 30 under the provisions of Article 62.

The Child Support Convention entered into force in Brazil in October 2017. As mentioned before, under the law, the Ministry of Justice and Public Security is the central authority for three of the Children's Hague Convention and several other bilateral and multilateral treaties. The concentration of treaties in the same government body was an advantage to successfully implementing the new Convention following the challenging first years of the Child Abduction Convention in Brazil.

Since the beginning, inspired by the already established practice of the BCA in promoting amicable agreements in child abduction cases, it was decided that a letter for voluntary payment would be sent to the debtor in all cases received by the BCA. This decision was derived not only from the obligation found in Article 6 but was also based on the good results of contacting the parties before starting judicial proceedings observed in the years of working with the Child Abduction Convention. This may come as a surprise given the reservation made by Brazil to Article 20(1) and 30(8), which provides the recognition and enforcement of agreements.¹⁰

¹⁰ Reservations made by Brazil: to Article 20(1)(e): Brazil does not recognize or enforce a decision in which an agreement to the jurisdiction has been reached in writing by the parties when the litigation involves obligations to provide maintenance for children or for individuals considered incapacitated adults and elderly persons, categories defined by the Brazilian legislation and which will be specified in accordance with Article 57. To Article 30(8): Brazil does not recognize or enforce a maintenance arrangement containing provisions regarding minors, incapacitated adults, and elderly persons, categories defined by the Brazilian legislation and which will be specified in accordance with Article 57 of the Convention.

In fact, at the time of the reservation, the idea seems to have been avoiding conflict with domestic law, which prescribes that agreements involving children and incapacitated or vulnerable adults can only be recognised and enforced after a revision on the merits by a judge, and after the hearing of the Public Prosecutor's Office. The reservation is derived from paternalistic principles that permeate Brazilian legislation, severely restricting party autonomy in matters involving children (Araujo and Vargas 2014). However, the changes made in the Brazilian Code of Civil Procedure¹¹ and the implementation of the new Law on Mediation¹² in the country, just two years before the Convention on Child Support entered into force in Brazil, as well as the emphasis from the Judiciary and the Executive branches on public policies to promote negotiated agreements, conflict with the excessive caution taken by the negotiators at the time of the reservation.

Under current legislation, an arrangement that involves non-disposable rights (i.e., rights one cannot surrender, transfer, or dispose of) but can be the object of an agreement is not enforceable unless it is validated by a judge.¹³ That means that, although a parent cannot decide whether a child has the right to receive child support, an arrangement regarding the amount and frequency of payments is acceptable and enforceable after a judge's review.

In practice, since the Child Support Convention initiated its operation in Brazil, arrangements that a court of another member state approved—and, thus, that became a court order—have been accepted for recognition and enforcement by Brazilian authorities under Article 10 (1a), based on the understanding that if the agreement is enforceable in the other state as a court order, it can be recognised in Brazil as a foreign decision. It is a reasonable approach considering that the basis for the recent modernisation of Brazilian law is that negotiated solutions are preferred and prioritised by the Judiciary, especially in family law.

Therefore, although the reservation has not been an obstacle to accepting a request for recognition and enforcement received by Brazil to date, there are discussions in place regarding the possibility and convenience of removing the reservation made in 2017, as practice—as well as a review of country profiles—has shown that contracting states mainly share the same principles regarding the protection of children and other weaker parties when it comes to approving and enforcing agreements.

In the same direction, the BCA, as mentioned before, has been encouraging agreements since the beginning of the implementation of the Child Support Convention. Once a letter is sent to the debtor, the BCA will help the parties to exchange proposals for the voluntary payment of the debt and, in some cases, to establish paternity. Only when a voluntary agreement is impossible the request is sent to the Public Defender's Office (DPU), a public body whose mission is to guarantee access to justice for those who cannot afford to pay attorneys. The Public Defenders will also work with the parties to obtain an amicable agreement at any point in the proceedings, and the judge will make another attempt in most cases, as prescribed by law (Brazil 2015a).¹⁴

In contact with the parties, it was noticeable, from the start, that many requests for the obtention of a decision or recognition and enforcement of a child support order involved parties that were either left-behind parents or abducting parents in previous or current cases handled by the BCA. Unsurprisingly, the same complaints and accusations were brought back to the dispute: lack of contact, resentments about the abduction, disagreement with the relocation, and non-compliance with child support orders obtained in one or more

¹¹ (Brazil 2015a). Law 13.105/15. Available at https://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13105.htm (accessed on 1 July 2023).

¹² (Brazil 2015b). Law 13.140/15. Available at https://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13140.htm (accessed on 1 July 2023).

¹³ Law 13140/2015, Article 2, Paragraph 2: *The consensus of the parties involving undisposable but negotiable rights must be ratified in court, requiring the hearing of the Public Prosecutor's Office.*

¹⁴ The Brazilian Code of Civil Procedure (2015) states in Article 3. (...) Paragraph 2. *The State shall promote, whenever possible, the consensual resolution of conflicts.* Paragraph 3. *Conciliation, mediation, and other methods of consensual dispute resolution shall be encouraged by judges, lawyers, public defenders, and members of the Public Prosecutor's Office, including during the course of judicial proceedings.*

jurisdictions.¹⁵ The need for these disputes to be addressed as a set of complex and intertwined issues, which in cross-border cases is more realistic with the use of mediation, became visible in practice.

3. Mediation in Cross-Border Family Disputes

Just as it happened in European countries and the United States in the 1970s and, more recently, in Latin American countries, where the promotion of alternative dispute resolution methods emerged as a response to excessive litigation (Melo Filho 2003), the interest in the use of consensual methods by the HCCH coincides with the yearly increase in the number of requests for international legal cooperation involving children (Vigers 2011). The enthusiasm for using mediation in international family disputes also derived from successful experiences and studies demonstrating that this method could lead to more favourable outcomes for the parties, particularly children (Roberts 2008).

Mediation, in this context, arises not only as an alternative to the slowness of the justice system but as a process that values the autonomy of the parties and has as its main advantage the potential to improve communication between parents, who, because their children bind them, will be required to maintain an ongoing relationship that does not end with the conclusion of the judicial process (Mnookin and Kornhauser 1979).

Some advantages of mediation in family cases are (a) decreased animosity; (b) a sense of greater control for the parties over the process; (c) greater adherence to and respect for the agreed-upon terms (Roberts and Palmer 2008); (d) increased possibility that the agreement will serve the best interests of the child; (e) the ability to address various aspects of the conflict in the agreement, even those that are not the subject of the legal action or international legal cooperation request; (f) improved cost–benefit ratio, as mediation tends to be shorter in duration and involve fewer financial resources (Coester-Waltjen 2000).

In cases of international child abduction, expanding the aspects discussed in mediation seems to play an important role, meaning the difference between a quick voluntary return and a costly and lengthy judicial process, which may potentially harm the child’s well-being¹⁶. Furthermore, an agreement between the parties tends to prevent future abductions (Mosten 1993). Practical experience in Brazil showed that negotiating an agreement for a voluntary return was easier when there was the possibility of addressing other aspects of the family relationship, such as visitation rights, custody, and child support (Dittrich 2015).

However, mediating international child abduction disputes presents some challenges, as mediation must be adapted to meet the contingencies imposed by distance and time. Projects underway in Europe, such as in England, Germany, and The Netherlands¹⁷, indicate that the ideal mediation, in these cases, would involve the presence of two mediators, respectively, of the gender and nationality of each party. The language used should be the common language of the couple. Still, a translator may also be necessary since the parties cannot always express intense emotions in a language other than their mother tongue (Paul and Kiesewetter 2014).

Another challenging task when it comes to elaborating on an agreement that involves different jurisdictions is the “reality test”—is what is being agreed realistic? Is it feasible in financial and logistical terms? Will it be adequate in one or two years, or should it be reviewed in a pre-determined timeframe? More fundamentally, will it be valid in both (or

¹⁵ In 2023, there were 18 open cases at the BCA in which the child for whom maintenance is requested is involved at some point in disputes under the Child Abduction Convention. Unpublished data are available under request to the author.

¹⁶ That seems to also be the case in South Africa. Ferreira (2019) argues that “the reality is that a court-imposed outcome is seldom a good fit in family matters. The issues are just too personal and require a level of detailed attention that overburdened courts in South Africa cannot provide. Alternative dispute resolution, or dispute resolution by agreement, provides an alternative to court procedures, and it is a quicker, non-confrontational, conciliatory approach to resolving matters”.

¹⁷ From 2019 to 2020, the European Justice Program funded the AMICABLE project to promote a court model mediation into international child abduction proceedings in the EU. See: <https://www.amicable-eu.org/> (accessed on 1 July 2023).

more) jurisdictions? The need for certainty and predictability is a significant factor for the parties to agree on the return or relocation of a child, and the HCCH acknowledged the need to respond to these demands with the creation of a working group to explore the convenience of elaborating on new binding or non-binding instruments to uniformise rules among member states.

Recognition and Enforcement of Agreements in Cross-border Family Disputes Involving Children

The primary objective of the Child Abduction Convention is the immediate return of the child, explicitly limiting the jurisdiction of the judge in the country to which the child has been taken or is being retained solely to determine whether the child's removal or retention was wrongful. Custody decisions, which should be made in the child's habitual residence state, are not allowed. In other words, discussions about custody should only take place after the child's return to the state of habitual residence, and any eventual agreement could only be approved by the judge of the requested state regarding the issue of the child's return.

When the parties are not allowed to discuss the real issues that led to the child's abduction in the first place, it is unlikely that the mediation will result in a genuinely consensual agreement. Baroness Hale (2023) rightly stated that although the apparent answer to child abductions is to bring the child back as soon as possible to restore stability, *"human life is not so simple"*, and there may be many reasons for an abduction that may impend the return. *"What about poverty? A parent may have been abandoned without resources in a country with little or no welfare benefit provision. What about inequality of arms? A parent may be vulnerable to losing her children to the other parent if he has money for lawyers and she does not"*.¹⁸

For Grammaticaki-Alexiou (2020), the idea that the status quo ante will be restored with the return is not a given fact, as another dispute will probably begin in the state of habitual residence, *"which may result in the change of the custodial parent, or a significant change in the everyday life of the child, often to the worse"*.¹⁹ In this sense, it might be in the child's best interest to have an arrangement if the parents are willing to negotiate a solution to their dispute. This is only possible, however, with the knowledge that an agreement will be respected and there will be a way to enforce it in case of non-compliance, as otherwise, one of the parties would be left with only trust in the other's good faith. Unfortunately, trust between the parties involved in such cases can be compromised after an international abduction.²⁰

The main challenge regarding the recognition and enforcement of "package agreements" in child abduction disputes is the lack of jurisdiction of the judge in the requested state, derived from the Child Abduction Convention, which expressly prohibits a court in the requested state from deciding on the merits of custody until there is a decision for the non-return of the child (Article 16), and to refuse a return order based on the existence of a custody order in the requested state (Article 17). In the case of non-return, it should be easier to determine the shift in the child's habitual residence, but there is still controversy about the moment this occurs. Nonetheless, it seems logical that when both parents agree with the non-return of the child, they agree to change her/his residence to the requested

¹⁸ Hale (2023). "Foreword". In *Research Handbook on International Child Abduction*. Cheltenham, UK: Edward Elgar Publishing, p. 1.

¹⁹ Grammaticaki-Alexiou (2020). "Best Interests of the Child in Private International Law (Volume 412)". Collected Courses of the Hague Academy of International Law. Brill Reference Online. Retrieved 10 Aug. 2023 from https://referenceworks-brillonline-com.peacepalace.idm.oclc.org/media/pplrdc/1875-8096_412-02.pdf?id=the-hague-academy-collected-courses/best-interests-of-the-child-in-private-international-law-volume-412-A9789004448995_02#pagemode=bookmarks&page=1 (accessed on 1 July 2023).

²⁰ For Treichl "it goes without saying that consensus between the parties is a prerequisite of any settlement agreement. As a result, one would assume the recognition of settlement agreements, and eventually their enforcement, become questions of lesser importance. (...) However, enhancing the enforcement of settlement agreements beyond the status of a mere contract is likely to provide parties with a perhaps decisive incentive to settle. This is especially so in international contexts because parties are all the more disinclined to initiate litigation for breach of a settlement agreement if they are forced to do so abroad and could be required to re-litigate a merits phase" (Treichl 2020).

state. It would make no sense to ask them to first present a case to the court in the requested state—where, in many cases, there are no pending proceedings—before being able to recognise an agreement in the new state of habitual residence. A pragmatic approach should prevail in these cases as time and money can be saved when a decision can be made regarding the non-return and all other issues agreed upon by the parents simultaneously. However, the question of how to recognise the agreement in the other state remains.

It is also debatable if an agreement that includes more than just the decision about return or non-return could be incorporated in a court order to be enforced in another jurisdiction. The question is even more complicated regarding an arrangement for the voluntary return, as the agreement may not be accepted in the state of habitual residence, leading to a new dispute to rediscuss its terms.

Therefore, when an agreement is being elaborated on, the parties must know the rules of jurisdictions regarding custody, child support, access rights, parental rights, and any other matter affecting their arrangement. In the absence of uniform rules at the international level guaranteeing that an agreement will not be “just a piece of paper”²¹ or an empty promise, legal practitioners must be creative in providing some predictability to the parties.

In this regard, the most expected instrument to help shed light on this complicated issue was the 2022 HCCH *Practitioner’s Tool*. This document explores different scenarios based on the intersection between three of the Children’s Hague Convention (Abduction, Protection and Child Support). Although helpful as a tool to understand which elements must be considered in elaborating an agreement (habitual residence being the common connecting factor to all three Conventions), the guide is of limited use for states where one or two of the Conventions are not in force. It is particularly challenging for states where the 1996 Protection Convention, a treaty that provides a framework to incorporate protection measures into return orders and set rules for the temporary transfer of jurisdiction between states, somewhat supplementing the other two Conventions, is not in force. In this sense, the *Practitioner’s Tool* also aims to engage more states in joining all three Conventions whilst still encouraging close cooperation between central authorities and judges’ networks to fill eventual gaps in the law for states that cannot rely on the use of all these treaties.

As the 1996 Protection Convention—considered by some to be the stitch of the other Conventions (Estin 2010)—is not in force in Brazil, the *Practitioner’s Tool* is not yet a helpful instrument to solve some of the cases that involve the need for undertakings as a condition for a voluntary return, for example, or the recognition of a custody arrangement obtained in Brazil after the return of a child is denied under one of the exceptions for non-return. Nonetheless, it may help accelerate the country’s adhesion to the Protection Convention. This demand is even more urgent in the context of the limitations of regional agreements within Latin America dealing with these matters—contrary to what happens in the European Union, where there is the Brussels IIb Regulation providing mechanisms to facilitate the recognition of agreements²²—and the fact that most cases of child abduction in Brazil involve a European country or the United States of America.²³ Meanwhile, the need for close cooperation between the BCA and other central authorities will be essential to circumvent the limitations imposed by the lack of an international instrument for the recognition and enforcement of agreements made in Brazil, where the use of mediation and conciliation has been increasingly promoted as the basis of a public policy to reduce litigation in the country, as it is going to be discussed in the following part of this article.

²¹ That is also true regarding undertakings negotiated by judges, as reported by Freeman (2006) on the results of a Reunite scheme research study: ‘one abducting parent described how the left-behind parent referred to the undertakings he had given to the English court as “toilet paper”’.

²² EC Regulation 2019/1111 or Brussels IIb Recast Regulation replaced the Brussels IIa Regulation in August 2022. This binding regulation facilitates the recognition and enforcement of judgments in matrimonial and parental responsibility matters within EU Member States.

²³ Data from the Brazilian Central Authority show that more than half the cases of child abduction involve the United States, Portugal, Spain, Italy, Germany, and France. Argentina comes in the fourth position. Regarding child support requests, half the cases involve Portugal and the United States of America.

4. Cross-Border Family Disputes in Brazil: Case Studies

In Brazil, the use of consensual methods for resolving disputes was mainly motivated by the massive backlog of the courts (Melo Filho 2003). In 2019, the Council of National Justice revealed that, at the end of that year, there were 77.1 million cases pending resolution (Conselho Nacional de Justiça 2022).

Since 2016, the practice of mediation and conciliation has been regulated by the Code of Civil Procedure (“CPC”—Law 13.105/2015)²⁴ and by the Law on Mediation (Law 13.140/2015). These two instruments establish that private agreements have the status of extrajudicial enforceable documents. In cases involving children, however, arrangements must be judicially approved to have the status of an enforceable decision, which means that agreements that define custody, visitation, and child support must be submitted to the scrutiny of a judge, after which they hold the value of a court judgment²⁵. The Law on Mediation and the changes made in the CPC have been slowly changing the judicial scenario in the country. In 2019, 12.5% of the cases were resolved with a judgment homologating an amicable agreement (Conselho Nacional de Justiça 2022).

Regarding international child abduction disputes, in 2018, around 23% of the requests handled by the Brazilian Central Authority (BCA) were resolved with voluntary returns, and 7% ended with the child’s relocation to Brazil. There are no consolidated statistics on the use of consensual methods in child support cases, as the implementation of the Child Support Convention is still recent. The BCA, however, registered a few cases that ended in agreement after the debtor received and responded to the voluntary payment letter and others that ended in agreement during court proceedings²⁶. The Child Support Convention greatly facilitated the recognition of these agreements for the voluntary payment of child support. However, when the dispute involved visitation rights or other issues, there were several limitations and challenges for central authorities and parties involved.

In the last part of this article, some of the issues involving voluntary methods in resolving cross-border disputes in Brazil will be explored and illustrated by four cases that the BCA handled between 2016 and 2019.

Case 1. *Agreement for temporary relocation from Brazil to Scotland.*²⁷

The case involves two Brazilian nationals who had a child in Brazil and separated soon after. They shared custody of their child and had an amicable relationship. The mother decided to move to Scotland, and the father agreed to let the child go with the condition that she would return to Brazil after two years. To this end, the couple signed an agreement before a notary in Brazil, in which they both stated the child’s habitual residence was in Brazil and the move would be temporary. The agreement was not considered enforceable in Brazil, as all agreements involving children must be reviewed by a judge to have the force of a judicial decision.

After two years, the child did not return, and the mother alleged that it was the child’s wish to stay in Scotland, where she made friends and adapted to a new school. A request for the child’s return was sent to Scotland under the argument that the father disagreed with the permanent change of residence of the child. A social worker heard the child before judicial proceedings were initiated. Based on the report of this professional, who considered that the child was habituated to her new place and did not want to return, the case was not considered strong enough to be presented to a court and the father was left with the option to negotiate visitation rights with the help of an appointed lawyer.

²⁴ Brazilian Code of Civil Procedure (2015). Article 3. No threat or violation of rights shall be excluded from judicial review. Paragraph 2. *The State shall promote, whenever possible, the consensual resolution of conflicts.* Paragraph 3. *Conciliation, mediation, and other methods of consensual dispute resolution shall be encouraged by judges, lawyers, public defenders, and members of the Public Prosecutor’s Office, including during the course of judicial proceedings.*

²⁵ Article 2, Paragraph 2: *The consensus of the parties involving unavailable but negotiable rights must be ratified in court, requiring the hearing of the Public Prosecutor’s Office.* Law 13140/2015.

²⁶ Ministry of Justice and Public Security (2018). Statistics. Brasília, DF. Unpublished.

²⁷ Child abduction case handled by the Brazilian Central Authority in 2018. Unpublished.

In this case, three things show the difficulties involving cross-border family agreements:

- (a) The definition of habitual residence—is it possible to decide on the child’s habitual residence to be in a state where she is not living, and for how long? In these cases, there is always the likely possibility that the child will become attached to her new residence, and a return after a long time could not be in her best interest, as it was the conclusion of the authorities in Scotland. Party autonomy to decide on the habitual residence, therefore, is restricted.
- (b) That leads to the other crucial point in these situations: the child’s opinion. Should the agreement prevail over the wishes of a child considered mature enough to be heard? Suppose one is to consider the provisions of the United Nations Convention on the Rights of the Child (UNCRC). In that case, it is hard to argue that the force of a contract establishing “legal” habitual residence could have more weight, even if the agreement were indeed enforceable. The child’s interests prevailed over the parents’ intention at the time of the agreement.
- (c) Finally, in this case, the fact that the agreement was not enforceable in its state of origin and was not “mirrored” in Scotland made it almost impossible for the father to return her child to Brazil, which shows the importance of having at least a parenting plan in place in both states before the relocation. At the time, the child support convention was not in force in Brazil, and no other international instruments were available to the parents.

Case 2. Voluntary return from Brazil to Germany.²⁸

In this case, the BCA received a request to return a child born in Germany, where she lived with her German father and her Brazilian mother. The couple separated, and the mother, who had no income or extended family in Germany, started talking about moving to Brazil with the child. Afraid of having the child removed from the country, the father went to court and obtained a temporary order for sole custody of the child in Germany. Fearing losing child custody, the mother flew to Brazil at the end of 2016.

With the help of the BCA and the German Central Authority, before court proceedings were initiated, the parents agreed that the child should return to Germany, where she would live with her mother. It was revealed during negotiations that the father considered her ex-partner a good mother and did not oppose his daughter living with her mother as long as they shared custody over the child. The mother revealed that she wanted to live in Germany but feared she would not have the means to support herself and that her poor financial conditions meant she would never be granted custody of her daughter. The couple agreed on place of residence, maintenance, custody, and visitation rights, and a voluntary return of the child seemed easy to guarantee.

However, the mother wanted to ensure the agreement would be enforceable in Germany before the return. The German legislation did not allow for a decision for custody to be issued whilst the child was not back in Germany, even though the German court had jurisdiction over custody matters under the Child Abduction Convention and the Child Protection Convention, which was in force only in Germany.

The solution was signing a document before a notary in Germany with the promise of the father to comply with the agreement. This document would not be enforceable in Germany but could be used as evidence in favour of the mother in future custody proceedings. The child returned at the beginning of 2018, and further contact with the parties revealed that both parents respected the agreement.

This successful case demonstrated two critical factors. Firstly, the collaboration between central authorities led to a creative solution that eased the mother’s concerns. She was worried about being unable to support herself in a foreign state due to having a lower income and education than her ex-partner. Secondly, it highlighted the significance of broadening the discussion’s scope beyond the child’s return. This allowed for effective

²⁸ Child abduction case from 2016. Unpublished.

communication between the parties, resulting in the father admitting he did not want to be the sole custodian parent. As a result, arrangements were made in the child's best interest.

Even though this resulted in a good solution for the parties, it could have been handled differently if both the Child Protection and the Child Support Convention had been in force between Germany and Brazil at the time. For once, a child support order could be established in Brazil and recognised in Germany under the Child Support Convention, somewhat protecting the mother if the father changed his mind regarding the promise of helping her financially until she found work.

Case 3. *Agreement after a return order from Brazil to the United States of America (US).*²⁹

The case involved a child born in the US to Brazilian parents who lived there. The mother came to Brazil with the child in 2009 to visit their extended family and did not return. She asked for a divorce and custody of the child in Brazil. After a failed attempt to obtain a voluntary return, the case was presented to a court in 2010. The child's return was ordered, but the mother reversed the decision with an appeal, which was overturned again in a different court. The parties' attorneys negotiated an agreement to return the mother and child to the US under the condition that a court in the US and Brazil first homologated the agreement.

After the "parenting plan" approval by a US court³⁰, the agreement was recognised in Brazil, where the law allows for the recognition of foreign decisions if some conditions are met (Brazil 2015a)³¹. After recognising the decision in the US, the mother withdrew her appeal in Brazil and returned with the child³².

The agreement involved arrangements for visitation rights, custody, child support, religious education, and habitual residence. There were multilateral agreements between the US and Brazil, but none that applied to the case besides the Child Abduction Convention. The US court did not require the child's presence in its territory to homologate an agreement, and Brazil does not require the existence of a treaty or the promise of reciprocity to recognise foreign decisions. However, it took the parties several months to have "mirror" orders in place to allow for the child's return, which occurred in 2018.

It should be noted that this case took eight years to conclude in Brazil for several reasons, the main one being the fear of the judges separating a small child from her mother, who was also allegedly a victim of domestic violence. It can be hypothesised, therefore, that an agreement was only possible when the "best alternative to a negotiated agreement" (Fisher and Ury 1991) for the mother was not a good one: returning to the US without any undertakings in place. This case also involved allegations of parental alienation, as the father lost contact with the child. The relationship between the parties was worsened after many years of battling in court, and the whole family was traumatised by the experience.

Case 4. *Agreement for relocation to Brazil from the US.*³³

The final scenario presented involves a boy taken to Brazil by his mother from the US in late 2012.

In this case, the parents were not married, and both lived in the US. The father took legal action to establish paternity and gain shared custody of the child shortly after his birth. Upon receiving notification of these proceedings from the US court, the mother, a

²⁹ Child abduction case that was finalized in 2010. Unpublished.

³⁰ In this case, it seems the US court relied on the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). According to Estin (2010), under these provisions, "state courts consider foreign countries as if they were states of the United States for jurisdictional purposes".

³¹ Under Article 963 of the Brazilian Code of Civil Procedure, the indispensable requirements for the approval of the decision are as follows: I—To be issued by a competent authority; II—To be preceded by regular citation, even in the case of default; III—To be effective in the country in which it was issued; IV—Not to violate the Brazilian *res judicata*; V—To be accompanied by an official translation, unless there is a provision in a treaty that exempts it; VI—Not to contain a manifest offense to public order.

³² Superior Court of Justice. RESP 1.458.218. Available at: www.stj.jus.br (accessed on 28 June 2023).

³³ Child abduction case finalised in 2013. Unpublished.

Brazilian citizen living undocumented in the US, fearing losing custody, took the child to Brazil.

The BCA received the Hague request for the child's return at the beginning of 2013. Return proceedings were initiated after an unsuccessful attempt to have the child voluntarily returned to the US. The child's mother argued that she would not be permitted entry into the country and could not bear to be separated from her young child. In 2016, during a conciliation hearing before a judge in Brazil, the parties agreed to relocate the child to Brazil until 2022, when he would then move to the US to live with his father. According to the agreement, the parents will share custody of their child. Visitation rights and child support were also objects of the agreement, which was first homologated by the court in the US, where paternity and custody rights were decided. With the relocation, the Brazilian court had jurisdiction over the matters, and the agreement was replicated in Brazil.

Many issues were involved in this case: the possible application of Article 13 (a) of the Child Abduction Convention as an exception for the return since the father did not have custody rights at the time of the removal (although the US court has already retained jurisdiction to establish custody rights); the challenges presented by the immigration status of the mother, which could not be the object of negotiations and that imposed severe difficulties for a voluntary return and future contacts with the child; the young age of the boy, who would allegedly be at risk of losing contact with his mother, who was his primary caretaker since his birth; the shift in jurisdiction after a relocation agreement and the future difficulties to enforce an agreement that established a change in the place of residence of the child seven years later (2022). Both courts (in the US and Brazil) solved the case by retaining jurisdiction and "mirroring" their orders. Straight cooperation between the BCA, the US Central Authority, and the US Embassy in Brazil fundamentally solved this dispute.

5. Conclusions

The Brazilian experience with the Hague Children's Conventions underscores the significance of exploring different solutions to address the difficulties involving recognising and enforcing agreements in cross-border family disputes. Despite potential obstacles and limitations, these conventions provide a framework for international collaboration and assistance to families in an ever-changing world.

In this article, the advantages of using mediation to resolve high-conflict cases were presented, such as the improvement of communication in the family, the possibility of discussing arrangements for the child's future, and the higher adherence to agreements as a result of the parties being more satisfied with the solution construed by themselves. The challenges to the use of consensual methods when more than one jurisdiction is involved, as in cases of child abduction, were also highlighted to raise possible solutions, especially for states that are not members of the European Union, where regional instruments and resolutions, such as the recently reformed Brussels IIb—make it more accessible to obtain a document that can "travel" between jurisdictions without the need for lengthy and costly proceedings.

In child abduction cases, extra care must be taken with time constraints, as mediation cannot jeopardise the primary goal of promoting the child's return. As in all mediations, the agreement must be tested to avoid unrealistic expectations and to comply with legal requirements. In cases in which agreements will need to be in force in more than one jurisdiction, this involves spending more time considering domestic legislation and the international framework available to recognise the final decision in all states involved.

In Brazil, where mediation has recently become incorporated into domestic legislation, promoting voluntary agreements in cross-border disputes proved a valuable alternative to years of litigation before the child's return is finally decided. It has also served to broaden the scope of the matters that can be decided in one jurisdiction, bringing more certainty to families and judges who might not feel comfortable ordering a return in cases where the mother and the child could be left in a vulnerable situation in another state—for example, with no resources to dispute custody rights.

Given the difficulties caused by the lack of an instrument that standardises the practice of recognition and enforcement of family agreements at the international level for states such as Brazil, which is not a party of the Child Protection Convention, practitioners must seek alternatives to provide some legal predictability to the parties. The HCCH *Practitioner's Tool* may help to guide the elaboration of agreements, even though it has limited applicability for states that are not members of all three Children's Conventions.

Finally, although there is a strong argument in favour of more states becoming parties to the Child Protection Convention, there are indications that more is needed to address many dispute complexities. There is undoubtedly a case for elaborating on a new international agreement to facilitate the recognition of family agreements across borders, making them "portable documents". Meanwhile, solutions must be built with cooperation between Central Authorities, judges' networks, and the creative use of other bilateral and multilateral agreements.

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References

- Araujo, Nadia de Araújo, and Daniela Trejos Vargas. 2014. The cross-border recognition and enforcement of private agreements in family disputes on debate at the Hague Conference on Private International Law. In *Los Servicios en el Derecho Internacional Privado*. Edited by J. Rodrigues and C. Marques. Rio de Janeiro, RJ: Jornadas de la ASADIP.
- Beaumont, Paul, and Nieve Rubaja. 2022. Family Agreements Involving Children. In *A Guide to Global Private International Law*. Edited by Paul Beaumont and Jane Holliday. Oxford: Hart Publishing, pp. 539–52.
- Boggiano, Antonio. 1992. The Contribution of the Hague Conference to the Development of Private International Law in Latin America: Universality and Genius Loci. Collected Courses of the Hague Academy of International Law. Brill Reference Online. vol. 233. Available online: https://referenceworks.brillonline.com/entries/the-hague-academy-collected-courses/*A9780792324096_02 (accessed on 6 August 2023).
- Brazil. 1990. Estatuto da Criança e do Adolescente. Available online: <https://www.unicef.org/brazil/estatuto-da-crianca-e-do-adolescente> (accessed on 1 July 2023).
- Brazil. 2015a. Código de Processo Civil. Lei 13.105. Available online: https://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/113105.htm (accessed on 1 July 2023).
- Brazil. 2015b. Lei de Mediação. 13.140. Available online: https://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/113140.htm (accessed on 1 July 2023).
- Coester-Waltjen, Dagmar. 2000. The future of the Hague Child Abduction Convention: The rise of domestic and international tensions—the European perspective. *NYU Journal of International Law and Politics* 33: 59–82.
- Conselho Nacional de Justiça. 2022. *Justiça em números*. Brasília: CNJ.
- Dittrich, Lalis Froeder. 2015. Promoting Voluntary Agreements in International Child Abduction Disputes: The Case of Brazil. *International Journal of Law, Policy and the Family* 29: 97–120. [CrossRef]
- Elrod, Linda. 2023. Chapter 4: The global effort to deter parental kidnapping: A history of the Hague Child Abduction Convention. In *Research Handbook on International Child Abduction*. Cheltenham: Edward Elgar Publishing. Available online: <https://doi-org.peacepalace.idm.oclc.org/10.4337/9781800372511.00015> (accessed on 5 August 2023).
- Estin, Ann Laquer. 2010. Families Across Borders: The Hague Children's Conventions and the Case for International Family Law in the United States. In *Florida Law Review*. Miami: University of Florida College of Law, vol. 47, pp. 1–62. Available online: <https://scholarship.law.ufl.edu/flr/vol62/iss1/2> (accessed on 5 August 2023).
- Ferreira, Sandra. 2019. The Hague Convention on the Civil Aspects of International Child Abduction: Why Mandatory Mediation Is Necessary. *Comparative and International Law Journal of Southern Africa* 52: 22–41.
- Fisher, Roger, and William Ury. 1991. *Getting to Yes: Negotiating Agreement without Giving in*, 2nd ed. New York: Penguin Books.
- Freeman, Marilyn. 2006. *International Child Abduction: The Effects*. London: Reunite Research Unit.

- González Beilfuss, Cristina. 2020. Party Autonomy in International Family Law. Collected Courses of the Hague Academy of International Law. Brill Reference Online. vol. 408. Available online: https://referenceworks-brillonline-com.peacepalace.idm.oclc.org/entries/the-hague-academy-collected-courses/*A9789004445048_02 (accessed on 10 August 2023).
- Grammaticaki-Alexiou, Anastasia. 2020. Best Interests of the Child in Private International Law. Collected Courses of the Hague Academy of International Law. Brill Reference Online. vol. 412. Available online: https://referenceworks-brillonline-com.peacepalace.idm.oclc.org/media/pplrdc/1875-8096_412-02.pdf?id=the-hague-academy-collected-courses/best-interests-of-the-child-in-private-international-law-volume-412-A9789004448995_02#pagemode=bookmarks&page=1 (accessed on 10 August 2023).
- Hague Conference on International Private Law. 2012a. Guide to Good Practice on Child Abduction Convention: Part V—Mediation. Available online: <https://www.hcch.net/en/publications-and-studies/details4/?pid=6561&dtid=3> (accessed on 1 July 2023).
- Hague Conference on International Private Law. 2012b. Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction—Mediation. Available online: <http://www.euromed-justice-iii.eu/document/hcch-2012-mediation-guide-good-practice-under-hague-convention-civil-aspects-international> (accessed on 28 June 2023).
- Hague Conference on International Private Law. 2022. Practitioners’ Tool: Cross-Border Recognition and Enforcement of Agreements Reached in the Course of Family Matters Involving Children. Available online: <https://assets.hcch.net/docs/c7696f38-9469-4f18-a897-e9b0e1f6505a.pdf> (accessed on 1 July 2023).
- Hale, Baroness Brenda. 2023. Foreword. In *Research Handbook on International Child Abduction*. Cheltenham: Edward Elgar Publishing. Available online: <https://www.elgaronline-com.peacepalace.idm.oclc.org/view/book/9781800372511/front-5.xml> (accessed on 5 August 2023).
- Lowe, Nigel. 2018. A Statistical Analysis of Applications made in 2015 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction Part I—Global Report, The Hague: The Hague Conference on International Private Law. Available online: <https://assets.hcch.net/docs/d0b285f1-5f59-41a6-ad83-8b5cf7a784ce.pdf> (accessed on 28 June 2023).
- Melo Filho, Hugo Cavalcanti. 2003. A Reforma do Poder Judiciário Brasileiro: Motivações, Quadro Atual e Perspectivas. *Centro de Estudos Judiciários do Conselho da Justiça Federal* 21: 79–86.
- Mnookin, Robert, and Lewis Kornhauser. 1979. Bargaining in the shadow of the law: The case of divorce. *The Yale Law Journal* 88: 950–97. [CrossRef]
- Mosten, Forrest. 1993. Mediation makes sense: How to prevent an international crisis. *Family Advocate* 15: 44–45.
- Paul, Christopher, and Sybille Kiesewetter. 2014. *Cross-Border Family Mediation. International Parental Child Abduction, Custody and Access Cases*. Frankfurt am Main: Wolfgang Metzner Verlag.
- Pérez-Vera, Elisa. 1982. *Explanatory Report on the 1980 HCCH Child Abduction Convention*. Hague: HCCH.
- Roberts, Marion. 2008. *Mediation in Family Disputes: Principles of Practice*, 3rd ed. Aldershot: Ashgate.
- Roberts, Simon, and Michael Palmer. 2008. *Dispute Processes: ADR and the Primary Forms of Decision Making*, 2nd ed. Cambridge: Cambridge University Press.
- Treichl, Clemens. 2020. The Singapore Convention: Towards a Universal Standard for the Recognition and Enforcement of International Settlement Agreements? *Journal of International Dispute Settlement* 11: 409–429. [CrossRef]
- Vigers, Sarah. 2011. *Mediating International Child Abduction Cases: The Hague Convention*. Oxford: Hart Publishing.

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Article

Continuity of Parental Responsibility in Child Abduction Cases: Lesson Learned from the Case of *Z. v. Croatia*

Mirela Župan * and Martina Drventić Barišić *

Faculty of Law, Josip Juraj Strossmayer University of Osijek, 31000 Osijek, Croatia

* Correspondence: mzupan@pravos.hr (M.Ž.); mdrventic@pravos.hr (M.D.B.)

Abstract: The new ECtHR decision in the case of *Z. v. Croatia* suggests that the rule of parental responsibility acquired *ex lege* is not always easy to implement in child abduction cases. The case primarily raised the question of determining whether the removal or retention of the child is wrongful in situations when the unmarried left-behind father does not have the *ex lege* right to parental responsibility under the law of the country of habitual residence, but he has acquired it under the law of the country in which he and the child had their previous habitual residence. In addition, the case of *Z. v. Croatia* raises the issue of *renvoi*, the habitual residence of children whose lifestyle involves frequent moving with their parents, as well as the issue of the need for thorough justification of the court decision. The identified difficulties showed the need to clearly elaborate and determine the interrelationship between Article 3 of the Child Abduction Convention and Article 16(3) of the Child Protection Convention, as well as the necessity to evaluate domestic legislative solutions and the practice of the national authorities that have led to the determination of violation in the present case.

Keywords: child abduction; parental responsibility acquired *ex lege*; habitual residence; *renvoi*; *Z. v. Croatia*; Child Abduction Convention; Child Protection Convention

1. Introduction

The provision of Article 3 of the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter: Child Abduction Convention) (HCCCH 1980), which regulates a wrongful removal or retention of a child, is the key provision of this instrument.¹ The obligation to return the child exists only if the removal or retention of a child can be considered wrongful under the Child Abduction Convention. This provision governs the relations protected by the Child Abduction Convention itself, and at the same time, establishes the conditions under which a unilateral change in the *status quo* may be considered wrongful. A wrongful removal or retention of a child depends on two facts: the existence of the right to parental responsibility under the law of the state of a child's habitual residence, and the actual exercise of that right prior to the removal or retention of a child (Pérez-Vera 1982, para 64). In this way, the Child Abduction Convention protects family relationships that have already been protected by virtue of the manifest right to parental responsibility acquired in the country of the child's habitual residence (Pérez-Vera 1982, pars 65). The removal or retention of the child by one parent who has joint parental responsibility without the consent of the other parent is also unlawful, regardless of whether it is grounded in the law or by court order. Wrongfulness stems from the fact that this type of unilateral action violates the protected rights of the other parent, who is

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¹ “(1) The removal or the retention of a child is to be considered wrongful where—(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. (2) The rights of custody mentioned in sub-paragraph (a) above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.”

prevented from exercising those rights normally (Beaumont and McEleavy 1999, p. 4). Joint parental responsibility does not always arise *ex lege*. There are national legal systems that do not automatically recognise the joint parental responsibility of fathers when the parents are not married.² This type of national legislation does not contradict the fundamental right to family life. It was clearly stated by the Court of Justice of the European Union (hereinafter: CJEU) in the child abduction case *McB*.³ The European Court of Human Rights (hereinafter: ECtHR) did not determine such national legislation as being generally contrary to the right to family life and to the prohibition of discrimination. Nevertheless, it gave its opinion on domestic legislative solutions where the mother's consent is a prerequisite for the father to acquire the right to parental responsibility, and established discrimination in this respect.⁴

The law applicable to parental responsibility is generally governed by the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children (hereinafter: Child Protection Convention) (HCCH 1996), which also contains, in Article 16, the rule on the law applicable to parental responsibility, which takes into account a change in the child's habitual residence.⁵

The facts of the recent case of *Z. v. Croatia*⁶ show the inevitable need to take into account the rules of both Hague Conventions. The case concerns the proceedings for the return of children under the Child Abduction Convention, in which the domestic courts refused to order the return of the applicant's four children to Germany after their mother had retained them in Croatia. The parents—Ms X and Mr Z, both Croatian nationals—had lived as an unmarried couple since 2007. They had four children, all born in Croatia. In the period between 2011 and 2018, the family moved frequently and lived in Greece, Slovakia, Hungary, Sweden, and France, and, as of 2018, again in Croatia. In 2018, Ms X and Mr Z ended their relationship. In October 2018, the mother gave the father written consent to bring the children from Croatia, where they were living at the time, to Germany, and to take care of them there, fully and independently. In December 2018, the father moved with the children to Germany, where he enrolled them in a private school and kindergarten. In July 2019, the mother revoked her consent, and in August of the same year, she came to Germany and took the children to Croatia. She refused to return the children to Germany after the summer holidays. The national courts in both instances refused to return the children, holding that prior to the abduction, the children had their habitual residence in Germany and that German law was applicable for assessing whether the retention of the children in Croatia is wrongful. According to German law, the retention of the children in Croatia by their mother did not represent a breach of the father's right to parental responsibility because he did not have such a right.⁷ The national court did not take into

² UK, some of the USA states, New Zealand, France, the Netherlands. (Schuz 2013, p. 151).

³ CJEU, Case C-400/10 PPU *McB*, 2010, EU:C:2010:582.

⁴ E.g., ECtHR, *Paparrigopoulos v. Greece*, Application No 61657/16, 30.6.2022; *Zaunegger v. Germany*, Application No 22028/04, 3.12.2009; For more information, see: (Hanke 2011; Koukoulis 2022).

⁵ “(1) The attribution or extinction of parental responsibility by operation of law, without the intervention of a judicial or administrative authority, is governed by the law of the State of the habitual residence of the child. (2) The attribution or extinction of parental responsibility by an agreement or a unilateral act, without intervention of a judicial or administrative authority, is governed by the law of the State of the child's habitual residence at the time when the agreement or unilateral act takes effect. (3) Parental responsibility which exists under the law of the State of the child's habitual residence subsists after a change of that habitual residence to another State. (4) If the child's habitual residence changes, the attribution of parental responsibility by operation of law to a person who does not already have such responsibility is governed by the law of the State of the new habitual residence.”

⁶ ECtHR, *Z. v. Croatia*, Application No. 21347/21, 1.9. 2022. The ECtHR already conducted several cases against Croatia, in which a violation was established due to the improper implementation of the Child Abduction Convention—*Karadžić v. Croatia*, Application No. 35030/04, 15.12.2005; *Adžić v. Croatia*, Application No. 22643/14, 12.3.2015; *Vujica v. Croatia*, Application No. 56163/12, 8.10.2015; *Adžić (2) v. Croatia*, Application No. 19601/16, 2.5.2019. For the analysis of national legislation and court practice on child abduction, see: (Tomljenović and Kunda 2010; Župan and Ledić 2013; Hoško 2015; Župan and Hoško 2015; Župan et al. 2019, 2021).

⁷ According to Article 1626a of the German Civil Code, the mothers of children born out of wedlock have sole custody and fathers have no right unless both parents agree on joint custody or the court imposes it.

account the father’s argument that he had acquired parental responsibility automatically under Croatian law and that he could not have lost this right by moving with the children to Germany.⁸ Prompted by this case, the aim of this paper is to expose and discuss how the Child Abduction Convention and the Child Protection Convention interact in view of the continuity of parental responsibility and to suggest ways of resolving the difficulties that occur in this regard. The discussion will be framed in legal sources, the broad literature, and case laws concerning parental responsibility and custody rights.

2. Concept and Matter of Continuity of Parental Responsibility in Child Abduction Cases

2.1. Semi-Autonomous Nature of Parental Responsibility

Before discussing the presented case law, it is necessary to consider the concept of the right to custody—i.e., parental responsibility—contained in the Child Abduction Convention. The “right to custody”, as provided in the Child Abduction Convention, is not so common in contemporary family law.⁹ Most countries have replaced it in their legislations with the concept of parental rights and responsibilities (Lowe 1997). The Child Abduction Convention has not followed this trend as, within its framework, the “right to custody” has an autonomous meaning.¹⁰ This concept is independent of any legislative construction of the Contracting States. In order to determine the substance of parental responsibility, the law of the state in which the child has habitual residence must be consulted; only then can the court of the requested state determine whether the right in question falls under the concept “the right to custody” in the Child Abduction Convention and whether there has been a violation of that right (Pérez-Vera 1982, para 39). In this sense, the right to custody under the Child Abduction Convention is semi-autonomous (Beaumont and McEleavy 1999, p. 74). The Child Abduction Convention defines the “right to custody” as the right that includes the custody of the child as a person, and in particular the right to determine the child’s place of residence.¹¹ This definition should be interpreted in accordance with the objectives of the convention (HCCH 1993).

An autonomous definition from the Child Abduction Convention and the concept of the right to parental responsibility in the contracting states may differ, and as such, this may cause confusion. Schuz proposes a two-step approach to resolve these difficulties. The first step is to recognise the rights that the parent or guardian has over the child under the law of the country in which the child has habitual residence. The second step is to characterise those rights according to the autonomous definition from the convention; i.e., to determine whether or not those domestic rights can be considered the “right to custody” within the meaning of the convention.¹²

When deciding on the request for the return of the child, the Croatian courts technically followed the recommended approach. This proved insufficient in this case, as the ECtHR blamed the domestic courts for the lack of sound reasoning in their decisions. In what follows, this article will further examine the possible failures in the application

Bürgerliches Gesetzbuch in der Fassung der Bekanntmachung vom 2. Januar 2002 (BGBl. I S. 42, 2909; 2003 I S. 738), das zuletzt durch Artikel 1 des Gesetzes vom 14. März 2023 (BGBl. 2023 I Nr. 72) geändert worden ist.

⁸ The Family Act of 2003 (Obiteljski zakon, Official Gazette no 163/03) was in force at the time the children were born. Under Article 99(1), both parents of a child (regardless of whether the child was born in or out of wedlock) acquired parental responsibility jointly by operation of law. The current Family Act (Obiteljski zakon, Official Gazette nos 103/15, 98/19, 47/20, 49/23) kept the same regulation of joint parental responsibility in Article 104.

⁹ In this paper, the term “parental responsibility” is used generally, while the term “custody” is used only when it explicitly refers to Article 3 of the Child Abduction Convention. See also: (Scherpe 2009).

¹⁰ The Overall Conclusion of the Special Commission of October 1989 on the Operation of the Hague Convention on the Civil Aspects of International Child Abduction, 29 ILM, 1990, para 9; (Freeman 2000).

¹¹ Child Abduction Convention, Article 5(a); (Harrison et al. 2020).

¹² Schuz’s proposal was supported in practice: *Re V-B* (Minors: Child Abduction: Custody Rights), 1999, 2 FLR 192, 196B; *Hunter v. Murrow*, 2005, EWCA Civ 976; *Fairfax v. Ireton*, 2009, NZFLR 433, NZCA 100; *Re D* (A Child) (Abduction: Foreign Custody Rights), 2006, UKHL 51; *Abbott v. Abbott*, 2010, 130 S Ct 1983. (Schuz 2013, p. 147).

of the relevant provisions of the Child Abduction Convention and the Child Protection Convention in more detail.

2.2. *Renvoi*

This scenario leads to the first general question of private international law relevant to the application of Article 3 of the Child Abduction Convention; i.e., is the applicable law determined by the convention law of the state concerned in its entirety (entailing also its rules of private international law), or is it merely a reference to substantive law? The question is well-known in the doctrine as *renvoi*. In international treaties containing the uniform rules concerning conflicts of laws, *renvoi* is usually expressly excluded. Unlike other Hague conventions on applicable law (since 1955), the drafter of the Child Abduction Convention chose to break with this tradition and not to address the issue. This approach was generally understood as a decision *pro renvoi*. The Explanatory Report confirms that the fact that the traditional approach of the HCCH to avoid *renvoi* and to refer to “internal” law was abolished can only mean that the word “law” is to be understood in its broadest sense, including also the rules concerning conflict of laws of the relevant legal system. Despite initiatives to clarify that the reference to the “law of habitual residence” refers to the domestic law of that state as the designated law, as applicable by its conflict of laws rules, the HCCH held that it was “unnecessary and became implicit anyway once the text neither directly nor indirectly excluded the rules in question” (Pérez-Vera 1982, para 66).

The landmark writings on the Child Abduction Convention confirm this understanding (Sonnentag 2017, p. 1541; Schuz 2013, p. 146). Beaumont and McEleavy argue that the standard form clause of earlier HCCH conventions restricting the applicable law to the domestic law was intentionally omitted. The Child Abduction Convention thus leaves room for *renvoi* in order to allow for a broader range of custody rights to be considered (Beaumont and McEleavy 1999, p. 46). The fact that the return of the child to the place of habitual residence does not automatically trigger the application of the substantive law of that state to the proceedings has been reiterated by the doctrine (Wolfe 2000, p. 302).

Some authors still believe that the drafters should have been clearer on this issue. For example, Beevers and Perez Milla emphasise that Article 3 should have been worded more precisely to explicitly allow *in favorem renvoi*, but only if it achieves the desired result (Beevers and Milla 2007, p. 226). This approach could be supported by the intention of the drafters of the convention to bring as many cases as possible under the scope of Article 3 (Pérez-Vera 1982, para 67). Schuz advocates for this approach: wherever custody rights have been violated, either under domestic law or under the choice of law rules of the state of habitual residence, the removal or retention will be wrongful (Schuz 2013, p. 170). Driven by the objectives of the convention, these authors propose a layered application of *renvoi*. The abducting court should first consider the domestic law of the child’s habitual residence. If the applicant (the left-behind parent) does not invoke the convention under those rules, the conflict of laws rules of the relevant state should be invoked (Beevers and Milla 2007).

In light of some older national case laws on *renvoi* in the context of child abduction, this approach seems reasonable. In the 2004 *Re JB*¹³ decision on the abduction of a child from Spain to the United Kingdom (UK), the UK court’s application of *renvoi* led to results that were unfavourable from the perspective of the drafters of the convention. Namely, although the father had custody under Spanish substantive law, the application of Spanish private international law referred to the law of the nationality of the child—that is, English substantive law—which deprived the father of custody rights. This case illustrates the danger of sticking to the letter of the law, which may lead to a result that the convention aimed to prevent. Although the father had secured his parental rights under Spanish law, he did not foresee that he would also have to do so under English law. The decision was in favour of the abducting parent, who gained an advantage by removing the child to

¹³ *Re JB* (Child Abduction: Rights of Custody: Spain), 2003, EWHC 2130 (Fan), 20041 1 FLR 796.

another jurisdiction. These results are outdated in all States Parties to the Child Protection Convention, as they all apply the connecting factor of the child's habitual residence.

It is worth noting that the available national law is not consistent, even within the same jurisdiction. Subsequent court decisions in the UK,¹⁴ as well as the practice in New Zealand¹⁵ and the Croatian case we examine in this paper, refer to internal law. *Renvoi* has not been addressed by either of the rulings adopted by the national courts or ECtHR in the case of *Z. v. Croatia*.

The Child Abduction Convention has opted for *renvoi*. However, the approach to *renvoi* in child abduction should be policy-oriented. A mechanical application of *renvoi* may violate fundamental rights, which fall under the ambit of public policy. When ruling on Article 3 of the Child Abduction Convention, one must bear in mind the intention of the drafters to include as many cases as possible within the scope of the convention. The right to respect for family life under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR), which also includes the legitimate expectations of parents regarding the right to the continuity of the once acquired parental responsibility settlement, should be taken into account. Only such an approach can guarantee the best interest of the child. This approach takes advantage of the *renvoi* doctrine while avoiding its disadvantages in a way that promotes the objectives of the convention (Schuz 2013, p. 170; See 2012). In the Contracting States of the Child Protection Convention, the conflict of laws rule is the same as that of the Child Abduction Convention: it focuses on a child's habitual residence. Moreover, Article 16(3) of the Child Protection Convention effectively monitors the *conflict mobile* in the event of the connecting factor not being established as it guarantees that parental responsibility as it exists under the law of the state of the child's habitual residence subsists after that habitual residence is transferred to another state. However, the application of the conflict of laws rules of the Child Protection Convention broadens the scope of the rule and makes it possible to fully implement the policy advocated by both instruments.

For the sake of all States Parties to the Child Abduction Convention that are not States Parties to the Child Protection Convention, the HCCH should clarify whether *renvoi* should be treated as an alternative referral rule (where the left-behind parent does not have custody rights under the domestic substantive law, the choice of law rules of the state of habitual residence are taken into consideration) or whether the legitimate policy objectives should be achieved by other means.

2.3. Habitual Residence

Without establishing the child's habitual residence at the time of the alleged wrongful removal or retention, it is not possible to establish whether or not the act of removal or retention was wrongful (Kruger 2011, p. 21). The Child Abduction Convention provides that the law of the state of the child's habitual residence is the only applicable law under which the wrongfulness of the abduction can be determined. The connecting factor of habitual residence is a well-established HCCH concept,¹⁶ which was primarily considered as a factual concept,¹⁷ and in this respect, it was distinguished from residence. It is considered appropriate for practice because it is important that the competent authorities of the place where the child is actually located are responsible for their physical well-being and can decide on their financial needs (De Winter 1969, p. 470). Habitual residence as a connecting factor meets the requirements of a modern and mobile society, which cannot be addressed according to residence and citizenship (Beaumont and McEleavy 1999, p. 89). It

¹⁴ *Hunter v. Murrow*, 2005, EWCA Civ 976, 12005 2 FLR 1119.

¹⁵ New Zealand Court of Appeal in *Fairfax v. Ireton*, 2009, NZCA 100, 12009 3 NZLR 289.

¹⁶ The concept was first introduced in the 1902 Guardianship Convention and it has since then been part of all Hague conventions dealing with family matters.

¹⁷ Although in early documents, including the Explanatory Report, this concept is considered exclusively factual, this is a terminological mistake. The determination of habitual residence presupposes the application of legal standards to the fact of a specific case. (Kunda 2019; Beaumont and Holliday 2021).

indicates a person's actual, real (closest) connection to a legal order, provides the possibility that several different family relationships are subject to the same applicable law, and promotes greater harmony between the rules of jurisdiction and the applicable law when both are based on habitual residence (Dutta 2017, p. 559). It is considered logical to prescribe the habitual residence of a child as a connecting factor to determine the wrongfulness of abduction. This is supported by the importance of child protection and the very nature of the Child Abduction Convention; i.e., its limited scope of application (Pérez-Vera 1982, para 66; Beaumont and McEleavy 1999, p. 88). The nature of this concept causes difficulties in abduction cases because it may benefit the abducting parent, who are able to remain undetected by giving the child sufficient time to adjust to the new environment. Therefore, it is not uncommon for the interpretation of the concept of habitual residence to arise as a difficulty in proceedings under the convention, nor for it to be interpreted differently by the courts of different states, and even by the courts of the same state (Schuz 2013, p. 175).

The case of *Z. v. Croatia* raises the question of whether the children actually had their habitual residence in Croatia before they moved to Germany and acquired it there. This question is significant from the point of view of establishing parental responsibility on the basis of Croatian national law. The Croatian Government argued before the ECtHR that the children did not have their habitual residence in Croatia before moving to Germany. The Government argued that before moving to Germany, the family had lived in Croatia, Greece, Slovakia, Sweden, and France, and then again in Croatia. The children were born between 2008 and 2015, and some of them had only resided in Croatia for a few months and had not attended school or kindergarten there.¹⁸ On the other hand, the father claimed that the children had habitually resided in Croatia before moving to Germany. He emphasised that Croatia was the country with which the children had the closest connection: they had been born in Croatia and had Croatian citizenship, just like their parents. After the family's numerous temporary stays abroad, they had always returned to Croatia. The fact that they did not attend school or kindergarten was related to their parents' specific lifestyle. The older children took correspondence courses and were home-schooled (*Ibid*, para 74). The applicant also referred to the arguments raised by the children's mother during the return proceedings concerning their integration into a social and family environment in Croatia (*Ibid*, para 22). Finally, the ECtHR decided that, in accordance with the principle of subsidiarity, it was not appropriate to examine the issue of habitual residence in the proceedings as it was not examined by the domestic courts in the return proceedings. Given the specific circumstance of family life and the significance of the matter in establishing the continuity of parental responsibility, it is the failure of the national courts to not have further examined the issue of the children's habitual residence. In this sense, it was necessary for the courts to establish all elements of the children's habitual residence in Croatia, especially the fact of their actual physical presence and the parents' intention to stay (Kunda 2019, p. 301), in line with the rich practice of the CJEU.¹⁹

2.4. Parental Responsibility Arising Ex Lege

The sources of the right to parental responsibility are those on which the child return request can be based under the respective legal system. The Child Abduction Convention takes into account the most significant sources, such as parental responsibility arising *ex lege*, the right to parental responsibility established by a judicial or administrative decision, and the right to parental responsibility established by an agreement with legal effect. This list is not exhaustive (Schuz 2013, p. 146). The wording of Article 3 contains the phrase:

¹⁸ *Z. v. Croatia*, para 77.

¹⁹ C-523/07 *A*, 2009, EU:C:2009:225; C-512/17, *HR*, 2018, EU:C:2018:513; C-499/15 *PPU, W. and V. vs. X*, 2017, EU:C:2017:118; C-393/18 *PPU, UD vs. XB*, 2018, EU:C:2018:835; C-111/17 *PPU, OL vs. PQ*, 2017, EU:C:2017:436; C-85/18 *PPU, CV vs. DU*, EU:C:2018:220; C-372/22 *CM*, 2023, EU:C:2023:364; C-572/21 *CC*, 2022, EU:C:2022:562; C-644/20 *W. J.*, 2022, EU:C:2022:371; C-603/20 *PPU MCP*, 2021, EU:C:2021:231; C-501/20 *M P A*, 2022, EU:C:2022:619; C-759/18, *OF*, 2019, EU:C:2019:816; C-530/18 *EP*, 2019, EU:C:2019:583; C-468/18 *R*, 2019, EU:C:2019:666.

“may arise in particular”, which emphasises the fact that there may be other types of arrangements that are not provided for in this provision. It is clear that these sources of the right to parental responsibility cover a wide area of law, but the fact that the list is not exhaustive renders the rule subject to flexible interpretation and applicable to a large number of factual situations (Eekelaar 1982, p. 320).

The Child Abduction Convention primarily provides for the law as a source of parental responsibility. It thus confirms one of the main characteristics of the child return system; namely, the protection of the right to parental responsibility even before any decision has been made on that matter. This is especially important in cases where the child has been removed or retained prior to the decision on parental responsibility (Beaumont and McEleavy 1999, p. 48). The Explanatory Report states that at the time the convention was drafted, the parent from whom the child was removed had no other option to regain the child than to resort to force or other actions that are harmful to the child. By including the cases with no decision on parental responsibility within the scope of the application of the convention, a significant step was taken toward resolving real problems that had previously been outside of the scope of the traditional private international law mechanisms (Pérez-Vera 1982, para 68). At present, the Child Abduction Convention provides that the removal of a child by a parent who has joint parental responsibility without the consent of the other parent is equally wrongful. Wrongfulness stems from the fact that the protected right of the left-behind parent, who is prevented from exercising that right normally, is violated by such a procedure. This confirms the legal nature of the convention, which is not intended to determine the merits of parental responsibility or the issue of the change of the right to joint parental responsibility due to subsequent changes to the facts. The aim of the convention is to prevent the decision on parental responsibility from being affected by factual changes caused by the unilateral action of one of the parents (Beaumont and McEleavy 1999, p. 49; Taylor and Freeman 2023, p. 4.; Bryant 2020, p. 182).

The purpose of the Child Abduction Convention is to protect all ways in which parental responsibility can be exercised. In terms of Article 3 of the Child Abduction Convention, the right to parental responsibility may be conferred on the person who requests it, independently or jointly with another person. It is difficult to imagine any other arrangement considering that joint parental responsibility, based on the principle of gender equality, is part of the internal law of most modern countries (Pérez-Vera 1982, para 71). Joint parental responsibility does not always arise *ex lege*. This is confirmed by national legislation, which does not automatically recognise the system of joint parental responsibility in relation to the father if the parents are not married. Some of these laws provide legal arrangements under which the unmarried father has no right to parental responsibility unless he has obtained it through a court order or some other method recognised by the state, such as the mother’s consent or registration. In such a system, if the mother or another person takes the child before the father has made the necessary arrangements to obtain parental responsibility, such removal cannot be considered wrongful. This also applies to cases in which the father *de facto* takes care of the child either independently or jointly with the mother (Schuz 2013, p. 151; See also: Beevers 2006; Jiménez Blanco 2012; Župan and Drventić 2023, p. 20). A child abduction case from a state with such legal regulation was brought before the Court of Justice. In the *McB* case, the CJEU ruled on the application of Article 7 on the right to respect for family life of the Charter in relation to the existence and realisation of the right to parental responsibility. The facts of the case considered the mother and the father of three children who were not married. Under Irish law, where the children were habitual residents, the father was not entitled to the right of parental responsibility without a court order or consent. By the force of the law, the mother is the sole bearer of parental responsibility over a child born out of wedlock. Due to the disrupted family relationship, the mother took the children to England, and the father submitted a request for the return of the children back to Ireland. The English court rejected the father’s request, explaining that the removal of the children was not wrongful. Following the father’s appeal, the Supreme Court of Ireland referred a request for a preliminary ruling to the

CJEU regarding the possible application of Article 7 of the Charter when determining the existence of the right to care in order to establish the wrongfulness of the child abduction. The CJEU replied that Member States are not prevented from prescribing, in their national law, that the unmarried father must first obtain a court decision granting him the right to parental responsibility in order to acquire the right to parental care, which would mean that removing the child from the country of habitual residence is wrongful.²⁰ The Court did not find such a national solution to be in violation of the Charter.

Cases with a similar scenario are not unknown to the Croatian courts. Recent research (Drventić 2022) of national judicial practice has recorded cases questioning the right to parental responsibility of an unmarried father as an applicant through direct judicial communication,²¹ administrative cooperation,²² or independent research into the law of the state of habitual residence.²³ This had led to the conclusion that when domestic authorities receive a request for the return of a child by the unmarried applicant father, they will always inquire in some way about the content of the foreign law on parental responsibility of the requesting state. However, all of these cases considered the facts in which the family was established in the state of habitual residence before the abduction. The case of *Z. v. Croatia* indicated that greater attention is required in those child abduction cases where the family moves from Croatia (or any other country which provides for joint parental responsibility of unmarried parents) to another state that may not automatically recognise the right to joint parental responsibility.

2.5. Applicable Law Provisions in the Hague Child Protection Convention

In Article 16, the Child Protection Convention governs the law as applicable to parental responsibility. The general rule provides that the law of the state in which a child is a habitual resident is applicable to the assignment or termination of parental responsibility.²⁴ The significant provisions for this research are those that consider a change in the habitual residence of a child contained in Article 16(3) and (4). The Lagarde Report brought to our attention that these provisions were the results of two divided opinions, neither of which took into account the totality of the elements of the problems (Lagarde 1998, para 105). The first opinion was grounded in variability. It held that for each change in the state of habitual residence, there is a necessary corresponding change to the applicable law to the assignment or termination of parental responsibility through the operation of the law. The opinion relied on the need for simplicity and security. The second opinion advocated for the continuity of protection; it argued that parental responsibility conferred through the operation of the law of the state of the child's habitual residence should subsist despite the change in the child's habitual residence. The main advantage of this opinion is the continuity of protection, especially in situations where the law of the state of the new habitual residence does not assign parental responsibility through the operation of the law. The opinion was grounded on the hypothesis that continuity would allow the holder of parental responsibility to continue caring for a child in the new state of habitual residence and to represent them in ordinary day-to-day transactions (*Ibid*, para 106). Finally, the drafters decided to embrace the second solution referring to continuity of parental responsibility. The actual provisions provide that parental responsibility existing under the law of the state of the child's habitual residence continues, notwithstanding the change of the child's habitual residence to another state.²⁵ Nevertheless, where the law of the state of the child's new habitual residence automatically confers parental responsibility on a person who does not already have it, it is the latter law that prevails (*Ibid*, Article 16(4); HCC 2014, p. 96; Detrick 1996). In other words, a change in habitual residence cannot

²⁰ *McB*, para 64.

²¹ Municipal Civil Court in Zagreb (Općinski građanski sud u Zagrebu), 131 R1 Ob-1746/20-8, 21.10.2020.

²² Municipal Civil Court in Zagreb (Općinski građanski sud u Zagrebu) 146-R1 Ob-2395/2019-4, 11.12.2019.

²³ Municipal Civil Court in Zagreb (Općinski građanski sud u Zagrebu), 130 R1 Ob-937/2019-22, 18.11.2019.

²⁴ Child Protection Convention, Article 16(1) and (2).

²⁵ Child Protection Convention, Article 16(3).

terminate parental responsibility, but it can confer it, which effectively means that the Child Protection Convention gives preference to a substantive rule that imposes parental responsibility whenever possible (Lowe 2010; Župan 2012, p. 213). Applying these rules to the circumstances of the case of *Z. v. Croatia*, the following can be concluded: Assuming that the children’s previous habitual residence was in Croatia, the unmarried couple had joint parental responsibility under Croatian law. When the father moved with the children to Germany, whose national legislation assigns parental responsibility only to the unmarried mother, the German law should remain, without any effect on the rights of the father, who would retain parental responsibility as conferred on him by the first law (Lagarde 1998, para 107).

2.6. *The Impact of the Applicable Law Provision on the Child Abduction Proceedings*

Despite the rather clear application of Article 16(3) to the circumstances of the case, there is still the question of the interrelation of the applicable law provisions of the Child Protection Convention and the provisions of the Child Abduction Convention governing the wrongful removal of children. The relationship between these two conventions is thus complex (DeHart 2000). When it comes to cases where both Conventions can be applied, as in the present case, the Child Protection Convention does not change or replace the mechanism established by the Child Abduction Convention. On the contrary, it complements and strengthens the Child Abduction Convention in certain aspects (Duncan 2010). This means that a number of its provisions can be used to complement the mechanism of the Child Abduction Convention when it is applied to a specific case. Article 50 provides that the Child Protection Convention “shall not affect” the application of the Child Abduction Convention; further, Article 50 clarifies that: “Nothing, however, precludes provisions of this Convention from being invoked for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organising access rights.” The applicable law provisions on parental responsibility in the Child Protection Convention are thus relevant to the application of the Child Abduction Convention and, in particular, to establishing whether the applicant has the right to parental responsibility within the meaning of Article 3 of the Child Abduction Convention (Lowe 2010, p. 7).

3. Overview of the Case of *Z. v. Croatia*

3.1. *Child Abduction Proceedings*

In October 2019, the father instituted the proceedings before the Municipal Civil Court in Zagreb for the return of his children to Germany in accordance with the Child Abduction Convention and the Brussels IIbis Regulation.²⁶ Before the court, the father stated that the mother had wrongfully retained the children in Croatia, while the mother claimed that the applicant had agreed on taking the children back to Croatia permanently. During the administrative procedure between two Central Authorities, the officers corresponded via e-mail. In the course of that correspondence, an official from the German Central Authority referred to the request of the Croatian Central Authority for the delivery of the relevant provision of German law regarding parental care. In the letter, the officer stressed that German law is not applicable in this case as the children were born in Croatia, where they previously lived with the parents. The German Central Authority pointed out on two occasions that the parents had joint parental responsibility with respect to the children in Croatia under Croatian law. The German Central Authority grounded its opinion in Article 16(3) of the Child Protection Convention. It is not clear whether the judge of the Municipal Civil Court in Zagreb was aware of this correspondence at the time. However, at the court hearings, the applicant’s lawyer provided the court with a copy of the correspondence between the two Central Authorities. In the court proceedings, a judge of the Municipal Civil Court in Zagreb, who was appointed contact judge for the purposes

²⁶ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338, 23.12.2003, pp. 1–29.

of the International Hague Network of Judges and the European Judicial Network, asked the German counterpart for information regarding the parental responsibility of fathers of children born out of wedlock under German law. In its response, the German court referred the judge to Article 1626a of the German Civil Code, which states that mothers of children born out of wedlock have sole custody and that fathers have no right unless both parents agreed on joint custody or a court imposed it.²⁷ In its decision of 15 November 2019, the Municipal Civil Court in Zagreb dismissed the father's request for the return of the children. The court held that prior to the abduction, the children had their habitual residence in Germany, and that the German law was applicable for assessing whether the retention of the children in Croatia constituted a breach of the applicant's right to parental responsibility. The court referred to the provision of the German Civil Code and concluded that the retention of the children in Croatia by their mother did not represent a breach of the father's right to parental responsibility because he has not such right.²⁸

The applicant appealed. He argued that he had acquired parental responsibility automatically under Croatian law and that he could not have lost this right by moving with the children to Germany. He considered that this court's decision is contrary to Article 16(3) of the Child Protection Convention. The County Court of Zagreb dismissed the appeal and upheld the first-instance decision. In doing so, the appellate court referred only to the German Civil Code, agreeing, in this way, with the court of the first instance that the retention was not wrongful. The County Court did not refer at all to the applicant's argument regarding the application of the Child Protection Convention.²⁹

Following this, the father lodged a constitutional complaint before the Constitutional Court of the Republic of Croatia, claiming that the decisions of the civil courts had breached his right to fair proceedings and the right to respect for his family life. He again stressed that the civil courts misapplied substantive law by applying German law and not Article 16(3) of the Child Protection Convention. The Constitutional Court held that there had been no breach of his constitutional rights. It merely noted that the applicant had invoked Article 16(3) of the Child Protection Convention, without further elaboration. In addition, the Constitutional Court referred to Article 7 of the same Convention, which defines wrongfulness in removal or retention, without explaining why that article was relevant at all. Finally, it concluded that the reasons given by the Municipal Civil Court in Zagreb and the County Court of Zagreb were relevant and sufficient and did not disclose any arbitrariness with regard to the father.³⁰

3.2. ECHR Assessment

The ECtHR found that there were no justified reasons for the domestic courts to interfere with the father's family life and established a violation of Article 8 on the right to respect for private and family life in the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR).³¹ The ECtHR considered that insufficient reasoning in a ruling dismissing or accepting objections to the return of a child under the Child Abduction Convention was contrary to the requirement of Article 8 of the ECHR. The ECtHR found that that the appellate court did not address the issues stressed by the father that were relevant to establishing the wrongful retention of the children. The nature and importance of those arguments required a specific and express reply.³² In regard to the decision of the Constitutional Court, the ECtHR found that the Constitutional Court had only referred to Article 7 of the Child Protection Convention, but did not explain how this article was relevant for dismissing the complaint (*Ibid*, para 90). Taking these

²⁷ Bürgerliches Gesetzbuch.

²⁸ Municipal Civil Court of Zagreb (Općinski građanski sud u Zagrebu), 145-R1-Ob-2080/19-19, 15.11.2019.

²⁹ County Court of Zagreb (Županijski sud u Zagrebu), 10 Gž Ob-36/20-2, 15.1.2020.

³⁰ Constitutional Court of the Republic of Croatia (Ustavni sud Republike Hrvatske), U-III-4062/2020, 13.2.2021.

³¹ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5.

³² *Z. v. Croatia*, para 89.

circumstances into account, in addition to their previously established practice,³³ the ECtHR found that the reasons stated by the domestic courts were neither relevant nor sufficient to justify the interference with the applicant's right to respect for his family life.³⁴

4. Conclusions

In the case of *Z. v. Croatia*, the ECtHR brought another case against Croatia, which has already had a history of inadequate implementation of the Child Abduction Convention. In this case, the reasoning from Strasbourg bypasses a universally significant and essentially relevant issue for the application of Article 8 of the ECHR and the Child Abduction Convention—that of the continuity of parental care. On the contrary, the ECtHR took an easier path and focused only on the aspects of the insufficient application of the Child Abduction Convention with regard to the insufficiently reasoned decision of the national courts.

This paper looks at the notion of parental responsibility in child abduction proceedings from multiple angles. The right to custody under the Child Abduction Convention is semi-autonomous. It is roughly defined by Article 3. In order to determine the content of parental responsibility, the law of the state in which the child had habitual residence before the abduction must be consulted. Only then can the court of the requested state determine whether the right in question falls under the concept of “the right to custody” in the Child Abduction Convention and whether there has been a violation of that right. There are different domestic legislation approaches to the notion of parental responsibility. In the context of this research, the most significant aspect is with respect to domestic substantive laws that do not attribute parental responsibility to fathers *ex lege*. However, the entire exercise of the application of Article 3 described above should be governed by the objectives of the convention.

Another plea for teleological interpretation refers to the matter of *renvoi* in the course of child abduction proceedings. The matter has not been addressed by any of the courts involved in many instances of the dispute in *Z. v. Croatia*. When ruling on Article 3 of the Child Abduction Convention, the court must bear in mind the intention of the drafters to include as many cases as possible within the scope of the convention. Courts should also take into account the right to respect for family life under the state's fundamental rights, which also includes the legitimate expectations of parents regarding the right to the continuity of the once acquired parental responsibility settlement. Only such an approach can guarantee the best interest of the child.

It is sustained here that the Child Abduction Convention opts for *renvoi*. Thus, the applicable law determined by Article 3 is the law of the state concerned in its entirety, entailing also its rules of private international law. Such an approach speaks for a combined application of both Hague conventions, of 1980 and 1996, in handling child abduction proceedings. When it comes to cases where both conventions can apply, as in the present case, the Child Protection Convention does not change or replace the mechanism established by the Child Abduction Convention. The demarcation clauses sustain that the Child Protection Convention complements and strengthens the Child Abduction Convention in certain aspects.

In Article 16, the Child Protection Convention governs the law applicable to parental responsibility. The general rule provides that the law of the state in which a child is a habitual resident is applicable to the assignment or termination of parental responsibility. The significant provisions for this research are those that consider a change in the child's habitual residence and are contained in Article 16(3) and (4). They effectively monitor the *conflict mobile* in the event that the connecting factor is not established as it guarantees that parental responsibility as it exists under the law of the state of the child's habitual

³³ ECtHR already sanctioned insufficient reasoning in several child abduction cases: *X. v. Latvia*, Application No. 27853/09, 26.11.2013, para 106 and 107; *Blaga v. Romania*, Application No. 54443/10, 1.7.2014, para 70.

³⁴ *Z. v. Croatia*, para 91.

residence subsists after that habitual residence is transferred to another state. However, the application of the conflict of laws rules of the Child Protection Convention broadens the scope of the rule and makes it possible to fully implement the policy advocated by both instruments. Based on the considerations in this research, it follows that the provision on the continuity of parental responsibility should be applied and taken into account in cases of international child abduction when determining the wrongfulness of child removal or retention.

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References

Archive Sources

- Abbott v. Abbott*, 2010, 130 S Ct 1983.
- Adžić (2) v. Croatia*, Application No. 19601/16, 2.5.2019.
- Adžić v. Croatia*, Application No. 22643/14, 12.3.2015.
- Blaga v Romania*, Application No. 54443/10, 1.7.2014.
- Bürgerliches Gesetzbuch in der Fassung der Bekanntmachung vom 2. Januar 2002 (BGBl. I S. 42, 2909; 2003 I S. 738), das zuletzt durch Artikel 1 des Gesetzes vom 14. März 2023 (BGBl. 2023 I Nr. 72) geändert worden ist.
- C-111/17 PPU, *OL vs. PQ*, 2017, EU:C:2017:436.
- C-372/22 CM, 2023, EU:C:2023:364.
- C-393/18 PPU, *UD vs. XB*, 2018, EU:C:2018:835.
- C-468/18 R, 2019, EU:C:2019:666.
- C-499/15 PPU, *W. and V. vs. X*, 2017, EU:C:2017:118.
- C-501/20 M P A, 2022, EU:C:2022:619.
- C-512/17, *HR*, 2018, EU:C:2018:513.
- C-523/07 A, 2009, EU:C:2009:225.
- C-530/18 EP, 2019, EU:C:2019:583.
- C-572/21 CC, 2022, EU:C:2022:562.
- C-603/20 PPU MCP, 2021, EU:C:2021:231.
- C-644/20 W. J., 2022, EU:C:2022:371.
- C-759/18, *OF*, 2019, EU:C:2019:816.
- C-85/18 PPU, *CV vs. DU*, 2018, EU:C:2018:220.
- CJEU, Case C-400/10 PPU *McB*, 2010, EU:C:2010:582.
- Constitutional Court of the Republic of Croatia (Ustavni sud Republike Hrvatske), U-III-4062/2020, 13.2.2021.
- Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5.
- Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338, 23.12.2003, pp. 1–29.
- County Court of Zagreb (Županijski sud u Zagrebu), 10 Gž Ob-36/20-2, 15.1.2020.
- Fairfax v. Ireton*, 2009, NZFLR 433, NZCA 100).
- Family Act (Obiteljski zakon), Official Gazette no 163/03.
- Family Act (Obiteljski zakon), Official Gazette nos 103/15, 98/19, 47/20, 49/23.
- Hunter v. Morrow*, 2005, EWCA Civ 976, 12005 2 FLR 1119.
- Karadžić v. Croatia*, Application No. 35030/04, 15.12.2005.
- Municipal Civil Court in Zagreb (Općinski građanski sud u Zagrebu), 131 R1 Ob-1746/20-8, 21.10.2020.
- Municipal Civil Court in Zagreb (Općinski građanski sud u Zagrebu) 146-R1 Ob-2395/2019-4, 11.12.2019.
- Municipal Civil Court in Zagreb (Općinski građanski sud u Zagrebu), 130 R1 Ob-937/2019-22, 18.11.2019.
- Municipal Civil Court of Zagreb (Općinski građanski sud u Zagrebu), 145-R1-Ob-2080/19-19, 15.11.2019.
- New Zealand Court of Appeal in *Fairfax v. Ireton*, *Fairfax v. Ireton* ([2009] NZCA 100, 12009) 3 NZLR 289.

- Paparrigopoulos v. Greece*, Application No. 61657/16, 30.6.2022.
Re D (A Child) (Abduction: Foreign Custody Rights), 2006, UKHL 51.
Re JB (Child Abduction: Rights of Custody: Spain), 2003, EWHC 2130 (Fan), 20041 1 FLR 796.
Re V-B (Minors: Child Abduction: Custody Rights), 1999, 2 FLR 192, 196B.
Vujica v. Croatia, Application No. 56163/12, 8.10.2015.
X. v. Latvia, Application No. 27853/09, 26.11.2013.
Z. v. Croatia, Application No. 21347/21, 1.9.2022.
Zaunegger v. Germany, Application No 22028/04, 3.12.2009.

Published References

- Beaumont, Paul, and Jayne Holliday. 2021. Habitual Residence in Child Abduction Cases: The Hybrid Approach Is Now the Norm but How Much Weight Should Be Given to Parental Intention? In *Liber Amicorum Monika Pauknerova*. Edited by Pfeiffer Magdalena Brodec Jan, Břıza Petr and Zavadilová Marta. Prague: Wolters Kluwer, pp. 27–36.
- Beaumont, Paul, and Peter McEleavy. 1999. *The Hague Convention on International Child Abduction*. Oxford: Oxford University Press.
- Beevers, Kisch. 2006. Child Abduction: Inchoate Rights of Custody and the Unmarried Father. *Child and Family Law Quarterly* 18: 499–516.
- Beevers, Kisch, and Javier Pérez Milla. 2007. Child Abduction: Convention ‘Rights of Custody’—Who Decides? An Anglo-Spanish Perspective. *Journal of Private International Law* 3: 201–27. [CrossRef]
- Bryant, Diana. 2020. The 1980 Child Abduction Convention—The Status Quo and Future Challenges. In *The Elgar Companion to the Hague Conference on Private International Law*. Edited by John Thomas, Gulati Rishi and Köhler Ben. Cheltenham and Northampton: Elgar, pp. 181–95.
- DeHart, Gloria Folger. 2000. The Relationship between the 1980 Child Abduction Convention and the 1996 Protection Convention. *New York University Journal of International Law and Politics* 33: 83–102.
- Detrick, Sharon. 1996. Hague 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. *Hague Yearbook of International Law* 9: 77–84.
- De Winter, Louis. 1969. Nationality or Domicile? The Present State of Affairs. *Recueil des Cours de l’Académie de droit international de La Haye* 128: 441, 470.
- Drventić, Martina. 2022. Prekogranična građanskopravna otmica djece. Doctoral dissertation, Faculty of Law, Josip Juraj Strossmayer University of Osijek, Osijek, Croatia.
- Duncan, William. 2010. Hague Conference Future Developments in International Family Law with Special Emphasis on Cross-border Child Protection: A View from The Hague. In *Convergence and Divergence in Private International Law, Liber Amicorum Kurt Siehr*. Edited by Boele-Woelki Katharina, Einhorn Talia, Girsberger Daniel and Symeonides Symeon. Kamm: Eleven International Publishing, Schulthess, pp. 221–41.
- Dutta, Anatol. 2017. Chapter 8: Domicile, habitual residence and establishment. In *Encyclopedia of Private International Law*. Edited by Basedow Jürgen, Rühl Giesela, Ferrari Franco and de Miguel Asensi Pedro. Cheltenham and Northampton: Edward Elgar Publishing, pp. 555–61.
- Eekelaar, John. 1982. International Child Abduction by Parents. *The University of Toronto Law Journal* 32: 281–325. [CrossRef]
- Freeman, Marilyn. 2000. Rights of Custody and Access Under the Hague Child Abduction Convention—“A Questionable Result?”. *California Western International Law Journal* 31: 39–52.
- Hanke, Andreas. 2011. Custody and Visitation Rights in Germany After the Decisions of the European Court on Human Rights. *Family Law Quarterly* 45: 353–60.
- Harrison, Richard, Anderson Nicholas, Perrins Jennifer, Chokowry Katy, Ridley Samantha, Dance Thomas, and Tait Elle. 2020. *IKBW on International Child Abduction*. Haywards Heath: Bloomsbury Publishing.
- HCCH. 1980. Hague Convention on the Civil Aspects of International Child Abduction. October 25. Available online: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=24> (accessed on 25 May 2023).
- HCCH. 1993. Conclusion No 2 of the Second Special Commission Meeting in 1993. Available online: www.hcch.net/upload/abdrpt93e.pdf (accessed on 15 May 2023).
- HCCH. 1996. The 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. Available online: http://www.hcch.net/index_en.php?act=conventions.text&cid=70 (accessed on 25 May 2023).
- HCCH. 2014. Practical Handbook on the Operation of the 1996 Hague Child Protection Convention. Available online: <https://assets.hcch.net/docs/eca03d40-29c6-4cc4-ae52-edad337b6b86.pdf> (accessed on 25 May 2023).
- Hoško, Tena. 2015. Child Abduction in Croatia: Before and After the European Union Legislation. In *Private International Law in the Jurisprudence of European Courts—Family at Focus*. Edited by Župan Mirela. Osijek: Faculty of Law Osijek, pp. 15–184.
- Jiménez Blanco, Pilar. 2012. Unmarried Fathers and Child Abduction in European Union Law. *Journal of Private International Law* 8: 135–57. [CrossRef]
- Koukoulis, Andreas-Nikolaos. 2022. The exercise of parental care of children born out of wedlock and the ECtHR: Reflections on *Paparrigopoulos v. Greece*. *Maastricht Journal of European and Comparative Law* 29: 745–51. [CrossRef]

- Kruger, Thalia. 2011. *International Child Abduction. The Inadequacies of the Law*. Oxford: Hart Publishing.
- Kunda, Ivana. 2019. Uobičajeno boravište djeteta. In *Prekogranično Kretanje Djece u Europskoj Uniji*. Edited by Župan Mirela. Osijek: Pravni fakultet Osijek, pp. 295–315.
- Lagarde, Paul. 1998. Explanatory Report on the 1996 Hague Child Protection Convention, HCCH Publications. Available online: <https://www.hcch.net/en/publications-and-studies/details4/?pid=2943> (accessed on 15 May 2023).
- Lowe, Nigel. 1997. The Meaning and Allocation of Parental Responsibility—A Common a Common Lawyer’s Perspective. *International Journal of Law, Policy and Family* 11: 192–215. [CrossRef]
- Lowe, Nigel. 2010. The Applicable Laws Provisions of the 1996 Hague Convention on the Protection of Children and the Impact of the Convention on International Child Abduction. *International Family Law Journal* 51: 51–58.
- Pérez-Vera, Elisa. 1982. Explanatory Report on the 1980 HCCH Child Abduction Convention. Available online: <https://assets.hcch.net/docs/a5fb103c-2ceb-4d17-87e3-a7528a0d368c.pdf> (accessed on 5 May 2023).
- Scherpe, M. Jens. 2009. Establishing and Ending Parental Responsibility: A Comparative View. In *Responsible Parents & Parental Responsibility*. Edited by Robert Rebecca, Gilmore Stephen and Herring Jonathan. Oxford and Portland: Hart Publishing, pp. 43–62.
- Schuz, Rhona. 2013. *The Hague Child Abduction Convention—A Critical Analysis*. Oxford and Portland: Oxford University Press.
- See, Rina. 2012. Through the Looking Glass: Renvoi in the New Zealand Context. *Auckland University Law Review* 18: 57–85.
- Sonnentag, Michael. 2017. Renvoi. In *Encyclopedia of Private International Law*. Edited by Jürgen Basedow, Gisela Rühl, Franco Ferrari and Pedro de Miguel Asensio. Cheltenham and Northampton: Edward Elgar Publishing, pp. 1538–45.
- Taylor, Nicola, and Marilyn Freeman, eds. 2023. Chapter 1: Introduction and key themes. In *Research Handbook on International Child Abduction*. Cheltenham and Northampton: Elgar, pp. 2–19.
- Tomljenović, Vesna, and Ivana Kunda. 2010. Conflict of Laws Conventions and their Reception in National Legal Systems: The Croatian National Report. In *The Impact of Uniform Law on National Law: Limits and Possibilities*. Edited by Jorge Sánchez Córdero. Mexico City: Instituto de Investigaciones Jurídicas, pp. 1024–69.
- Wolfe, Karin. 2000. A Tale of Two States: Successes and Failures of the 1980 Hague Convention on the Civil Aspects of International Child Abduction in the United States and Germany. *The NYU Journal of International Law & Politics* 1: 285.
- Župan, Mirela. 2012. Roditeljska skrb u sustavu Haške konvencije o mjerama dječje zaštite iz 1996. In *Pravna zaštita prava na (zajedničku) roditeljsku skrb*. Edited by Branka Rešetar. Osijek: Pravni fakultet Sveučilišta Josipa Jurja Strossmayera u Osijeku, pp. 199–222.
- Župan, Mirela, and Martina Drventić. 2023. Gender Issues in Private International Law. In *Gender Perspectives in Private Law*. Edited by Gabriele Carapezza Figlia, Ljubinka Kovačević and Eleonor Kristofersson. Cham: Springer, pp. 1–28.
- Župan, Mirela, and Senija Ledić. 2013. *Jurisdiction and Recognition and Enforcement of Judgments in Family Matters (Equivalent of Brussels IIa and Maintenance)—Croatian Experience, Research within the Project Cross-Border Litigation in Europe, European Union Lifelong Learning Programme (the Jean Monnet Scheme)*. Aberdeen: University of Aberdeen.
- Župan, Mirela, and Tena Hoško. 2015. Operation of the Hague 1980 Child Abduction Convention in Croatia. In *Private International Law in the Jurisprudence of European Courts—Family at Focus*. Edited by Mirela Župan. Osijek: Faculty of Law Osijek, pp. 227–42.
- Župan, Mirela, Martina Drventić, and Thalia Kruger. 2019. Cross-border Removal and Retention of a Child—Croatian Practice and European Expectation. *International Journal of Law, Policy and the Family* 34: 60–83.
- Župan, Mirela, Paula Poretti, and Martina Drventić. 2021. Izvršenje presuda Europskog suda za ljudska prava u građanskopravnim međunarodnim otmicama djece u Republici Hrvatskoj—Nova otvorena pitanja. *Zbornik Pravnog fakulteta u Zagrebu* 71: 347–75. [CrossRef]

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