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***CHILD ABDUCTION  
USES AND ABUSES OF THE HAGUE CONVENTION:***

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This paper draws on the author's knowledge and experience of the situation in Britain, France and Germany. It is a personal commentary and is not to be published, quoted or in any way reproduced without the permission of the author.

## I. INTRODUCTION: THE PROBLEM

Most people associate child abduction with countries where laws and customs are very different from ours. But, child abduction within western societies is much more common than supposed and there has been an explosion in the number of incidents since the mid-1970s.

There is an obvious link between this phenomenon and the decline in marriage as a stabilising factor in our societies. The sharp rise in divorce rates and children born outside marriage provide fertile ground for disputes about custody and access.

At the same time, the problem of child abduction has over the last two decades acquired a new and sometimes insoluble dimension. Statistics point to an increase in marriage between people of different nationality. This is hardly surprising. With the explosion of international travel and tourism, the social consequences of a global economy, and the increasing irrelevance of national frontiers, especially in Europe, traditional impediments to trans-national marriages have fallen away. But those unions are no less prone to divorce and to quarrels about children.

Whenever marriages break down, a decision has to be taken on where and with whom the children will live. This can be a bitter and contentious business. But when parents of different nationalities are involved, disputes over custody and access can be further exacerbated by differences in culture and in the legal systems of the two countries involved. Some of these situations result in cross-frontier abductions by one of the parents. When this happens - in contrast to abduction within a single national jurisdiction - experience shows how difficult it is to secure the safe return of children and to protect them from the psychological damage inflicted by abduction. If anything should transcend frontiers, it is the interests of children. Sadly, children's issues remain an area where national interest is often allowed to assert itself.

Judicial co-operation between states can be a highly contentious area as the recent negotiations on an International Criminal Court have shown. One of the reasons is that judicial systems lie at the heart of national sovereignty. This often inhibits cross-border co-operation, which requires the competence of national courts to be limited by international obligations. The issue of child abduction is a prime example of the limitations of international co-operation in the judicial area.

There are no international conventions regulating custody matters. Every country has its own judicial system. Custody orders made in one country are not necessarily recognised in another. When non-custodial parents abduct their children from the state in which custody has been given (usually heading to their home country), the chances of recovering them through judicial process can be slim. Every year, more and more children find themselves separated in the most harrowing circumstances from one of their parents.

The effect on children can be devastating. But the victim parents themselves are also plunged into a bewildering world where helplessness, despair and disorientation compete. The emotional trauma is compounded by the daunting practical obstacles to retrieving the children, or even to gaining access to them. Simply finding out where to get help can be very difficult. Parents often face unfamiliar legal, cultural and linguistic barriers. Their emotional and financial resources can be stretched to the limit. In the meantime, the abducted child is often led to believe that the victim parent has abandoned it, so leading the child, in its anger and hurt, to assert that it does not want contact with the victim parent. This vicious circle complicates still further a resolution, and will continue to do so until courts recognise that there is such a thing as Parental Alienation Syndrome, PAS. As the years pass, the chances of recovering children before their adulthood become progressively more remote. Many victim parents feel that it would be easier to come to terms with the shock of bereavement than with a situation marked by prolonged uncertainty and anxiety.

Some parents may believe that their actions have an objective justification (e.g. to rescue their children from domestic violence). But a common thread in all too many cases is the sustained, vengeful effort of the abductor to deprive the other parent of contact with the child to the maximum degree possible. The aim is to flee one judicial system and to destroy the other parent's relationship with the child.

The International Hague Convention on the Civil Aspects of International Child Abduction of 1980 was designed to ensure "*the protection of children from the harmful effects of their wrongful removal or retention*". Should one parent break a custody agreement either by illegally retaining (on an access visit) or abducting a child, the Hague Convention requires its immediate return to the country where the original custody agreement was made.

The purpose of the Hague Convention was to provide a simple and straightforward procedure. In this, it has largely failed. Different national approaches to implementing the Hague Convention, the slowness of procedures, the lack of legal aid in some countries, and the excessive recourse to the loop-hole clause, has meant that most cases of

international child abduction remain unresolved. Some children are never located. Others are not returned to their country of origin.

The exact figures for trans-national child abduction are not known. Many parents are reluctant to go to the central authorities. Others are not even aware of the existence of the Hague Convention. The official figures could well understate the problem. Even so they are alarmingly high. In the United States alone, the National Centre for Missing and Exploited Children reports that 165,000 children are abducted by a parent every year. More than 10% of them are taken abroad. In recent years the number of abductions has grown sharply. In England, Reunite, the National Council for Abducted Children, has recorded a 50% increase since 1995 in the number of children abducted abroad by an estranged parent. In France, a similar upsurge has been recorded.

Despite the rapid increase in abduction cases, there is little awareness of the phenomenon in the governments and legislatures of Convention signatories. Nor is there much awareness among the populations at large. As a result, very little is being done to tackle the issue and to make The Hague Convention work as originally intended.

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## II. THE HAGUE CONVENTION: WHAT IT DOES AND WHAT IT DOES NOT DO

The Hague Convention on the Civil Aspects of International Child Abduction is an international treaty currently in force between 49 countries.

The objectives of the Convention are "*to secure the prompt return of the children wrongfully removed to, or retained in, any Contracting State; and to ensure that rights of custody and access under the law of the Contracting State are effectively respected in the other Contracting States*" (Article 1). The Convention is not concerned with the "best interests of the child", that is to say, with the merits of a custody case. Criticisms or complaints about the custodial parent or the terms of a custody award, are matters to be dealt with by the jurisdiction of the child's habitual residence. The paramount objective of the Hague Convention is to return the child to the country of habitual residence and to confirm that country's jurisdiction.

The Hague Convention provides for a civil proceeding to be brought by the country from which the child was removed or retained. If proceedings are filed within one year, the

judge of the country of retention is mandated to order the return of the child to the country of habitual residence. (Return is discretionary if more than one year has elapsed and the child is settled in the new environment). The abducting parent can raise objections to the return. But the intent of the Convention is not to allow these objections except in the most narrowly defined circumstances.

The exception to the requirement for the immediate return of the child to the country of habitual residence is to be found in Article 13 of the Convention. "*The judicial or administrative authority of the requested State is not bound to order the return of the child if*" (Article 13b) "*there is a grave risk that the child's return would expose him/her to physical or psychological harm or otherwise place the child in an intolerable situation. 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 obtained an age and degree of maturity at which it is appropriate to take account of its views*".

A main intention of this article was to draw a clear distinction between a child's objections, as defined in the article, and a child's wishes as commonly expressed in a custody case. This is logical, given that the Convention is not intended as an instrument to resolve custody disputes per se. It follows, therefore, that the notion of "objections" under Article 13b is far stronger and more restrictive than that of "wishes" in a custody case. A failure by courts to grasp this distinction, and to see it as a key defence against the manipulation of a child by the abductor-parent, is a root cause of the difficulties described below in the implementation of the convention.

To sum up:

1. By allowing an exception, the Hague Convention does not set an absolute rule. Children are not automatically returned.
2. Article 13, in constituting this exception, can offer abductors a way of legitimising their actions.
3. Whether or not article 13 serves this purpose depends on how the judge interprets its meaning.

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### III. THE HAGUE CONVENTION: WHAT HAS GONE WRONG.

The discretion given to judges has in practice resulted in a wide variation between signatory states in the outcome of proceedings. The American Bar Association reports

that judicial returns vary between 5% and 95% from country to country. Article 13b, originally intended as an exception, has in some countries become virtually the rule. This is jeopardising the Convention's effectiveness and perverting its original intent.

### **1. The exception is made the rule**

Evidence is accumulating that a major cause for the discrepancy in rates of return orders is the level of court allowed to hear Convention cases. When cases are heard centrally by High Court judges, return orders are usually made. But, the system tends to fail, when the courts hearing Convention cases are local family courts without Convention experience. This is particularly significant when Article 13b is raised as an objection.

In England and Wales, Convention cases are exclusively heard **centrally** by a small number (seventeen at present) of specialist High Court judges. The High courts of England and Wales usually hear cases expeditiously based on paper evidence and without the child's view being heard. Judges usually make a decision quickly to return the children, relying on the foreign court to make a fair decision at any subsequent custody hearing.

The Consultation paper on Child Abduction published in the February 1997 issue of the British Family Law journal reported that in England and Wales, the "consistent approach has been to draw a clear distinction between children's objections under article 13b and children's wishes in ordinary domestic custody cases". The English High Court has taken a policy decision to approach Art. 13b with caution (for example against the risk of indoctrination by an abducting parent) and, even if a child were found to object to a return, to refuse a return only in an **exceptional case**.

Conversely, in countries where Convention cases are first heard in local courts without Convention expertise, the results can be very different. For instance, in Germany, all *Amstgerichte* (small family courts that can be found in towns which have as few as 20,000 inhabitants) have jurisdiction to hear Convention cases. Cases are heard in the locality where the abductor has taken the children (usually his hometown) and it is impossible to change jurisdictions.<sup>1</sup>

The risk here is of inexperienced judges, who may misinterpret the meaning of the Hague Convention. The 1996 Lowe report found that in Germany, no single *Amstgericht* court

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<sup>1</sup> This is currently under discussion in Germany and a proposal has been put forward to reduce the number of courts eligible to hear Convention cases (at present more than 300).

had heard more than one case and that **every time that the child's objections were raised as a "defence" for abduction or retention, a return order was refused.** Reunite's latest figures show a similar pattern: from their 27 recorded outgoing cases to Germany since 1995, only one child was returned, precisely when Article 13b was not advanced as a defence by the abductor.

There is the added risk of a vicious circle, if family court judges are seen to favour local residents. Abductors will be readier to take the law into their own hands, if they believe that their judges will ex-post facto legitimise what they have done. It is interesting to note that Madame Thomas Sassier (Direction des Affaires Civiles et du Sceau, French Ministry of Justice) recorded a four-fold increase in the number of outgoing cases from France to Germany between 1993 and 1997. This phenomenon coincided with the highly publicised Laylle/Volkman case, in which the German courts declined to order the return of two children abducted by their father. (The Laylle/Volkman case has been followed by the Gerbatsch (US/Germany) and the Lancellin/Tiemann (France/Germany) cases, all three of which have occurred within a narrow geographical area of Lower Saxony, near Bremen).

In the Laylle/Volkman case, the German courts overruled the English High Court order to return the children to the mother in the U.K. on the grounds that it was in the children's best interest to be raised in Germany. The judges' view was that the children had suffered in England *"because the entire social environment was based on a foreign language since German was spoken neither at home nor at school"*. In the McHale case (UK/Germany) similar reasons were given. In Tina Cone's case (UK/Germany) the judges concluded that her daughter *"had learnt to trust her father in Germany, whereas in England, nasty things were said about Germany"*. The illegal retention of two children by the wife of Pascal Holdry (France/Germany) was upheld on the grounds that it was the "will of the children" (who were three-and-a-half and five years old at the time) to live in Germany rather than in France where they had always resided before their illegal retention. In the case of Ildiko Gerbatsch (US/Germany), her illegally retained children were not returned to San Diego in the USA because the environment was deemed healthier for children in Germany. Other examples are available. France has 137 cases outstanding.

A feature of such cases is that they are allowed to become a discussion of the merits of custody arrangements. It is often the case that an abducting parent will, within the framework of Article 13b, level allegations against the other parent and request that oral evidence be heard. Judges, who are inexperienced, treat these Article 13b objections as "a merit of custody" argument. This is exactly what the Convention was supposed to

residence, which is best placed to decide on questions of custody and access. But local family courts are too often unable or unwilling to uphold the difference between proceedings under the Hague Convention and arguments over custody arrangements. Underlying this is a distrust of foreign courts.

## **2. The danger of delay**

The merit of the Convention is supposed to lie in the speed of its proceedings. But, some countries are markedly slower in dealing with Hague applications than others. This is particularly the case where, as described above, court proceedings become in reality an argument over custody. (The problem of delay is compounded when cases are first heard in lower courts and appeals can then be lodged in higher courts).

In Germany, the involvement of the local Jugendamt, or Youth Authority, plays a major role in proceedings. Local judges tend to rely on their evidence, and hold up matters by asking to see welfare reports and the children. While in principle this could give a more complete picture of the children's situation, it is nonetheless a major factor for delay. In the meantime the child is more and more under the influence of the abducting parent and further alienated from the absent parent. There is another problem. Youth Authority reports are usually based on information available only in the country of retention and there is little direct investigation into the environment from which the child has been taken. The result, therefore, can be an in-built bias in favour of the abductor. Finally, the passage of time will eventually generate a new argument, which favours abductors, namely that the children are now settled in their new environment and should not be moved yet again.<sup>2</sup>

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<sup>2</sup> At the Anglo-German Judicial Conference in Dartington (18 -20 May 1997) both sides agreed this was a problem. In England, High court judges generally made their decision quickly without the child's views being heard. Incoming Anglo-German cases resulting in a judicial return last an average just over **5 1/2 weeks**, while the average length of proceedings in Germany is just under **26 weeks**. Similarly, the average time it took for a judicial refusal to be made for incoming Anglo-German cases was **11 weeks**, while among outgoing cases it was just under **36 weeks**. (Dartington, May 1997 Anglo-German Summit report)



### **3. Perversion of the Convention's intent**

In a number of countries, therefore, interpretations of the Hague Convention extend its meaning to encompass in practice an unwarranted jurisdiction in custody matters. Certain consequences flow from this, all of them prejudicial to the victim-parent when, as is usually the case, the retained or abducted child is not returned.

When a child is not returned, the abducting parent has the advantage of having subsequent proceedings dealt with in the country of retention rather than the country of the child's habitual residence. Case studies show that these court decisions, dealing with custody and access rights, tend to favour the abducting parent. This, combined with the fact that, for example in Germany, judges are reluctant to enforce access orders, results in a situation where a parent is often deprived of all contact with the child, or at best, has contact in only the most harrowing circumstances (e.g. a government office with a third party present). On this interpretation of Article 13, the Hague Convention becomes in effect the instrument of alienation between a child and victim-parent – the very opposite of what was intended.

### **4. Child trauma and Parental Alienation Syndrome**

Children who are abducted will have already suffered from their parents' separation. But, in addition, they will experience the trauma of being suddenly cut off from their familiar environment – from a parent, grandparents, school and friends.

This experience is already bad enough: many children do not understand what is happening or why. But things are often made even worse, when the abducting parent is hiding from the police or taking precautions against re-abduction; when the child realises that there is a state of war between its parents. The child has already been traumatised by the loss of one parent; its greatest fear becomes that it will lose the other parent. This fear itself then becomes an obstacle to resolving the situation, since it is central to what is known as Parental Alienation Syndrome (PAS).

Studies of PAS, including by Dr. Richard Gardner, have established the severity of psychological damage done to abducted children, suddenly separated from a parent. The studies have also shown how susceptible the child is to being systematically alienated by the abductor-parent from the victim-parent.

This susceptibility bears comparison to the “Stockholm Syndrome”, when hostages start to identify with their captors. In the case of an abducted child the identification will be the stronger, because of the age of the “hostage” and the child’s relationship with the “captor”. For fear of losing the abducting parent as well, the child will not only be eager to please, but ready to believe allegations that it has been abandoned by the victim parent.

This is fertile ground for systematic indoctrination by the abducting parent and/or a professional psychologist. Since under the same judicial systems, children – sometimes as young as three – may be required to appear in court, it becomes of paramount importance to abductor-parents that their children say “the right thing” to judges. This puts an even higher premium on placing psychological pressure on abducted children.

The irony – and tragedy – of this is that the Hague Convention, in judicial systems like these, delivers children into precisely the danger from which it is supposed to protect them. Again Article 13 b is the crux. It can only be invoked if returning the child would expose it to grave risk of “physical or psychological harm” or place it in an “intolerable situation”. What greater psychological harm, what more intolerable situation could there be for a child, than to be exposed to systematic indoctrination by one parent against the other; and, worse, to carry the main burden of responsibility in adult court proceedings for deciding between mother and father? When placed in this context “the will of the children” becomes nothing less than a vehicle for legitimising the actions of the abductor-parent.

## **5. Enforcement**

Another problem lies in the alarming number of return orders, which have not been enforced. In several Convention countries, abduction is not considered a criminal act. Returns orders are not enforceable.

In Germany, for instance, appeal courts have no power of enforcement. A higher court decision can only be enforced by the Amtsgericht’s judge who heard the case initially. This enforcement process can take several months and does not always end in a return order being made. In 1994 in the *Nusair* case, the appeal court in Cologne had ordered the child’s return, but the local Amtsgericht refused to enforce it.

## CONCLUSION

Eighteen years of experience with The Hague Convention leads inevitably to the conclusion that it is a seriously flawed instrument, which at worst prejudices the welfare of abducted and illegally retained children. The heart of the problem lies in the failure of national legal systems to implement the Convention in a uniform fashion, consistent with its spirit. As a result the Convention appears to be no deterrent to child abduction; and when abduction or illegal retention does take place, not an effective mechanism in certain countries for reversing the situation.

It is arguable that, in so far as Article 13 can be exploited to justify abduction or retention, it has made the situation worse. It is also striking that, according to research by Dr. Linda Girdner, a parent is more likely to secure a return order through a non-Convention proceeding than through a Hague Convention proceeding (Dr. Girdner quotes an 80% success rate with the former compared with 33% under the latter).

This is not an argument for dismantling the Hague Convention. It is an argument for improving it. The international community needs an international treaty based on the rejection of illegal abductions or retentions across frontiers and the need to return children to their usual place of residence. The fact that, as in England & Wales, the Convention can be made to work as intended shows its potential. The task is to come up with remedies to deal with those situations where the Convention does not work.

## REMEDIES

This task will not be easily or quickly accomplished. That would require the establishment of some kind of supra-national legal body, to which signatory states would defer. That is not going to happen any time soon. The raw material with which we have to work is 49 signatories, with different judicial systems. By definition, as long as this situation remains, the proper implementation of the Hague Convention will depend in large part on a willingness to co-operate in good faith.

But there are a number of steps, which we can begin to take straightaway and which should set in motion an incremental process of improvement.

A Hague Convention Review Conference needs to be called as soon as possible to debate and introduce improvements in the following areas:

1. While an exception clause cannot be dispensed with altogether, Article 13 should be re-drafted in a way, which narrows its use to genuinely exceptional circumstances. As currently drafted, it can too easily become the rule and not the exception.
2. In parallel, strict limitations should be placed on the age and circumstances in which children can be called to appear before the court. As a general rule, since Convention hearings are not about custody, children should not appear in courts at all. To require young children to appear in court and to make a choice between parents is a form of child abuse, inflicting extreme cruelty. The confusion and stress involved are for most children beyond description, and empty the notion of the "will of the children" of any significance. There may be rare cases when it is important to hear the child at first hand. But no child below the age of 14 should have to endure this ordeal.
3. Article 13 should incorporate a clause dealing with access provisions. Namely, if a court refuses a return, it should automatically make the necessary provisions for enforceable rights, with a fair division of travel costs.
4. The Convention should make trans-national abduction and retention of children a criminal offence, notifiable to Interpol, Europol and national police agencies. At the same time, so as to coordinate action and information, there should be "hot lines" between Central Authorities and police; between national organisations, such as NCMEC and Reunite, on the one hand and Central Authorities and police agencies on the other; and between members of the public and national organisation. Governments should fund information campaigns to make the public aware of these arrangements.
5. The possibility of PAS must be taken into account by judges, especially where the "will of the child" is invoked by the abductor parent. Judges should be informed of and trained in the significance of PAS. The same applies to Central Authorities.
6. The staff and resources of the Permanent Bureau in The Hague and of Central Authorities should be increased to meet the need for more effective action to tackle international child abduction. In particular the Central Authorities should notify the Permanent Bureau of all abductions or illegal retentions brought to their attention, as well as of the outcome of Hague Convention proceedings on their territories. The Bureau should keep a comprehensive database of these cases.
7. Legal aid should be automatically available to all victim parents who meet a standard criterion.