

STUDY

Requested by the JURI Committee



# Parental Child Abductions to Third Countries

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Policy Department for Citizens' Rights and Constitutional Affairs  
Directorate-General for Internal Policies  
PE 759.359 - March 2024

EN



# Parental Child Abductions to Third Countries

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## **Abstract**

Cross-border parental child abductions in the EU are governed by The 1980 Hague Convention on the Civil Aspects of International Child Abduction and (except for Denmark) the Brussels II-ter Regulation. Countries outside of the EU may or may not be Contracting States to 'the Convention', but will not be bound by Brussels II-ter. Research has found that the often negative, long-lasting impact of abduction may continue throughout the lifecycle of those who have been abducted. It may also affect future generations of society. This means that every effort to deter abduction should be made. Where that is not possible, the 1980 Hague Child Abduction Convention should be nurtured to support its application in contemporary society. Specialist mediation should be encouraged in relation to international child abduction generally, and specifically in relation to Third Countries which are not Contracting States to 'the Convention'.

This study was commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee.

This document was requested by the European Parliament's Committee on Legal Affairs.

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Manuscript completed in March 2024

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## LIST OF ABBREVIATIONS

<b>Brussels IIb</b>	The Brussels IIb Regulation 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.
<b>Brussels II-ter</b>	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) (The Brussels II-ter Regulation) in force since 1 August 2022, replacing the Brussels II regulations.
<b>EU</b>	European Union
<b>GGP</b>	Guide to Good Practice
<b>HCCH</b>	Hague Conference on Private International Law
<b>JURI</b>	The European Parliament Committee on Legal Affairs
<b>LATAM</b>	Latin American and Caribbean States
<b>Malta Process</b>	Ongoing process of co-operation in cross-border family law disputes involving non-Convention States
<b>MOU</b>	Memoranda of Understanding
<b>Non-Convention State</b>	A country that has not joined 'the Convention'
<b>'The Convention'</b>	The Convention on the Civil Aspects of International Child Abduction 1980
<b>The 1996 Convention</b>	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
<b>Third Country</b>	A country which is not a member of the European Union and, in this study, should be understood as a country outside of the EU which may or may not be a Contracting State to 'the Convention'
<b>UK</b>	United Kingdom
<b>UNCRC</b>	United Nations Convention on the Rights of the Child, 1989
<b>USA</b>	United States of America

## EXECUTIVE SUMMARY

### Background

The European Parliament Committee on Legal Affairs (JURI) requested a study on **"Parental child abductions to third countries"**. This study is based on existing available data, statistics, studies, and analysis from various sources and documents from national and international institutions, including the [study on cross-border parental child abduction in the European Union](#) prepared for the European Parliament in 2015.

Cross-border parental child abductions in the EU are governed by The 1980 Hague Convention on the Civil Aspects of International Child Abduction ('the Convention') and (except for Denmark) the Brussels II-ter Regulation (previously Brussels IIb). Countries outside of the EU may or may not be Contracting States to 'the Convention', but will not be bound by Brussels II-ter. Therefore, this Study focuses on (i) the operation of 'the Convention' as this will govern abductions from EU States to third countries which are Contracting States to 'the Convention', and (ii) mechanisms to address abductions from EU States to third countries which are not Contracting States to 'the Convention' i.e. non-Convention States.

'The Convention', which currently has [103 Contracting States](#), provides a mechanism for the prompt return of abducted children to the State of habitual residence and is generally acknowledged as being a very successful instrument. Undoubtedly it has greatly improved the situation for abducted children since its introduction. However, there are recognised difficulties in its operation, including the way it works in relation to domestic violence and abuse, and the uneven playing field which is created by the individual approaches of the Contracting States to issues including: the provision of public funding to pursue and defend applications under 'the Convention'; child participation in 'the Convention' processes in the light of the right enshrined Article 12 of the United Nations Convention on the Rights of the Child (UNCRC); and the enforcement of orders made under 'the Convention'. Additionally, and notwithstanding the large number of Contracting States to 'the Convention', there are regions of the world where these are far fewer than would be desired. The reticence of most Islamic states to join the Convention, which leaves many abducted children unprotected, is a source of continuing regret and concern for 'the Convention' community.

Where a country has not joined 'the Convention' – and is thus a 'non-Convention State', there are limited ways in which the return of a child abducted into that country may be achieved. Most of these routes are ineffective, a situation which leads some left-behind parents to consider self-help which is often unlawful, can be dangerous, and is almost always not in the best interests of the child.

'The Convention' offers the best available protection against abduction by providing some degree of deterrence against it, as well as a mechanism for prompt return if abduction nonetheless occurs. 'The Convention' should therefore be nurtured to ensure its continued success in protecting abducted children in contemporary society.

This study concludes that **more needs to be done including:**

- Further collaborative evidence-based research on the outcomes of international child abduction, including where the abduction occurred against a background of violence or abuse

to the taking parent and/or the abducted child. Evidence-based research provides an important and necessary tool to assist in the required nurturing process of the Convention<sup>1</sup>.

- Further collaborative European fora involving key actors including: the European Parliament Co-ordinator on Children's Rights; The Hague Conference on Private International Law; The Judges Network members; specialist academics/researchers, mediators, and NGOs (for example, those mentioned in this study); psychologists; and government representatives from Convention and Non-Convention States<sup>2</sup>. The study respectfully suggests that such fora could appropriately take place under the aegis of the European Parliament Co-ordinator on Children's Rights who is ideally placed to coordinate and lead on this issue. These fora would provide ongoing discussion opportunities on issues of concern for the international child abduction community including active consideration between the key actors of the establishment of a specialist inter-disciplinary, international working group. The rationale and aim of this group would be to consider, address and report on issues relating to the required nurturing of 'the Convention', including those outlined in this study, so that these matters may benefit from the comprehensive, rather than piecemeal, approach that is needed for these issues (see Freeman and Taylor, *Nurturing the 1980 Hague Convention, Research Handbook*, Ch. 26, 404-429.
- Increased awareness-raising about the potentially serious and damaging long-term effects of abduction for children and adults who were abducted as children so that any person considering abduction of their children can understand what the effects of that action may be. The programme for such awareness-raising may be a topic for consideration of the key actors at the proposed European fora.
- Continued collaborative, inter-disciplinary work undertaken by specialist groups including academics/researchers, victim groups, and specialist NGO's on the issues of:
  - (i) prevention and
  - (ii) support for abducted children and their families where it has not been possible to prevent abduction from occurring, and how such aims may be achieved.
- The continued efforts by HCCH and others towards wider global membership of the Convention<sup>3</sup>.

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<sup>1</sup> IACLaR, supported by the national delegations for the United Kingdom and New Zealand, submitted a proposal for the consideration of the Eighth Special Commission which took place in The Hague from 10-17 October 2023 regarding the need for such evidence-based research to address the gaps remaining in our understanding of the issues involved in the field of international child abduction. These include the outcomes in cases involving domestic violence. The Special Commission approved the proposal which became Conclusion and Resolution No. 102. Conclusion and Recommendations of Eighth Special Commission <https://assets.hcch.net/docs/5b48f412-6979-4dc1-b4c1-782fe0d5cfa7.pdf>. In respect of the EU's focus in this study, it may also be timely to consider the commission of research about abductions into the EU from third countries.

<sup>2</sup> Such meetings have an important role to play in informing and supporting The European Parliament on these issues. The very recent encouraging response by Japan (see fn 165 and accompanying text) to the European Parliament Resolution of 2020 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020IP0182> demonstrates the effectiveness of such appropriately targeted action on the part of the European Parliament, and the potential for positive change which may result therefrom.

<sup>3</sup> See fn 167 regarding Africa: 'The Convention should be popularised to a greater extent on the continent, and accompanied by judicial training to support its implementation. The annual Miller du Toit Cloete /University of the Western Cape Child and Family Law Conference has provided an ongoing platform for discussing the need for ratification of the Convention, and for collaboration on training. In April 2019, an African Regional Conference on the application of the Hague Children's Conventions was hosted in Cape Town. It was attended by delegates from Botswana, Burundi, Cabo



- Greater use of government travel websites to provide information regarding the abduction status of specific countries, i.e. (i) whether it is a Contracting State to 'the Convention' (ii) if it is, whether 'the Convention' is in operation between that country and the State of habitual residence, or (iii) whether the country is a non-Convention country, together with (iv) an explanation of why this matters.
- Continued efforts (including through The Malta Process) to engage with countries which remain outside of the 1980 Hague Convention and to encourage the use of specialist mediation in appropriate cases.
- Although outside of the scope of this study, it would be very useful to know more about how abductions into EU countries from third countries, especially non-Convention States, are handled within the individual EU Member States, and research into this issue would make a welcome contribution to the literature in this field.

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Verde, Ethiopia, France, Ghana, Guinea, Israel, Japan, Lesotho, Mauritius, Mozambique, Namibia, Netherlands, New Zealand, Nigeria, South Africa, Tanzania, UK (England and Scotland), US, Zambia and Zimbabwe. The Conference aimed to promote implementation of the HCCH Children's Conventions in Africa (including the 1980 Hague Convention), discuss their operation, and invite States in Africa to consider becoming Contracting Parties to these conventions, as well as becoming Members of the HCCH. A session on child abduction, coupled with judicial training, next featured at the 25<sup>th</sup> anniversary of the Child and Family Law Conference in March 2023'. Julia Sloth Nielsen, International child abduction in Africa, Research Handbook, Ch 15, 232. NB: A similar session will be held at the March 2024 conference at which the author will be presenting a paper on the domestic violence and child abduction research which she is currently undertaking – see fn 15 below.

## 1. SCOPE OF THIS STUDY

### KEY FINDINGS:

Children often suffer distress when their parents' relationship breaks down. If, as part of the new arrangements, they move to a new place, additional problems may be experienced which may be exacerbated if the move is to another country. Many of these problems may be common to both lawful relocations and international child abduction. However, even though there are many commonalities between lawful relocation and abduction, there are also important differences. Research has found that the effects and consequences of international child abduction may be serious and long-lasting. 'The Convention' has greatly improved the situation which existed before it came into force. This Study therefore strongly supports 'the Convention', together with continued work to achieve improvements in its operationalisation and enlargement of its global community to include third countries which are not currently parties to it.

### 1.1. Overview of problems affecting children and parents living in different jurisdictions, and parental child abduction to third countries

When a parental relationship breaks down, children will often suffer acute distress<sup>4</sup>. Commentators have long noted that 'ongoing parental conflict destabilizes children and can evolve into significant emotional and behavioural difficulties'<sup>5</sup>.

Kelly and Wallerstein explain the high-level impact of parental divorce on children in this way:

'..the central event of divorce for children is psychologically comparable to the event of death, and frequently evokes similar responses of disbelief, shock, and denial'.<sup>6</sup>

In addition to the factual separation of their parents when the parental relationship breaks down, children also often have to deal with moving to another place which may be in another country and, at times, may be on another continent. This can cause various difficulties for children who are separated from one side of their families. Although some studies reveal beneficial effects from relocation, others emphasise the detrimental or harmful outcomes for children. The empirical research findings indicate heightened risk when a child relocates, particularly if there have been prior moves, multiple changes in family structure and exposure to interparental conflict that is frequent, intense and poorly resolved.<sup>7</sup> Whether a relocation will actually be harmful or not for an individual child depends 'on the combination of risk and protective factors that may be present'.<sup>8</sup>

<sup>4</sup> Michael E. Lamb, Kathleen J. Sternberg & Ross A. Thompson, (1997) The Effects of Divorce and Custody Arrangements on Children's Behavior, Development and Adjustment 35 *Fam & Council Cts Rev* 393.

<sup>5</sup> Kyle D Pruett and Marsha Kline Pruett, Only God Decides: Young Children's Perceptions of Divorce and the Legal System, *J. Am. Acad. Child Adolesc. Psychiatrx* 1999, 38(12):1544-1550, p1544.

<sup>6</sup> Joan B. Kelly and Judith Wallerstein, The Effects of Parental Divorce: Experiences of the Child in Early Latency. *Amer. J. Orthopsychiat.* 46(1), January 1976, 20.

<sup>7</sup> See Nicola Taylor and Marilyn Freeman, 'International Research Evidence on Relocation: Past, Present and Future' (2010) *Family Law Quarterly* 44(3), 317-339, 318 fn 4 referring to Joan Kelly, Relocation of Children Following Separation and Divorce: Challenges for Children and Considerations for Judicial Decision-Making (Aug. 23-26, 2009) (unpublished paper presented at the 5<sup>th</sup> World Congress on Family Law and Children's Rights, Halifax, Nova Scotia, Canada).

<sup>8</sup> William Austin, 'Relocation, Research and Forensic Evaluation, Part 1: Effects of Residential Mobility on Children of Divorce' (2008) *Family Court Review* 46(1), 137-150, at 137.

Cashmore and Parkinson have investigated children's wishes and feelings in lawful relocation disputes, that is where consent for the relocation is sought and provided by the other parent or the court. They state that, 'almost invariably, it is the mother as the primary caregiver, who wants to relocate and the father who opposes the relocation' and that 'some children were happy to move, some ambivalent, and others were opposed' to the relocation<sup>9</sup>. They also found that, although children generally navigated the locational adjustment well, some children, especially those of primary school age, missed their fathers a great deal after the move<sup>10</sup>. Notwithstanding that the parents may often have valid reasons for advocating for or against the relocation, these authors correctly state that issues such as leaving friends, starting at a new school or coping with travel to see a non-resident parent are the children's to manage<sup>11</sup>. They report that many felt the burden of travel for contact, especially in relation to road travel<sup>12</sup> and, for some children, leaving the only family home they had known was very difficult<sup>13</sup>. Relationships with step-parents, both the new partners of the left-behind parent and the relocating parent, were also issues which affected the way that children felt about the relocation.<sup>14</sup>

There is a degree of commonality between relocation and international parental child abduction, that is the unlawful removal of a child to, or retention in, another country by a parent. Both situations involve parental relationship breakdown. It is likely that there will have been conflict in the familial circumstances, and there may also have been family violence. Both situations mean that the child will need to move from the home that they knew to a new venue which may be unfamiliar to them. The move will impact in various ways on the child's relationship with the left-behind parent and family, and the child will also lose the grounding features of their previous life, for example their school, friends and community. The move may also involve learning a new language, and the resultant loss of their birth language. This avalanche of change and loss can be very difficult to manage.<sup>15</sup>

The key distinction between relocation and international child abduction is that in the latter the taking parent has acted unilaterally, and this can lead to important differences in the consequential effects and impacts on those children involved in these situations.<sup>16</sup> These have been recently articulated by Taylor and Freeman:

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<sup>9</sup> Judy Cashmore and Patrick Parkinson, Children's 'wishes and feelings' in relocation disputes. *Child and Family Law Quarterly* (2016) Vol 28, No. 2, 151 (hereafter 'wishes and feelings').

<sup>10</sup> Cashmore and Parkinson, 'wishes and feelings' above, 151.

<sup>11</sup> Cashmore and Parkinson, 'wishes and feelings' above, 152.

<sup>12</sup> Cashmore and Parkinson, 'wishes and feelings' above, 169.

<sup>13</sup> Cashmore and Parkinson, 'wishes and feelings' above, 159.

<sup>14</sup> Cashmore and Parkinson, 'wishes and feelings' above, 158.

<sup>15</sup> It is important to recognise that some abductions occur because of violence to the taking parent and/or the child by the left-behind parent and, in such cases, the removal may be in the child's best interests. The possibility that not all abductions are bad for the child was contemplated in the report by Adair Dyer, See Dyer, A., The Report on International child abduction by one parent ('legal kidnapping') (Doc. No 1, August 1977) (hereafter The Dyer Report) p22: 'It should only be noted here that some feedback from professionals in the field of international social work suggests the possibility that not all 'kidnapping' is bad for the child, that in some cases of deteriorating situations or ambivalent feelings on the part of the parent having custody or possession of the child the abduction may have a positive effect on the child, precisely by removing him from an unstable or uncertain environment'. The author, together with Professor Nicola Taylor, University of Otago, New Zealand, is currently undertaking a survey-based research project for the International Centre for Family Law, Policy and Practice to investigate the effects and outcomes of abduction on children where the abduction occurred against a background of violence or abuse. A full project report, including findings and conclusions, is expected to be published in May 2024 [www.icflpp.com](http://www.icflpp.com) See further fn 94 below for domestic violence references.

<sup>16</sup> These may include impacts on the child's identity and sense of self worth. On this issue, see Taylor, N. and Freeman, M. 'Relocation and International Child Abduction: The Impact on Children's Identity' in Marilyn Freeman and Nicola Taylors (eds) *Children and Young People's Identities in International Law: Life Events, Law and Selfhood*. (Elgar Studies in International Family Law). Edward Elgar (forthcoming). Hereafter 'Identity'.

'One of the most significant issues is the secrecy under which the abduction takes place. It has to be done this way. If the taking parent thought it was possible to move openly with the child, with the other parent's consent, the abduction would be unnecessary. Sometimes the children may be part of the secret which, of course, places a heavy burden on them. Other times, children may not be told the truth and know nothing of the plans or, if they do have some knowledge of the trip, believe they are going on a holiday or visit, about which they may be quite excited. Whatever the specific circumstances, the opportunity to emotionally adjust in advance to the move, which is possible in relocation cases, is unavailable to the abducted child. They have no chance to say goodbye to family, friends, pets, neighbours, or surroundings. The inability to resolve any unaddressed issues or unfinished business with the left-behind parent or family can linger – sometimes for a lifetime – in the thoughts and feelings of the abducted child.

Those children who only later discover that they are not returning to their previous home and life may be told that their left-behind parent has moved away, is not interested in them, or has died.<sup>17</sup> Some taking parents move the abducted child frequently, or keep them hidden, to avoid discovery and the anticipated consequent return to the State of habitual residence.<sup>18</sup>

The child's identity may be specifically changed, forcing them to live with different names, genders, dates of birth, and family histories. Those who are not hidden find their involvement in the adult arguments and legal proceedings which follow their abduction to be divisive, and often overwhelming. Abducted children are often unable to receive the support of their left-behind parent and family members, unlike relocation disputes where both sets of family are more likely to remain involved.

If a return to the State of habitual residence is ordered by the court of the requested State, the child may then be reunited with a left-behind parent whose family profile has changed. Depending on the duration of their time away, there may be many differences to which the returned child needs to adapt, including new people (a step-parent, step- and/or half-siblings), or a new home in a new area. The child may have learnt coping strategies to avoid the hurt and confusion caused by the abduction that impact on their ability to trust others and form intimate relationships, all of which will affect the way that the reunification plays out.<sup>19</sup>

## 1.2. Effects and Consequences of international child abduction

The effects and consequences of international child abduction are usually significant and harmful<sup>20</sup> to the abducted child<sup>21</sup>. Justice Victoria Bennett recognised that a wrongful retention or removal away

<sup>17</sup> M Freeman, *Parental Child Abduction: The Long-Term Effects* (International Centre for Family Law, Policy and Practice, London, 2014) (hereafter 'Long-Term Effects') see fn 21 below.

<sup>18</sup> For a recent example, see the case of Kayla Unbehaun who disappeared in 2017, aged nine years, on a visit with her non-custodial mother. She was found, aged 15, in May 2023, and has now returned to live with her father <https://www.theguardian.com/us-news/2023/may/17/kayla-unbehaun-found-netflix-unsolved-mysteries>

<sup>19</sup> Taylor and Freeman, 'Identity' above, Ch. 5.

<sup>20</sup> See fn 15 above regarding abductions undertaken against a background of violence and/or abuse to the abducting parent and/or the abducted child.

<sup>21</sup> GL Greif, 'A Parental Report on the Long-Term Consequences for Children of Abduction by the Other Parent' (2000) *Child Psychiatry and Human Development* 31(1), 59–78; GL Greif, 'The Long-Term Aftermath of Child Abduction: Two Case Studies and Implications for Family Therapy' (2009) *The American Journal of Family Therapy* 37(4), 273–86; M Freeman, 'The Effects and Consequences of International Child Abduction' (1998) *Family Law Quarterly* 32(3), 603–21; M Freeman, *International Child Abduction: The Effects* (reunite International Child Abduction Centre, London, 2006) (hereafter 'the effects project') [https://www.familylaw.co.uk/news\\_and\\_comment/international-child-abduction-the-effects](https://www.familylaw.co.uk/news_and_comment/international-child-abduction-the-effects); M Freeman, *Parental Child Abduction: The Long-Term Effects* (International Centre for Family Law, Policy and Practice, London, 2014) (hereafter Long-

from one parent and the child's home country probably changes the child's world view permanently and irretrievably.<sup>22</sup>

Sarah Cecelie Finkelstein Waters, a former abducted child who is now a powerful advocate in international child abduction matters, encapsulates many of the issues involved in the following description of how she, and those with whom she works, have been affected:

'The child's life and entire childhood is often divided into *before* and *after* sections as the abduction takes over the family's identity and defines relationships, birthdays, connections with siblings, relationships with grandparents and extended family, culture, religion, identity, and so much more. ... In the messy, tricky, difficult arena that is family dynamics, being faced with the idea that one of your parents is so awful that you must be taken to a different country and hidden from them by force, is psychological trauma. Parents are not supposed to be dangerous. It is a wound that will ooze for a lifetime, as it is so far removed from what a child's definition of family should be. Family is about togetherness, not being pulled apart. At the very least, it is about bonds that sustain our identity and sense of self. Our very DNA, our facial features, our physical build, hair colour and beliefs attest to the bonds that we have with all members of our family, culture and identity, and attempting to take us away from any of it only brings with it pain. ... Most of us have had challenges forming and maintaining our identity and sense of self. If we lean more towards the identity forced upon us and yet prefer to retain that identity, are we letting the abductor win? If we slip back into the person we were supposed to be had we not been abducted, are we losing a part of ourselves? What does it all mean anyway? So many of us have grappled with these and many other raw and painful questions about what it means to be someone's child and a part of a slippery mix of social and cultural identities that we do not quite fit in to. We struggle with making sense of our core relationships in a world already full of complex challenges concerning identity, belief and belonging'.<sup>23</sup>

Sarah, and her half-brothers, were all abducted at different times, and then re-abducted, by their common father. Although it is not possible to know how much of what she describes has been due to the abductions, the re-abductions, or other linked (or unlinked) circumstances, the perceived impact of abduction (and, no doubt, re-abduction,) and the emotional toll on the mental health and well-being of abducted children, are clear from the following account:

'For many of us, our abduction day was the day we began to lose our faith in our families as shields from the harshness of the world. It was the event that caused us to believe that we would forever have to choose between our parents and, in some way, divide our loyalties between them. It was also the day that unanswerable questions and uncomfortable realities formed. Children seek black and white truths and do not deal well with grey areas. It is easy to convince children that an abduction is justified by telling them lies or bending the truth in a way that is

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Term Effects <http://www.famlawandpractice.com/researchers/longtermeffects.pdf>); MJL Gibbs, WP Jones, SD Smith, PA Staples and GRWeeks, 'The Consequences of Parental Abduction: A Pilot Study with a Retrospective View from the Victim' (2013) *The Family Journal* 21(3), 313–17; K Van Hoorde, M Putters, G Buser, S Lembrechts, T Ponnet, T Kruger, W Vandenhole, H Demarré, N Broodhaerts, C Coruz, A Larcher, D Moralis, C Hilpert and N Chretiennot, *Bouncing Back: The Wellbeing of Children in International Child Abduction Cases* (EWELL, with the support of the European Union, 2017).

<sup>22</sup> Auckland Workshop, 2018 as part of British Academy project on Outcomes for Objecting Children under the 1980 Hague Convention 2017-2018 undertaken by Freeman, M. and Taylor, N. during which three workshops were held (Auckland, Genoa and London) in 2018 <https://assets.hcch.net/docs/a8621431-c92c-4d01-a73c-acdb38a7fde5.pdf>

<sup>23</sup> Sarah Cecelie Finkelstein Waters, 'Long-Term Reflections of a Former Milk Carton Kid' in Marilyn Freeman and Nicola Taylor (eds) *Research Handbook on International Child Abduction: The 1980 Hague Convention* (Edward Elgar Research Handbooks in Family Law Series, 2023, 19-29) (hereafter 'Research Handbook') at 21-22, 24 and 28.

convincing. Children are left trying to make sense of it all, which is a burdensome position to be in. Parents, like any humans, are often deeply flawed and make mistakes. For abducted children, there is an urgent need to figure out which parent is right and which is wrong, and to determine whether the abduction was an act of valour or a crime. It is a hefty burden to grapple with, and the weight of it can rob children of the ability to feel whole and fully connected to both parents' cultural, ethnic and religious heritages, or much of anything at all. When the most sacred bonds can be ripped out from under our souls as if they mean nothing, then just about anything can happen. Very little feels safe or stable'.<sup>24</sup>

Dr. Sarah Calvert, a specialist psychologist in New Zealand, has written about her professional experience of international child abduction cases:

'Research evidence on children in abduction or high conflict situations, and children who become alienated or estranged from a parent, indicates that these children's responses often involve the development of psychological maladaptations caused by anxiety and by intolerable psychological conflicts. An escalating cycle of fear and anxiety can develop in the child that is maintained into adulthood. Difficulties identified include issues with reality testing, illogical cognitive operations, simplistic and rigid information processing, inaccurate or distorted interpersonal perceptions, compromised interpersonal functioning, distorted perceptions of self (often very negative forms of self-hatred), poor self-esteem, gender identity issues, difficulty with the separation/individuation phase of psychological development, the development of conduct disorder presentations and the use of aggression to manage emotional distress ... They reported symptoms consistent with depression, anxiety and dissociative states, as well as struggles with their sense of identity and self ... Tragically, the most significant impacts for children involved in high conflict Family Court matters, such as Convention proceedings, are in terms of their development into healthy adulthood. These post-parental separation children, when they speak as adults, tell us that they are caught in the 'parental wars' and forever assailed by the ghosts created by loss and conflict. The loss of resilience and capacity which they experience, their inability to form a secure adult sense of identity, a loss of trust in adults and a belief they themselves lack the capacity for sustaining adult relationships, are all psychologically adverse outcomes. The impacts of these experiences are often hidden and unrecognised'.<sup>25</sup>

Empirical research has shown that some of the effects of abduction on children perceived by their parents include: coping strategies like 'blinking out'; physical and non-physical symptoms of stress; lack of faith in the legal system and adults; and a general lack of trust.<sup>26</sup> Parents of abducted children reported tensions in familial relationships when the abducted child returned and was living with non-abducted siblings and new family members, and a psychological barrier which had been created between the abducted child and the left-behind parent because both now knew that they survived this period of separation and life without each other, and both had now lost faith in their reciprocal need. Both abducting and left-behind parents remarked on the lack of post-return support which impacted the children. They felt that once the children had been returned, that was the end of the matter for the legal system and international community. Children also reported finding the return could be as upsetting and stressful as the original abduction. That returning the child to the State of

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<sup>24</sup> Sarah Cecillie Finkelstein Waters, 'Long-term reflections of a former milk carton kid', Research Handbook, p22 see fn 23 above.

<sup>25</sup> Sarah Calvert, Ghosts in our genes: Psychological issues in child abduction and high conflict cases' in Freeman and Taylor, 'Research Handbook' at 30-45, 32.

<sup>26</sup> Freeman, M. 'The Effects Project' see fn 21 above.

habitual residence may also be harmful to the abducted child is well recognised<sup>27</sup>, and has been described as possibly being experienced by the child as a geographical rather than a psychological phenomenon, 'a return which is more apparent than real'<sup>28</sup>.

### 1.3. Long-Term Effects of Abduction

A small scale<sup>29</sup> qualitative study was undertaken by the author to find out about the lived experiences of those who had been through an abduction many years earlier, and to learn whether, and how, the participants felt that the abduction had affected their lives, and if those effects had continued long-term. Although it is not suggested that these qualitative findings are generalisable, as the focus of the research is to understand the effects of abduction on this sample of people as reported by themselves, the research undoubtedly provides illuminating data<sup>30</sup>.

There were several identifiable themes of effects which emanated from the research interviews which included: numbness and blocking out; lack of self-worth; issues with personal identity; mental health issues including depression and suicidal tendencies; difficulties with personal relationships and intimacy; feelings of insecurity; problems with trust; fear of being like the person blamed for causing these effects.<sup>31</sup> A high proportion (73.53%) of the previously abducted children in this sample reported suffering very significant effects<sup>32</sup> from their abduction in terms of their mental health. This percentage increases further (to 91.17%) when taking into account those reporting less significant, but still

<sup>27</sup> Freeman, M. 'The Effects project', see fn 21 above.

<sup>28</sup> Justice Victoria Bennett, 'A better place for the child in return proceedings – under the 1980 Convention – A perspective from Australia'. *The Judges Newsletter*, Vol. XX11 Summer-Fall 2018, 20.

<sup>29</sup> 34 adults participated in the study – 33 had been previously abducted as children, and one was the non-abducted sibling of an abducted child participating in the research. The sample of 34 interviews related to 30 separate incidents of abduction. There was no opportunity for a control group in the project but, although the sample numbers are relatively small, they are certainly not insignificant, and it is suggested that these limitations do not detract from the strength of the project findings. Each participant was interviewed by the author as Principal Investigator (PI) during the period 2011–2012 with an opportunity provided to each participant to update the PI by email in July 2014. The sample was recruited primarily in the USA and UK although initial discussions with potential participants who did not eventually participate took place in other countries including South Africa and Spain. The sample was acquired through personal and professional contacts working in the field, word of mouth, media publicity, and via the assistance of Take Root, an organisation for previously abducted children, funded by the U.S. Department of Justice and located in Washington State, United States of America.

<sup>30</sup> Freeman, M. Long-Term Effects (2014) see fn 21 above. See also Freeman, M. (2015) Parental Child Abduction: The Long-Term Effects: A Research Summary, *International Family Law*, 1. There are, as in all empirical research, reasons for some caution about the findings. The research sample involved abductions which had occurred between 10 to more than 50 years before the research interview, and many of the abductions occurred before the implementation of 'the Convention'. It is possible that this may have affected the outcomes for these children, and also that the outcomes may have been different at earlier points in time. The periods of time away before reunification, if it occurred, were substantial. For the majority (68.76%) of those reunified, this did not occur until more than 5 years after the abduction, and more than one third of the reunifications (34.37%) occurred after 10 years. Reunifications after a shorter time away may have resulted in less extreme outcomes. Additionally, it should be borne in mind that the report's qualitative findings result from the interviewees' personal perspectives both as to the cause of the effects described, and the degree of impact of those effects on their lives, as well as the author's system of data classification.

<sup>31</sup> Long-Term Effects, above.

<sup>32</sup> "Very significant effects" are those where the interviewee reported:

- (i) Attempting to see, seeing, or having seen a counsellor, therapist, psychologist, psychiatrist or similar; or
- (ii) being diagnosed with a condition like post-traumatic stress; or
- (iii) having suffered a psychotic episode or breakdown; or
- (iv) having been admitted to a hospital or other institution with mental health issues; or
- (v) having suffered depression or attempted suicide. See 'Long-Term Effects', p18.

discernible, effects<sup>33</sup>. Such effects were evident even where the abduction occurred at a very young age where it might be thought that, as the child had not yet had a chance to form a strong and enduring relationship with the left-behind parent, the effects might be expected to be correspondingly less severe. A very low percentage (8.82%) in this sample reported no real effects, and these were either related to very short abductions or to abductions where the interviewee supported the abduction or intention to abduct by the primary carer.<sup>34</sup> The primary care or non-primary care status of the abductor did not tend to alter the effects experienced by the abducted child<sup>35</sup>. Those who reported very significant effects talked about the ongoing nature of those effects in their current adult lives, often very many years after the abduction.

The concern regarding the lack of support and after-care which had been expressed in the Effects project<sup>36</sup> was repeated in the data from the current project and was a recurring theme. One participant explained: 'There is no time limit to the need for aftercare because it takes time to know what it has done to you, and how you are feeling'.<sup>37</sup>

The participants commented on the vast difference in the ways that society views stranger abduction and parental abduction, wrongly believing that parental abduction is unimportant because the children are with one of their parents. Sadly, the two forms of abduction may share many of the same characteristics, notwithstanding that the child is with one of its parents, and the participants felt that this was widely misunderstood by society.

These findings tend, therefore, to support those from earlier studies about the long-lasting negative effects of abduction<sup>38</sup> which are emphasised in this project by the direct reporting of the abducted children, as adults, many years after the event, and build on the Effects report<sup>39</sup> which had a smaller sample of child interviewees<sup>40</sup> where less time had passed between the abduction and interview<sup>41</sup> and where the time away before reunification, where it occurred, was far less<sup>42</sup>.

#### 1.4. The situation before 'the Convention' came into force

The harm caused to children by being removed suddenly from their home and taken to another country, together with the lack of certainty and uniformity about how the matter would be addressed in the country of refuge, was recognised as requiring urgent attention by various international

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<sup>33</sup> "Effects" are those which do not fall into the above classification, but where the interviewee reported other discernible effects such as having problems with:

- (i) trust in relationships; or
- (ii) lack of self-worth; or
- (iii) fear of abandonment; or
- (iv) panic attacks. See 'Long-Term Effects', p18.

<sup>34</sup> Long-Term Effects, p35.

<sup>35</sup> Long-Term Effects, p32.

<sup>36</sup> See fn 21 above.

<sup>37</sup> Long-Term Effects, p32.

<sup>38</sup> See fn 21 above for details of earlier studies. The report makes recommendations regarding the ways in which protection may be provided against the harmful effects of abduction as set out in the preamble to 'the Convention'. These recommendations relate to (i) prevention and (ii) support and aftercare. See Long-Term Effects, p37 et seq.

<sup>39</sup> See fn 21 above.

<sup>40</sup> Ten children were involved in the Effects project.

<sup>41</sup> All abductions in the Effects project occurred more than 5 years before the interview vs a minimum of 10 years and a maximum of 50 years in the Long-Term Effects sample.

<sup>42</sup> 6 weeks to 14 months in Effects project; a few days to 42 years in Long-Term Effects sample.



organisations during the 1970's including the Council of Europe and the Hague Conference on Private International Law<sup>43</sup>. To understand the scope of this study and the importance of the Convention it is helpful to have a clear understanding of the unsatisfactory situation which existed internationally regarding the international abduction of children before the coming into operation of 'the Convention'.

At that time, in order to try to obtain the return of their child, the left-behind parent would need to seek recognition and enforcement in the refuge State of a prior custody order obtained in the State of habitual residence. It was very much 'hit and miss' as to whether such recognition and enforcement would occur and, it must be said, it was more 'miss' than 'hit', with courts in the refuge state often giving custody to the taking parent in spite of the earlier custody order. This resulted in the extreme unpredictability discussed by Bodenheimer<sup>44</sup> who identified the reasons she believed were at the root of this situation:

- (i) Mistrust by the second judge of the existing custody judgment which would in most circumstances have been based on the amorphous measure of the best interests of the child;
- (ii) A reluctance to defer to another country's court order, together with the possible tendency for courts to be more receptive to local parties, which results in a judicial power struggle being added to the parental struggle over the child;
- (iii) An attempt by those dealing with these emotional matters to resolve them as well as they are able to do by giving the child to each parent alternately and consecutively now that the child can no longer be with both parents simultaneously.

She concludes that these attitudes may account for the willing modification of custody decrees in another jurisdiction which was then prevalent<sup>45</sup>.

Lowe reminds us that: '...[T]his state of international 'anarchy' operated as an encouragement to would-be abductors who, by appropriate forum shopping, could hope to take their children from one jurisdiction to another and there obtain judgment in their favour. From the left-behind parent's perspective, the prospects of recovering their abducted child were poor'.<sup>46</sup>

Elrod recounts that the hurdles which the left-behind parent encountered in locating and securing the return of an abducted child were:

'... almost insurmountable in the international context due to the incredible time and expense necessary to locate the abducted child. Left-behind parents often did not know how to get help as they were faced with unfamiliar, sometimes hostile, foreign laws, different languages, cultural and religious prejudices as well as trying to figure out the logistics of getting a return order from a foreign court.'<sup>47</sup>

<sup>43</sup> See fn 49 below.

<sup>44</sup> Brigitte M. Bodenheimer, 'The International Kidnapping of Children: The United States Approach' (1977) 11 *Fam LQ* 83. NB the term 'international child abduction' was later used by the Hague Conference on Private International Law (HCCH) – see Dyer, fn 15, 275.

<sup>45</sup> Brigitte M. Bodenheimer, above, pp 83 et seq.

<sup>46</sup> Whither the 1980 Hague Abduction Convention? (hereafter 'Whither') In Freeman and Taylor (eds), 'Research Handbook', 389. Also see Elrod, In Freeman and Taylor, 'Research Handbook', 48.

<sup>47</sup> Linda Elrod, 'The Global Effort to Deter Parental Kidnapping: A History of the Hague Child Abduction Convention' in Freeman and Taylor, 'Research Handbook', 52. See also Brigitte Bodenheimer, 'The Hague Draft Convention on

As noted above, this was not an occasional problem. Although formal statistics were not readily available, the widespread occurrence of parents removing a child to another jurisdiction on the breakdown on their relationship was documented by Dyer in reference to the Member States of the Hague Conference on Private International Law:

'Indeed, the characteristic patterns consisting of abrupt removal of the child from one country to another by a parent during or after the breakdown of a marriage, frequently in violation of a custody order handed down in the country of the child's residence, or the unauthorised retention of the child after a legally permitted period of visitation under a custody order, have made their appearance in all Member States of the Conference and seem to occur with rapidly increasing incidence'.<sup>48</sup>

## 1.5. The 1980 Hague Child Abduction Convention

This unsatisfactory situation led to a proposal for the HCCH to prepare an international treaty to address the issue, and to the eventual introduction of the Convention<sup>49</sup>. Dyer explains the fundamental change introduced by the Convention which addresses some of the attitudes identified earlier by Bodenheimer which had been such potent stumbling blocks to the resolution of international child abduction cases:

'The Hague Convention intrudes upon the jurisdiction of the courts in the country to which the child has been taken, even if that is the country of the child's nationality, and insists that the child be returned (usually to the place of the child's habitual residence immediately before the abduction) so that the courts of another country may exercise jurisdiction over the merits of custody. The execution of this obligation requires discipline on the part of the courts and a willingness to let the best interests of the child be framed, not merely within the context of the judge's own culture, but also in a three-dimensional, multicultural setting, including the child's interest in not being abruptly jump-started from one culture to another'.<sup>50</sup>

The earlier, problematic need for recognition and enforcement of orders made in other jurisdictions was avoided by 'the Convention's' structure which is framed around cooperation between Contracting States to ensure the return of the child to the State of habitual residence for the welfare issues to be decided there. It is that jurisdiction which, in the absence of a judgment under the Convention not to return the child<sup>51</sup>, will decide the welfare matters involving, for example, custody, contact, and leave to remove from the jurisdiction, if sought.

Although the Convention has not been a panacea for all the concerns of international child abduction, and there remains a need to continue nurturing the Convention to ensure its continued efficacy,<sup>52</sup> it is

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International Child Abduction' (1980) *Family Law Quarterly* 14(2), 99-120.

<sup>48</sup> See 'Dyer Report' (fn 15 above) p12.

<sup>49</sup> For the history of analogous activities by other international organisations, and specifically The Council of Europe's contemporaneous work in the area of international child abduction, and the encouragement it offered to the Hague Conference because of 'the worldwide scope of the problems.. work by the Conference therefore should not in any sense interfere with the work of the Council of Europe..'. See 'Dyer Report' (fn 15 above), 14.

<sup>50</sup> Adair Dyer, 'The Hague Convention on the Civil Aspects of International Child Abduction - Towards Global Cooperation - Its Successes and Failures' (1993) 1 *Int'l J Child Rts* 273, 274.

<sup>51</sup> Which will only be made in limited, defined circumstances – see text of 'the Convention', especially Article 13 <https://www.hcch.net/en/instruments/conventions/full-text/?cid=24>

<sup>52</sup> See Freeman and Taylor, 'Research Handbook'; All chapters in 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) (eds Freeman, M. and Taylor, N.) (hereafter Contemporary Issues)

generally considered to be a very successful instrument. There are currently 103 Contracting States to the Convention<sup>53</sup> and, although Lowe makes the valid point that ‘..the value of the Convention cannot be judged by the number of Contracting States alone..’<sup>54</sup>, this statistic does undoubtedly speak to the way that the Convention is perceived positively by countries around the world. However, there are important absences to this list of Contracting States, notably India, mainland China, and most Islamic states, which have not been willing, or felt able, to become part of ‘the Convention’. This lacuna in the reach of ‘the Convention’, as well as other issues in its operation, requires the continuing attention and efforts of the international child abduction community.<sup>55</sup> Notwithstanding its acknowledged imperfections<sup>56</sup>, this study submits that the Convention provides the best opportunity to prevent the trauma which generally results from international child abduction<sup>57</sup>. It achieves this through the relatively broad-based international consensus that an abducted child needs to be protected from the harmful effects of abduction by a prompt return to the State of habitual residence where decisions about its future can most effectively be taken. This prompt-return mechanism will, as originally envisaged, deter some abductions from occurring<sup>58</sup> but, where they do nonetheless occur, it encourages the speedy resumption of the status quo pending determination of the welfare issues in the State of habitual residence. As recently noted by Lowe, speed is ‘of the essence’ in abduction cases<sup>59</sup>: there are many reasons for this, including the uncertainty which is created for the child by lengthy periods of time passing before a decision is made about its future which are generally not in a child’s best interests. Whilst it is acknowledged that the aims of deterrence and prompt return are not always achieved within the community of Contracting States<sup>60</sup>, it has greatly improved the situation which existed before it came into force. This Study therefore strongly supports: (i) the continuation of the Convention (ii) continued work to achieve improvements in its operationalisation and (iii) efforts to enlarge its community globally.

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[https://www.mdpi.com/journal/laws/special\\_issues/08G6OB562R](https://www.mdpi.com/journal/laws/special_issues/08G6OB562R) including Freeman, M. and Taylor, N. Contemporary Nurturing of the 1980 Convention <https://www.mdpi.com/2075-471X/12/4/65>

<sup>53</sup> <https://www.hcch.net/en/instruments/conventions/status-table/?cid=24>, last accessed 16.1.24.

<sup>54</sup> See Lowe, ‘Whither’ fn 46 above, 388.

<sup>55</sup> It is noteworthy that a proposal to hold a forum on domestic violence and Article 13(1)(b) of the Convention’ was supported by the Eighth Special Commission held in October 2023 which indicates the willingness of the international child abduction community to consider and work towards solutions for the recognised difficulties which arise in the operation of the Convention. See Conclusions and Resolutions of the Eighth Special Commission para 26 <https://assets.hcch.net/docs/5b48f412-6979-4dc1-b4c1-782fe0d5cfa7.pdf>

<sup>56</sup> See fn 52 above.

<sup>57</sup> See Sarah Calvert, fn 25 above; Freeman, M. ‘Long-Term Effects’ fn 21 above.

<sup>58</sup> See the Explanatory Report by Professor Elisa Perez-Vera (hereafter the Perez-Vera Report) at para 16: ‘..since one factor characteristic of the situations under consideration consists in the fact that the abductor claims that his action has been rendered lawful by the competent authorities of the State of refuge, one effective way of deterring him would be to deprive his actions of any practical or juridical consequences. The Convention, in order to bring this about, places at the head of its objectives the restoration of the status quo, by means of ‘the prompt return of children wrongfully removed to or retained in any Contracting State’ <https://assets.hcch.net/docs/a5fb103c-2ceb-4d17-87e3-a7528a0d368c.pdf>

<sup>59</sup> Lowe, ‘Whither’ fn 46 above, 399.

<sup>60</sup> See Lowe, N. and Stephens, V. Global Report – Statistical study of applications made in 2021 under the 1980 Child Abduction Convention. Prel. Doc. No 19A of September 2023 (currently available in English only) Global Report – <https://assets.hcch.net/docs/bf685eaa-91f2-412a-bb19-e39f80df262a.pdf> (hereafter ‘Global Report’).

## 1.6. Third Countries

The term 'third country' in the title of this study is used in EU Treaties to mean a country which is not a member of the Union<sup>61</sup>. This being so, the scope of this study should be understood as covering abductions from EU Member States to countries which are outside of the EU, and this includes both those which are Contracting States to the Convention (e.g. USA, Australia, South Africa), as well as those which are not, usually termed 'non-Convention States'<sup>62</sup> (e.g. India, China, Saudi Arabia). Although outside of the scope of this study, it would be very useful to know more about how abductions into EU countries from third countries, especially non-Convention States, are handled within the individual EU Member States, and research into this issue would make a welcome contribution to the literature in this field. A recommendation to this effect is made in the Conclusions to this study.

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<sup>61</sup> See [https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/third-country\\_en](https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/third-country_en)

<sup>62</sup> This study uses the term 'third country' as explained in fn 61 above and accompanying text. Care should be taken to distinguish this term from the references in jurisprudence and academic commentary to the term 'third States' used in the context of whether a child can be returned to a country which is not their State of habitual residence. For example, see *Re B (A Child) (Abduction: Habitual Residence)* [2020] EWCA Civ 1187; Katarina Trimmings (2021) 'Return of a child under the 1980 Hague child abduction convention to a 'third state'? *Journal of Social Welfare and Family Law*, 43:2, 202-204, DOI: 10.1080/09649069.2021.1880165.

## 2. STATISTICS RELATING TO APPLICATIONS UNDER THE CONVENTION

### KEY FINDINGS

Although the latest statistics produced for the Eighth Special Commission held in the Hague from 10-17 October 2023 show a small decrease in return applications, these cover the years of the Covid-19 pandemic so are unlikely to be typical. In any event, they only relate to those Contracting States to 'the Convention' which participated in the statistical survey, and to those applications which were routed through central authorities. They do not, therefore, tell us anything about abductions which occur outside of these circumstances, particularly those which involve third countries which are not currently Contracting States to 'the Convention'. No comprehensive statistics exist regarding abductions involving non-Convention countries, but the cited sources suggest that they are numerous.

The Fifth Statistical Study of return and access applications under the Convention, which provides the most recent authoritative data for these purposes, was carried out by Lowe and Stephens for the Eighth Special Commission on the practical operation of the 1980 Convention and the 1996 Child Protection Convention, which was held in The Hague from 10-17 October 2023 (hereafter Fifth Statistical Study). The study focuses on applications made under the Convention in 2021. The Report is in two parts: (i) a Global Report<sup>63</sup> and (ii) a Regional Report<sup>64</sup>.

### 2.1. Global Report

Responses to the Fifth Statistical Study were received from 71 of the then 101 Contacting States, capturing (in the estimation of the authors) 94% of all application received and sent in 2021 under 'the Convention' which were routed through Central Authorities. A total of 2,579 incoming applications were detailed which were made up of 2,180 return and 399 access applications. The authors compared data from 2021 with those from their previous study relating to applications in 2015 and concluded that there had been a 4% decrease in return applications and a 1% increase in access applications<sup>65</sup>. However, they point out that the 2021 figures are likely to have been affected by the COVID pandemic and, therefore, should be treated with some caution. The percentage of taking persons who were mothers increased from 73% in 2015 to 75% in 2021. A high proportion of the taking persons (88%) were either the primary, or joint primary, carer of the abducted child. At least 2,771 children were involved in the 2,180 return applications with the average age of the children involved being 6.7 years. The overall return rate was lower than in previous studies, being 39% in 2021 compared with 45% in

<sup>63</sup> Global Report –Statistical study of applications made in 2021 under the 1980 Child Abduction Convention Prel. Doc. No 19A of September 2023 (currently available in English only) <https://assets.hcch.net/docs/bf685eaa-91f2-412a-bb19-e39f80df262a.pdf> (hereafter 'Global Report').

<sup>64</sup> Regional Report – Statistical study of applications made in 2021 under the 1980 Child Abduction Convention. Prel. Doc. No 19B of October 2023 (currently available in English only) <https://assets.hcch.net/docs/fcb00f53-ba49-4f62-ae79-0f0724b59093.pdf> (hereafter 'Regional Report').

<sup>65</sup> Cf Yakub, ' ..[t]he incidence of parental child abduction is reportedly on the increase', Parental Child Abduction to Islamic Law Countries: A Child Rights Analysis of the Legal Framework. Oxford: Hart Publishing, 2022. Studies in Private International Law. Bloomsbury Collection (hereafter Yaqub, Child Rights), p1 fn 2. N.B The Statistical Study figures only relate to applications routed through participating central authorities. They therefore exclude any abductions to countries where the relevant central authorities did not participate in the Statistical Study, to those abductions not routed through central authorities, and to those which are outside of 'the Convention'.

2015. Return applications were slower to resolve than previously, being on average 207 days in 2021, and 164 days in 2015<sup>66</sup>.

## 2.2. Regional Report

This part of the Fifth Statistical Study analyses data from three different regions: the European Union; Latin America and the Caribbean; and Asia Pacific States, and provides some interesting insights about abductions to and from some non-EU countries which are Contracting States to 'the Convention'<sup>67</sup>.

Data was provided by 57 States in these regions including all EU Member States, except Denmark. In addition, 25 States from Latin America and the Caribbean, and six States from the Asia Pacific Region feature in this regional study.

### 2.2.1. The EU

The Brussels II a Regulation<sup>68</sup>(the Regulation), which governed EU cases of abduction at the relevant time, came into force on 1 August 2004 and was binding on all EU Member States except for Denmark, taking precedence over the Convention within the Contracting States. In 2021 the Regulation applied to 479 (22%) i.e. nearly one quarter of the 2,180 global applications. Lowe and Stephens found that:

'In 2021, there was a marginally higher return rate in Regulation cases (43% compared with 40% in non-Regulation cases) which reflects the findings of the of 2015 Study. However, the Regulation had a minimal impact on court decisions with 55% of Regulation cases decided in court ending in an order for the return of the child compared with 54% for non-Regulation cases. In 2015 the findings were 59% and 48%, respectively'.<sup>69</sup>

It is interesting to note that there were less appeals in Regulation cases than non-Regulation cases:

'In 2021, 57% of Regulation cases were appealed (109 of the 190 which went to court and where information on appeals was known) compared with 72% of non-Regulation cases (97 out of 134 applications)'.<sup>70</sup>

However, the Regulation does not seem to affect the time taken to reach a final outcome in applications overall.<sup>71</sup>

Of the EU Member States, France received the highest number of applications in non-Regulation cases (61 cases representing 48% of their total cases), closely followed by Poland (56 cases representing 48%

<sup>66</sup> Global Report, Executive Summary, para 13.

<sup>67</sup> NB Since 31 January 2020 the UK is no longer a member of the EU. For a recent account of practice in England and Wales, see George R. and Netto, J. (2023) Concurrent Convention and Non-Convention Cases: Child Abduction in England and Wales. *Laws* 12:70.

<sup>68</sup> 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.

<sup>69</sup> 'Regional Report', Executive Summary, para 5. NB 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) (hereafter The Brussels II-ter Regulation ) has been in force since 1 August 2022, repealing Regulation (EC) 2201/2003. Krzysztof Pacula and Thalia Kruger explain the confusing terminology regarding this regulation: 'This regulation is called Brussels IIter by some; Brussels IIb by others, Brussels IIbis (recast) by yet others, or simply Regulation 2019/111 (thanks to its easy number). Brussels IIb will probably prevail, as this is the name that the Commission seems to be opting for'. Krzysztof Pacula and Thalia Kruger, Long Live The Regulation? Brussels II ter Regulation becomes fully applicable. <https://conflictoflaws.net/2022/long-live-the-regulation-brussels-ii-ter-regulation-becomes-applicable/?print=pdf>

<sup>70</sup> 'Regional Report,' above, para 32.

<sup>71</sup> 'Regional Report', above para 42.

of their total cases) and Germany and Spain which each received 47 cases (representing 40% and 65% respectively of their total cases)<sup>72</sup>. It is not known which countries made these applications.

### 2.2.2. Latin America and the Caribbean<sup>73</sup>

Lowe & Stephens found that '[t]he 18 Latin American and Caribbean States ('LATAM States') that took part in the 2021 Study received a total of 421 return applications amounting to 19% of the 2,180 return applications received globally. Making a direct comparison with the 2015 Study there was 21% increase in the number of return applications. This finding contrasts with a 4% decline in return applications globally. The return rate was also lower at 30% compared with 39% globally'.<sup>74</sup> The number of appeals was also higher (49%) than the global average (42%)<sup>75</sup>. However, a significantly higher proportion of applications received by LATAM States remained pending at the cut-off date of 30 June 2023 - 29% compared with 12% globally.<sup>76</sup> Mexico received the highest number of return applications (58) from non-LATAM states, representing 60% of their total cases, but it is not known how many, if any, of these were from EU countries.

### 2.2.3. Asia-Pacific States

The six participating states<sup>77</sup> received 60 return applications i.e. 3% of the global applications (2,180) in 2021. This represented a drop of 46% compared with a decrease of 4% globally<sup>78</sup> which the Regional Report authors attributed to the drop in applications to and from Australia which they concluded may be 'related to the effect of COVID-19 pandemic travel restrictions'<sup>79</sup>.

The return rate (52%) was higher than the global average (39%)<sup>80</sup>. The Report authors found that 34 applications received by Asia-Pacific States went to court and 12 of these were appealed (35%), compared with the 2021 global average of 42%. The average time taken to resolve a return application in Asia-Pacific States was 205 days from receipt by the Central Authority, as against 144 days in 2015. This can be compared with the global average of 207 days in 2021.<sup>81</sup>

Japan had the highest number of applications (12) from non-Asia-Pacific states, representing 86% of their total cases, but it is not known how many, if any, of these were from EU countries. (Japan is further considered at 3.6 below).

<sup>72</sup> 'Regional Report', above, p21.

<sup>73</sup> If a Contracting State is also party to the Inter-American Convention on the International Return of Children 1989 (OAS, Treaty Series, No. 70, signed in Montevideo, Uruguay, in 1989) the latter has priority under Article 34 of that Convention unless they have entered into bilateral agreements to give priority to the application of the Hague Convention <https://www.oas.org/juridico/english/treaties/b-53.html>

<sup>74</sup> 'Regional Report', paras 66, 67.

<sup>75</sup> 'Regional Report', above, para 89.

<sup>76</sup> 'Regional Report', above, para 95. This represents 39% of applications received, as against 12% globally for this category.

<sup>77</sup> Australia, China (Hong Kong and Macao), Japan, New Zealand, the Republic of Korea and Singapore.

<sup>78</sup> 'Regional Report', above para 117.

<sup>79</sup> 'Regional Report', above para 119.

<sup>80</sup> 'Regional Report', above, para 111.

<sup>81</sup> 'Regional Report', above, paras 113, 114.

### 3. ANALYSIS, AND SUGGESTIONS FOR POSSIBLE IMPROVEMENT OF, THE PRACTICAL FUNCTIONING AND ENFORCEMENT OF DECISIONS UNDER THE CONVENTION

#### KEY FINDINGS

'The Convention' is more than 40 years old and is facing challenges in its current operation. These include the uneven playing field on which it functions; the way in which the important issues of domestic violence and abuse are managed within it; the timing of the various stages of applications and appeals made under it; the question of child participation in 'the Convention' proceedings; and enforcement of orders made under 'the Convention'. Attention has been drawn to these matters in various ways including those recorded hereunder, but it is argued in the conclusions of this study that a more joined-up approach is required to focus appropriately both on what is needed and what can realistically be achieved in this global instrument so that it continues to serve the best interests of children in contemporary society.

'The Convention' is now more than 40 years old. Life and society have changed significantly in that time. Adair Dyer, widely acknowledged to be one the 'fathers' of 'the Convention', foresaw the need for the nurturing of law-making treaties in order that their utility might extend for at least 30 years<sup>82</sup>. 'The Convention' has already considerably exceeded that timeframe, and it is unsurprising that such nurturing should now be required. Freeman and Taylor argue that providing the necessary nurturing would best position the Convention to meet current and future challenges and demands<sup>83</sup>. These are varied and have been well described<sup>84</sup>. They include:

#### 3.1. The uneven playing field

An uneven playing field exists because the operation of 'the Convention' differs significantly between its Contracting States. This 'militates strongly against the outcomes for the abducted child, as well as for the adult parties in the dispute.'<sup>85</sup> One of the clearest examples of the uneven playing field relates to the provision of public funding to pursue 'the Convention' proceedings in the refuge state<sup>86</sup>. Where such public funding is available for the left-behind parent, that parent is in a strong position to seek the return of their abducted child, and this is even more the case where, as in the United Kingdom, there is a specialist group of lawyers who handle such cases, and experienced, concentrated jurisdiction in the courts which are able to hear 'the Convention' applications. Where public funding is

<sup>82</sup> Dyer, Adair. 2000. To Celebrate a Score of Years! *NYU Journal of International Law and Policy* 33: 1.

<sup>83</sup> Freeman, Marilyn, and Taylor, Nicola (2023). Contemporary Nurturing of the 1980 Convention. *Laws* 2023, 12(4), 65 <https://www.mdpi.com/2075-471X/12/4/65>

<sup>84</sup> See Contemporary Issues (2023) fn 52 above which contains 12 open access papers by global abduction specialists on issues including the interaction of the Convention and domestic violence; hearing children's objections in Convention proceedings; and judicial interviews of children in Convention proceedings [https://www.mdpi.com/journal/laws/special\\_issues/08G6OB562R#info](https://www.mdpi.com/journal/laws/special_issues/08G6OB562R#info)

<sup>85</sup> Freeman, Marilyn, and Taylor, Nicola. Nurturing the 1980 Hague Convention. In Freeman and Taylor, Research Handbook, 408.

<sup>86</sup> See Freeman, M. The Hague Child Abduction Convention – An Uneven Playing Field, Part 11 – Legal Aid and the Role of Administrative Proceedings, Occasional Papers on the 1980 Hague Child Abduction Convention, International Child Abduction and Related Issues, Part 11, reunite, 2002.



not available, left-behind parents are extremely disadvantaged by having to fund the application for return of their child under ‘the Convention’ which is usually very expensive and likely to be prohibitive for many applicants. They must also find lawyers who are familiar with ‘the Convention’ principles and processes. Such serendipity should not govern the outcomes, wellbeing and opportunities for children,<sup>87</sup> yet it often does.

‘The key question of whether public funding is available in the refuge State remains one of the principal forms of unevenness in the Convention’s operation’.<sup>88</sup>

A similar lack of unevenness in ‘the Convention’ playing field exists in the disparity that may occur between those parties who are able to access public funding, where it is available, in the country to which the child has been taken, and those who are unable to access it or, alternatively, may access it on less beneficial terms. For example, in England and Wales the left-behind parent who applies from outside of the jurisdiction is entitled to non-means and non-merits tested public funding. However, the taking parent will have access to public funding only on a means and merits basis. This is especially relevant in cases involving domestic violence where most respondents to the application for return are women, and are likely to be significantly disadvantaged by this requirement for means and merits testing<sup>89</sup>.

### **3.2. Abductions which occur against a background of violence and/or abuse to the abducting parent and/or the child(ren)**

Although research has shown that the effects and consequences of abduction are often detrimental to the well-being of children<sup>90</sup>, it is uncertain whether abductions which occur to protect the child and/or the abducting parent from violence or abuse are similarly harmful<sup>91</sup>. There are no comprehensive statistics regarding the number of abduction cases which involve domestic violence, but researchers have recently stated that ‘it is suspected that domestic violence is a present issue in as many as 70% of the total parental child abduction cases’<sup>92</sup>.

<sup>87</sup> Freeman and Taylor, Research Handbook, above, p408.

<sup>88</sup> Freeman and Taylor, Research Handbook above, p408.

<sup>89</sup> Questionnaire concerning the Practical Operation of the 1980 Child Abduction Convention, Responses to the Questionnaire of January 2023, England and Wales.  
<https://assets.hcch.net/docs/85bfde82-f290-4656-b223-864ccf96b5d9.pdf>

<sup>90</sup> Taylor, Nicola, and Marilyn Freeman. 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.

<sup>91</sup> See Dyer Report, fn 15 above, 22. Also the The Perez-Vera Report (see fn 58 above), para 25: ‘it has to be admitted that the removal of the child can sometimes be justified by objective reasons which have to do either with its person, or with the environment with which it is most closely connected. Therefore the Convention recognizes the need for certain exceptions to the general obligations assumed by States to secure the prompt return of children who have been unlawfully removed or retained’. <https://assets.hcch.net/docs/a5fb103c-2ceb-4d17-87e3-a7528a0d368c.pdf>

<sup>92</sup> Katarina Trimmings, Onyoja Momoh and Konstantina Kalaitoglou [https://mdpi-res.com/bookfiles/book/8261/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.pdf?v=1707217903](https://mdpi-res.com/bookfiles/book/8261/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.pdf?v=1707217903) hereafter Interplay, p74, see fn 102 below.

As Baroness Hale observed in 2014:

'It would be interesting to know whether the effects of an abduction which the child perceived to be for their own or their carer's protection are different from those in other cases'.<sup>93</sup>

Commentators have long expressed concerns about the way that 'the Convention' works in these circumstances as it does not contain any provisions which directly address these situations<sup>94</sup>. Taking parents who assert domestic/family violence as the reason for the abduction and hope for the non-return of the child to the State of habitual residence, can only try to use the Article 13(1)(b) exception to return<sup>95</sup>. However, the focus of Article 13(1)(b) is harm to the child, not the taking parent. Notwithstanding the convincing social science research about the impact that violence between adults has on the children who witness it<sup>96</sup>, there has been considerable debate about whether harm to the parent may be brought within its ambit. The Guide to Good Practice on Article 13(1)(b) which was produced by HCCH addresses this question and states that:

'..harm to a parent, whether physical or psychological, could, in some exceptional circumstances, create a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. The Article 13(1)(b) exception does not require, for example, that the child be the direct or primary victim of physical harm if there is sufficient evidence that, because of a risk of harm directed to a taking parent, there is a grave risk to the child.'<sup>97</sup>

<sup>93</sup> Freeman, Long-Term Effects, Foreword. There are significant difficulties in undertaking this type of research, which account for the paucity of such research which exists. However, the author is currently completing a survey-based research project with Professor Nicola Taylor to investigate the effects and outcomes of abduction on children where the abduction occurred against a background of violence or abuse. See fn 15 above.

<sup>94</sup> For example, see M. Weiner, 'International Child Abduction and the Escape from Domestic Violence' (2000) 69 *Fordham Law Review* 694; M. Kaye, 'The Hague Convention and the Flight from Domestic Violence: How Women and Children are being Returned by Coach and Four' (1999) 13 *International Journal of Law, Policy and the Family* 191; C. Bruch, 'The Unmet Needs of Domestic Violence Victims and their Children in Hague Child Abduction Convention Cases' (2004) 38 *Family Law Quarterly* 529; B. Hale, 'Taking Flight —Domestic Violence and Child Abduction' (2017) 70 *Current Legal Problems* 3; Freeman, M. and Taylor, N. Domestic Violence and child participation: contemporary challenges for the 1980 Hague Child Abduction Convention. *Journal of Social Welfare and Family Law* 2020, Vol. 42, No. 2, 154–175, hereafter Domestic Violence and Child Participation, Contemporary Challenges, Edleson, J, Shetty, S. and Fata, M. Fleeing for safety; Helping battered mothers and their children using Article 13(1)(b). Freeman and Taylor, Research Handbook.

<sup>95</sup> Article 13:

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. The judicial or administrative authority 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.

<sup>96</sup> See 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, Preliminary Document No 9 of May 2011 for the attention of the Special Commission of June 2011 on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention (hereafter Reflection Paper).

<sup>97</sup> 1980 Child Abduction Convention Guide to Good Practice, Part V1, Article 13(1)(b) Hague Conference on Private International Law (2020) [www.hcch.net](http://www.hcch.net) paras 32,33 (hereafter GGP Article 13(1)(b)).

Nonetheless, concerns remain about this issue, specifically relating to a late-addition to the GGP Article 13(1)(b) in paragraph 58<sup>98</sup> which states:

‘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.’

The accompanying footnote to paragraph 58<sup>99</sup> explains this statement:

‘See also *Souratgar v Fair*, 720 F.3d 96 (2nd Cir. 2013), 13 June 2013, United States Court of Appeals for the Second Circuit, (the US) [INCADAT Reference: HC/E/US 1240] at pp. 12 and 16, in which the taking parent’s allegations of spousal abuse on the part of the left-behind parent were considered by the Court to be “only relevant under Article 13(b) if it seriously endangers the child. The Article 13(b) inquiry is not whether repatriation would place the [taking parent’s] safety at grave risk, but whether so doing would subject the child to a grave risk of physical or psychological harm.” In that case, the Court affirmed the finding of the district court that, while there were instances of domestic abuse, “at no time was [the child] harmed or targeted”, and that “in this case, the evidence [...] does not establish that the child faces a grave risk of physical or psychological harm upon repatriation.”

Schuz and Weiner argue that ‘the last sentence in para 58 is misleading and, if taken out of context, liable to be completely misunderstood’<sup>100</sup>, and ‘is liable to provide support for the approach taken by some judges that the grave risk exception cannot be established in cases of domestic violence in the absence of evidence of violence against the child or unless direct harm has already been caused to him or her, and so lead to a perpetuation of the inconsistencies in the application of Art 13(1)(b), demonstrated in the Reflection Paper’.<sup>101</sup>

Concerns also remain about the enforceability of any protective measures which may be put in place by the returning court in an effort to ensure the safe return of the taking parent<sup>102</sup>. The Protection of Abducting Mothers in Return Proceedings: Intersection between Domestic Violence and Parental Child Abduction (POAM) project<sup>103</sup> which was funded by the European Union’s Rights, Equality and Citizenship Programme notes that, ‘..[a]lthough it is not mandatory for the abducting parent to return together with the child, the abducting mother (in particular if she is the primary carer), will normally accompany the child back to the State of origin, even if it means that she has to compromise her own safety. This is an unintended consequence of the 1980 Hague Convention and Brussels IIa, the seriousness of which, however, is exacerbated by the fact that there is a lack of consideration for the safety of the returning parent in either of these instruments’.<sup>104</sup>

<sup>98</sup> See Schuz, R. and Weiner, M. A mistake waiting to happen: the failure to correct the Guide to Good Practice on Article 13(1)(b) (2020) *IFL*, 87.

<sup>99</sup> Footnote no. 73.

<sup>100</sup> See Schuz and Weiner, fn 98 above, 90.

<sup>101</sup> Schuz and Weiner, fn 98 above, 91.

<sup>102</sup> See Trimmings et al, fn 92 above and discussion about enforceability which follows hereunder.

<sup>103</sup> ‘The POAM project is a collaborative research project which explores the intersection between domestic violence and international parental child abduction within the European Union. The project is concerned with the protection of abducting mothers who have been involved in return proceedings under the 1980 Hague Abduction Convention and the Brussels IIa Regulation, in circumstances where the child abduction had been motivated by acts of domestic violence from the left-behind father’. <https://research.abdn.ac.uk/poam/>

<sup>104</sup> <https://research.abdn.ac.uk/poam/project/overview/> NB In all EU States (except Denmark) it is Brussels II-ter which will now apply, not its predecessor Brussels IIa.

There was much discussion at the Eighth Special Commission in October 2023 about domestic violence and the operation of Article 13(1)(b). Conclusion and Resolution no. 26 records the support of the Special Commission for the proposal of the Secretary General 'to hold a forum that would allow for discussions amongst organisations representing parents and children, and those applying the Convention. The importance of ensuring a balanced representation of all interested parties was emphasised. The agenda of the forum, which would focus on the issue of domestic violence in the context of Article 13(1)(b), would be prepared by a representative Steering Committee. The forum may also inform possible further work of the HCCH on this matter'<sup>105</sup>.

An Experts' Meeting to follow the Eighth Special Commission was convened by the study author at the University of Westminster, London on 19-20 October 2023 where domestic violence in the context of international child abduction and 'the Convention' was one of three topics on the agenda for discussion by the invited, interdisciplinary global experts. Another of the agenda topics concerned asylum and refugee status, and the impact that this has on proceedings under 'the Convention'. As explained by Al-Shargabi<sup>106</sup>, this may occur in the context of a woman who takes her child to escape from domestic violence in the State of habitual residence and applies for refugee status in the refuge State. The left-behind parent may then seek the return of the child under 'the Convention'. Several of the Contracting States<sup>107</sup> have considered this question which presents a considerable challenge in 'the Convention's' application (the third topic was child participation in Hague Abduction Convention proceedings). The meeting was chaired by Philippe Lortie, First Secretary, HCCH. A special edition of the Judges' Newsletter dedicated to the presentations and discussions at the Experts' Meeting will be published by HCCH in 2024.

### 3.3. Speed

As stated by Lowe, speed 'is of the essence if the Convention is to work in children's interests and is the very foundation of the summary return mechanism: an immediate return, if safe, can be justified on the basis that it preserves the child's connection with his/her home State before fresh roots are established elsewhere and, even where a return is refused, it is important to resolve the disruption caused by the abduction quickly. On the other hand, it becomes steadily more questionable whether a return order, particularly one made summarily, is the right solution where the child has spent a lengthy period in the State of refuge'.<sup>108</sup> He is undoubtedly correct - this is one of the key operational challenges facing the Convention. The six-week target<sup>109</sup> for disposal of return proceedings by the requested court is often illusory in practice. Lowe makes the point that, in fact, this target is often unrealistic for many states.<sup>110</sup>

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<sup>105</sup> See Conclusions and Resolutions from Eighth Special Commission <https://assets.hcch.net/docs/5b48f412-6979-4dc1-b4c1-782fe0d5cfa7.pdf>

<sup>106</sup> <https://www.netlaw.bg/en/a/the-interplay-between-international-child-abduction-law-and-international-refugee-law>

<sup>107</sup> Including the United Kingdom where the Supreme Court decided the case of *G v G* [2021] UKSC 9 in which ICFLPP was granted permission to intervene.

<sup>108</sup> Whither fn 46 above, 399.

<sup>109</sup> Article 11 Convention.

<sup>110</sup> Whither, fn 46 above, 399.

The Fifth Statistical Study, undertaken for the Eighth Special Commission in October 2023, makes interesting reading in the light of the obligations set out in Article 11<sup>111</sup>. Lowe and Stephens report<sup>112</sup> that the mean number of days to arrive at a final settlement was 207 days from the date at which the application was received by the Central Authority, which is longer than the 164 days recorded in 2015 and the 188 days in 2008. It therefore appears that the problems of speed are still current and, in fact, may be worsening.

Lowe and Stephens note: ‘significant differences between Contracting States in the time taken to determine applications’<sup>113</sup>. They provide examples of how this works in practice when they state:

‘The applications received by some States were resolved relatively quickly, given the number of applications they received. For example, Austria (90 days, 20 applications), and the Czech Republic (105 days, 12 applications) With smaller numbers Norway (53 days, 8 applications) and Denmark (90 days, 8 applications). By contrast, applications received by Türkiye, Brazil, and Morocco took much longer to conclude (384 days, 14 applications; 363 days, 24 applications, and 334 days, 12 applications, respectively)’.<sup>114</sup>

Brussels II-ter<sup>115</sup> addresses this issue in Article 24 by stating that a return court shall act expeditiously, using the most expeditious procedures available under national law and, except where exceptional circumstances make this impossible, give its decision no later than six weeks after it is seised. Again, except where exceptional circumstances make this impossible, a court of higher instance shall give its decision no later than six weeks after all the required procedural steps have been taken and the court is in a position to examine the appeal. Although Lowe cautions that ‘it remains to be seen how effective these provisions will prove to be in practice’, he notes that they address the need for speed at all stages of the process<sup>116</sup>. He boldly suggests<sup>117</sup> that the HCCH might consider developing a GGP on timing and that thought be given to encouraging Contracting States to limit the number of appeals allowed. He cites Brussels II-ter as an example which might be followed as this contains in Recital (42) a direction to Member States to limit the number of appeals possible against a decision granting or refusing the return of a child under the 1980 Convention to one. Nonetheless, and importantly, he recognises that 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’<sup>118</sup>. In terms, therefore, of the uneven playing field under

<sup>111</sup> Article 11 states: The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children. If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

<sup>112</sup> Fifth Statistical Study, para 98.

<sup>113</sup> Fifth Statistical Study, para 103.

<sup>114</sup> Fifth Statistical Study, para 104.

<sup>115</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R1111>

<sup>116</sup> Whither, fn 46 above, 399.

<sup>117</sup> Whither, fn 46 above, 110-111. ‘Boldly’ in view of the experience with GGP Article 13(1)(b) which took many years to complete and remains the subject of criticism and debate, see R. Schuz and M. Weiner, ‘A Small Change That Matters: The Article 13(1)(b) Guide to Good Practice’ Lexis-Nexis, 21 January 2020 ; R. Schuz and M. Weiner, ‘A Mistake Waiting to Happen: the failure to correct the Guide to Good Practice on article 13(1)(b) (2020) IFL 87; D. Bryant, ‘Response to Professors Rhona Schuz and Merle H Weiner (“the authors”’, A Mistake Waiting to Happen: The Failure to Correct the Guide to Good Practice on Article 13(1)(b)’ (2020) *International Family Law Journal* 207–08, 207.

<sup>118</sup> Whither, fn 46 above, 403.

discussion, it adds another layer to it unless the HCCH can address some of the operational problems of 'the Convention' but, on this question, he is not particularly optimistic:

'Principal amongst these is the need for speed. The summary return mechanism only really works in children's interests if it really is 'summary'. Brussels II-ter makes a serious attempt to address this issue which could provide a model for the Convention to follow possibly within a Good Practice Guide on Timing. Brussels II-ter also makes a significant attempt to improve the enforcement of both return and access orders. This is a major gap in the Convention that needs to be addressed, although the obstacles in doing so are likely to be immense'<sup>119</sup>.

When considering the unsuccessful attempts that have been made in the past to add a protocol to the Convention<sup>120</sup>, this lack of optimism may be well-founded. In his 2010 article, McEleavy describes the momentum which had built towards adding a Protocol to the Convention during the previous 10 years as a response 'to the shortcomings inherent in the text and interpretation of Art 21 (rights of access)<sup>121</sup> but he also noted that:

'there has always been and there remains an awareness of the challenges inherent in such an endeavour, as well as of the potential risks it presents for a highly successful global instrument'.<sup>122</sup>

Professor William Duncan, then the Deputy Secretary General of the HCCH, similarly noted<sup>123</sup> the diverging views about the desirability of a Protocol, those in opposition being concerned about the likelihood of reaching agreement due, amongst other reasons, to the demands of the different judicial systems of the Contracting States.

Baroness Hale also recalls the abandonment of the push for a Protocol:

'It is fair to say that, in the run-up to the sixth meeting, many states had been pressing for a Protocol to the Convention which, among other things, might do more to protect children and to cater for the problems posed by domestic violence. Other states were adamantly opposed to such a Protocol. So discussion of a Protocol was abandoned at the last minute.'<sup>124</sup>

With a protocol seemingly out of the question, and the appetite for another Guide to Good Practice being uncertain, thought must be given by the international child abduction community to what alternatives may be possible to deal with the fundamental issue of speed required in 'Convention' proceedings.

### 3.4. Child participation/hearing the child in Convention proceedings

The question of child participation/hearing the child in Convention proceedings has received considerable recent attention. The only provision within the Convention which addresses this issue is

<sup>119</sup> Whither, fn 46 above, 403.

<sup>120</sup> McEleavy, P. (2010). A protocol for the 1980 Hague Convention? *International Family Law*, (1), 59-65.

<sup>121</sup> McEleavy, above, 59.

<sup>122</sup> McEleavy, above, 59.

<sup>123</sup> W. Duncan, 'Transfrontier Access / Contact and the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Final Report', Prel. Doc. No 5 of July 2002 drawn up for the attention of the Special Commission of September / October 2002 paras 134-136.

<sup>124</sup> Hale, B. Taking Flight – Domestic Violence and Child Abduction, *Current Legal Problems*, Vol. 70, No. 1 (2017), pp. 3–16, 11.

what is known as the child's objections exception to return in Article 13<sup>125</sup>. This was the subject of a British Academy funded research project by the author in collaboration with Professor Nicola Taylor. The key project findings include 'a wide divergence in the attitudes of family justice professionals towards the child's objections exception ranging from a minority who thought the exception was overused and abused, to the majority who felt it was appropriate to listen to the child's views in the context of the exception'<sup>126</sup>. There was a similarly wide divergence in practice amongst the Contracting States relating to the manner in which a child was heard:

'We also found that the practices of contracting states relating to the child's objections exception vary considerably depending on domestic laws and procedures. These sometimes involve the use of independent experts/intermediaries between the child and the court; separate legal representation of children; children joined as parties to the proceedings; or judicial interviews with children. One of the most striking of our findings relates to the wide range of specialists involved with the child/family to inform the legal process when a child's objections are raised – 17 different types of specialists were identified within our global survey including psychologists, family consultants, counsellors, social workers, guardians ad litem, children's officers, child protection officials, youth department workers and child protection officials'<sup>127</sup>.

We concluded that the voice and role of children in 'Convention' proceedings, as well as the wide divergence of practice within the Contracting States, required further consideration<sup>128</sup>.

The International Handbook on Child Participation in Family Law<sup>129</sup> co-edited by the author, contained 17 country chapters, and included consideration of child participation in the context of international child abduction proceedings. Some diversity on this issue was found to exist between those countries which participated in the Handbook:

'Most jurisdictions offer similar participation opportunities for children in international child abduction proceedings as they do for children in domestic family law proceedings. Only in a number of jurisdictions specific provisions ensure either limited or extended participation opportunities to children in international child abduction proceedings'.<sup>130</sup>

<sup>125</sup> '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'. This section of Article 13 is sometimes referred to as Article 13(2).

<sup>126</sup> See Taylor N. and Freeman, M. *The Judges Newsletter on International Child Protection, Special Focus, The Child's Voice – 15 years Later*. Volume XX11/Summer-Fall 2018. [www.hcch.net](http://www.hcch.net) p11.

<sup>127</sup> Judges' Newsletter above, 11.

<sup>128</sup> Judges' Newsletter above, 12. A particular concern relates to the right in Article 12 UNCRC for children capable of forming their own views to express those views freely in all matters affecting them, with due weight being given to those views in accordance with the age and maturity of the child. Additionally, the child shall be provided with the opportunity to be heard in any judicial or administrative proceedings affecting them. With the wide divergence of practice found, the right to participation enshrined in the UNCRC is at risk in many proceedings held under 'the Convention'. See further Cross-border parental child abduction in the European Union, Study for the LIBE Committee, prepared for the European Parliament (2015), para 3.4.1, p86: 'Profound criticisms of the approach adopted by the Hague Convention - and a fortiori by EU Regulation 2201/2003 – concern the scarce attention paid by the regimes in force to the letter and spirit of the United Nations Convention on the Rights of the Child' [https://www.europarl.europa.eu/RegData/etudes/STUD/2015/510012/IPOL\\_STU\(2015\)510012\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2015/510012/IPOL_STU(2015)510012_EN.pdf)

<sup>129</sup> W.Schrama, M.Freeman, N.Taylor, M. Bruning (eds), Intersentia (2021) <https://www.larcier-intersentia.com/en/international-handbook-child-participation-family-law-9781839700569.html>

<sup>130</sup> Mol. C. Child Participation in Family Law Proceedings Compared in Schrama, Freeman, Taylor and Bruning (eds) (above), 350.

A round-table meeting was convened by the author and held in Israel in July 2019 on *The Voices of Children in Abduction Proceedings under the 1980 Convention*<sup>131</sup>. This led to the publication of a project report<sup>132</sup> which concluded that the round-table discussion illustrated the differences of opinion which exist among family justice professionals in relation to the hearing of children in abduction cases<sup>133</sup>. It seems likely that these differences of opinion are one of the explanations for the diversity of approaches found in the Outcomes for Objecting Children project,<sup>134</sup> some of which reflect attitudes about the lack of capacity of children to form legitimate views concerning their lives. The project report authors submitted that the approach to children's participation in Hague Convention cases has to be considered within a children's-rights framework underpinned by the United Nations Convention on the Rights of the Child. They also suggested that the round-table meeting, together with the Outcomes for Objecting Children project, provided support 'for the view expressed by Hollingsworth and Stalford<sup>135</sup>, on the basis of an analysis of English case law, that there is much more scope within the abduction framework to adopt an approach which is more closely informed by children's rights principles'.<sup>136</sup> Discussion continued on the topic of child participation in 'Convention' proceedings at The Experts' Meeting convened by the study author which was held at the University of Westminster on 19-20 October 2023 following the conclusion of the Eighth Special Commission in The Hague (see above).

Brussels II-ter, which entered into force on 1 August 2022, provides in Article 21 that children need to be given a genuine and effective opportunity to be heard and that due weight has to be given to their views in accordance with their age and maturity. This development is to be welcomed in terms of children's rights. However, this is another example of a good change making a dent in the uniformity of approach under 'the Convention' as identified by Lowe<sup>137</sup>, in other words, it extends the unevenness of the Convention playing field, and the serendipity of outcomes for the abducted child.

### 3.5. Enforcement and the 1996 Child Protection Convention<sup>138</sup>

Even if it is possible to argue that various provisions within 'the Convention' allude to the need for enforcement<sup>139</sup>, there are no specific provisions in the Convention which address the issue of enforcement directly. Without reliable enforcement, everything that goes before it in terms of legal

<sup>131</sup> See Freeman, M. and Taylor, N. Domestic Violence and child participation: contemporary challenges for the 1980 Hague Child Abduction Convention. *Journal of Social Welfare and Family Law* 2020, Vol. 42, No. 2, 154–175. See fn 94 above.

<sup>132</sup> Freeman, M., Taylor, N., and Schuz, R., 2019. *The voice of the child in international child abduction proceedings under the 1980 Hague Convention*. London: University of Westminster. <https://westminsterresearch.westminster.ac.uk/item/qx8q8/the-voice-of-the-child-in-international-child-abduction-proceedings-under-the-1980-hague-convention> (hereafter Project Report).

<sup>133</sup> Project Report, 10.

<sup>134</sup> Project Report above p10. For Outcomes for Objecting Children project, see fn 22 above.

<sup>135</sup> Hollingsworth, K., & Stalford, H. (2018). Judging Parental Child Abduction: What Does it Mean to Adopt a Children's Rights-Based Approach. In Gillian Douglas et al., (Eds.), *International and National Perspectives on Child and Family Law*, Intersentia, 125, 130.

<sup>136</sup> Project Report above, 10.

<sup>137</sup> See fn 118 above for Lowe's comments on the Brussels II-ter provisions regarding speed which, similarly, cause further imbalance in the operationalisation of 'the Convention'.

<sup>138</sup> 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 <https://www.hcch.net/en/instruments/conventions/full-text/?cid=70> (hereafter 'the 1996 Convention').

<sup>139</sup> See, for example, Articles 1 and 11 which refer to the prompt return of children, and the requirement for judicial or administrative authorities of Contacting States to act expeditiously in proceedings for the return of children, which might be said to infer the need for enforcement of orders made under 'the Convention'.



remedies is meaningless. The time, emotion, and expense involved in pursuing orders, including those under 'the Convention', are all for nothing if the resulting judgments are ignored with impunity.<sup>140</sup>

Enforcement has been discussed at several meetings of the Special Commission, leading eventually to The Guide to Good Practice on Enforcement (GGP Enforcement)<sup>141</sup> which states that:

'Rapid and effective mechanisms should be available for enforcing a return order, including a range of effective coercive measures'.<sup>142</sup>

Trimmings and Momoh emphasise that, in relation to domestic violence, in deciding what weight should be given to protective measures, the court must consider the extent to which they will be enforceable in the requesting State. They state that:

'Where the requesting State is not a Contracting Party to the 1996 Convention, the court dealing with the return application must exercise extreme caution when undertakings are offered and/or other protective measures are sought in the context of Article 13(1)(b)'.<sup>143</sup>

At the recently concluded Eighth Special Commission which was held in The Hague 10-17 October, 2023<sup>144</sup> the Special Commission:<sup>145</sup> '..underlined the benefits of ratification / accession to the 1996 Child Protection Convention'<sup>146</sup> and of the *Practitioner's Tool on Cross-Border Recognition and*

<sup>140</sup> The European Court of Human Rights has considered this question on several occasions including *Ignaccolo-Zenide v Romania* (App No 31679/96) (2001) 31 EHRR 7 where Romania was criticised for not doing what was required to enforce the order made by its court.

<sup>141</sup> Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part IV – Enforcement, Hague Conference on Private International Law, 2010 (GGP Enforcement) <https://assets.hcch.net/docs/49dc30cf-79cb-42ae-af36-dd2fc20bb11e.pdf>

<sup>142</sup> GGP Enforcement, para 1.5. NB GGP Enforcement followed a comparative legal study by Andrea Schulz, at that time, First Secretary at the Permanent Bureau of HCCH, which involved questionnaire responses from 46 jurisdictions. Concurrently, Lowe et al undertook empirical research regarding enforcement of Convention orders (including access orders) which was commissioned by the HCCH and sponsored by the International Centre for Missing and Exploited Children. See N. Lowe, S. Patterson and K. Horosova, Enforcement of Orders made under the 1980 Convention – An Empirical Study, commissioned by the Permanent Bureau and sponsored by the International Centre for Missing and Exploited Children. Information Document No 1 of October 2006 for the attention of the Fifth Special Commission to review the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (The Hague, 30 October – 9 November 2006) <https://assets.hcch.net/upload/wop/abduct2006infodoc.pdf>

<sup>143</sup> Trimmings, K. and Momoh, O. (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*, 2021, 18.

<sup>144</sup> at which the author was an invited observer on behalf of The International Association of Child Law Researchers (IACLaR) of which she is chairperson.

<sup>145</sup> Conclusions and Resolutions, No. 55.

<sup>146</sup> '1996 Convention' is a 'multilateral treaty covering a broad range of civil measures to protect children in cross-border situations. The Convention provides uniform rules that prevent conflicting decisions, enable cross-border co-operation between authorities, and secure the recognition and enforcement of measures among Contracting Parties. The "Child Protection Section" provides information about the operation of the Convention and the work of the Hague Conference in monitoring its implementation and promoting international co-operation in the area of child protection' <https://www.hcch.net/en/instruments/conventions/specialised-sections/child-protection> Article 23(1) of the '1996 Convention' provides for the recognition automatically in a Contracting State of a measure of protection taken in another Contracting State, and enforcement is addressed in Article 26(1). NB the number of Contracting States to the '1996 Convention' is currently 54 including all EU Member States <https://www.hcch.net/en/instruments/conventions/status-table/?cid=70> There are eight new Contracting States which have joined since the last Special Commission in 2017: Barbados, Cabo Verde, Costa Rica, Fiji, Guyana, Honduras, Nicaragua and Paraguay - Conclusion and Resolution no 56 – see <https://assets.hcch.net/docs/5b48f412-6979-4dc1-b4c1-782fe0d5cfa7.pdf> See Silberman's prescient remark in 2000 when she foresaw that 'it may take some time for countries to fully understand all of the implications and be willing to join the Convention' Linda Silberman, 'The 1996 Hague Convention on the Protection of Children: Should the United States Join' (2000) 34 *Fam LQ* 239, 241.

*Enforcement of Agreements Reached in the Course of Family Matters involving Children*<sup>147</sup> in facilitating lawful relocation'.

DeHart reminds us of the 'vital but limited purpose' of 'the Convention' in returning the abducted child to the State of habitual residence, the blueprint for jurisdiction or recognition being provided by the 1996 Convention.<sup>148</sup> She describes the way in which the 1996 Convention supplements and strengthens the 1980 Convention by doing what it was not designed to do, 'in particular by establishing mandatory standards of jurisdiction, recognition, and enforcement; by requiring enforcement of access orders and providing a procedure for the exchange of information and evidence regarding access; by denying jurisdiction in the event of a wrongful removal; and by providing constructive alternatives to non-return and to the largely futile or destructive imposition of conditions of return'.<sup>149</sup>

The Practitioner's Tool is an important development as it builds on the recognition that mediation and formal agreements are often the most productive way of settling the highly charged and emotionally draining circumstances of international child abduction:

'..the Practitioners' Tool identifies and discusses challenges that may arise in securing the enforceability of family agreements in cross-border situations where multiple HCCH Conventions may apply. Family agreements can have a very important role in deterring parental child abduction and facilitating the continuation of a meaningful relationship for a child with both of their parents when the parents are living in different States. Mutually agreed solutions have also been used to resolve cases of parental child abduction, often in a more holistic way than is possible by a judicial decision on return of the child to their habitual residence before their wrongful removal or retention, or a decision on non-return. Thus, mutually agreed solutions may help consolidate and resolve family matters that cannot be fully addressed by one Convention'<sup>150</sup>

Although family agreements are not enforceable under the 1996 Convention, the Practitioner's Tool advises that:

'Any such agreement would need to be incorporated into a decision taken by a judicial or administrative authority of the competent Contracting Party, usually that of the child's State of habitual residence. Such authority will generally apply its domestic law, and so the family agreement must have enforceable content as understood in that jurisdiction. Once the family agreement is incorporated into a decision, it becomes a measure of protection that must be recognised by operation of law (i.e., automatically recognised) in all other Contracting Parties, subject to the Convention's provisions for the refusal of recognition'<sup>151</sup>.

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<sup>147</sup> <https://assets.hcch.net/docs/333f37cc-28c9-4b6a-864a-8c335101592c.pdf>

<sup>148</sup> Gloria Folger DeHart, 'The Relationship between the 1980 Child Abduction Convention and the 1996 Protection Convention' (2000) 33 *NYU J Int'l L & Pol* 83, 86.

<sup>149</sup> DeHart, above, 98.

<sup>150</sup> Practitioner's Tool: Cross-Border Recognition and Enforcement of Agreements Reached in the Course of Family Matters Involving Children (2022) [www.hcch.net](http://www.hcch.net) p9, para 2.

<sup>151</sup> Practitioner's Tool, above, 23, para 33.

### 3.6. Japan as an example of the practical functioning and enforcement of the Convention

Japan became a Contracting State to the Convention in 2014. Professor Yuko Nishitani describes it being:

‘a delicate issue for Japan, like other Asian countries, to accept that a primary caregiver’s act of removing or retaining the child without the other parent’s consent was wrongful, and to also accept the fundamental aim of the Convention to secure the prompt return of a wrongfully removed child, thereby protecting the child by restoring the status quo’.<sup>152</sup>

She further explains the background to Japan joining the Convention, and the strong opposition to doing so within Japanese society, when she states:

‘In Japan, once a marital relationship breaks down, the mother typically takes the child and moves out of the house without the father’s consent. This unilateral act is not illegal under domestic Japanese law even though the parents share parental authority, since the father is not considered to have enforceable custody rights against the mother as a primary caregiver’.<sup>153</sup>

Much of the opposition centred on the issue of domestic violence and the fear that Japanese women, who had been subject to domestic violence from their partners while living overseas, and who had managed to escape home to Japan, would be returned to the abusive situation from which they had escaped due to ‘the Convention’ requirement to return the abducted child. Therefore, it was feared that Japanese women would be disadvantaged by Japan becoming a party to the Convention. Eventually, diplomatic pressure resulted in Japan becoming a Contracting State. Elrod recalls that there was rejoicing by other signatory states when Japan became a signatory to ‘the Convention’ ‘because Japan has long been seen as a safe haven for abductors, especially Japanese nationals’<sup>154</sup>. Japan’s Implementation Act was accordingly passed<sup>155</sup> and subsequently reformed in 2019 in order to deal with the weaknesses in its enforcement measures<sup>156</sup>. However, it is important to note that, in order to address the stated concerns regarding domestic violence, a provision was included in the Implementation Act to define Article 13(1)(b). As explained by Yuko Nishitani this means that:

‘Under Article 28(2) No 1-3 of the Implementation Act, the judge ought to contemplate the following factors:

- (i) whether return would expose the child to the petitioner’s words and deeds which may cause physical or psychological harm to the child (No 1);
- (ii) whether return would expose the respondent to violence by the petitioner in such a manner as to cause psychological harm to the child (No 2); or
- (iii) whether the circumstances make it difficult for the petitioner or the respondent to provide care for the child in the state of habitual residence (No 3)’.<sup>157</sup>

<sup>152</sup> International child abduction in Asia, Ch 14 Research Handbook, 201.

<sup>153</sup> International child abduction in Asia, Ch 14 Research Handbook, 201.

<sup>154</sup> Elrod, L. Japan Joins Hague Abduction Convention: England Returns Child, *Family Law Quarterly* (2014) Vol 48, No. 2, Symposium on Hague Convention on the Civil Aspects of International Child Abduction (Summer 2014), pp351-358, 351.

<sup>155</sup> Law No 48 of 2013, <https://www.japaneselawtranslation.go.jp/ja/laws/view/4008>

<sup>156</sup> Law No 2 of 2020, <https://www.mofa.go.jp/files/100039183.pdf>

<sup>157</sup> See Nishitani, fn 152 above, at 209.

Yamaguchi and Lindhorst provide the justification for the inclusion of this provision in the Implementation Act when they state that if: 'domestic violence is not taken into account when Hague Convention petitions are filed, children who are the supposed beneficiaries of the treaty may end up being victimized by the policy instead of helped by it'<sup>158</sup>. They opine that Japan's definition of domestic violence is more holistic than that in other countries (specifically the United States) as it includes 'psychological abuse, which has long been acknowledged as one of the primary methods violent spouses use to control their partners (which) facilitated recognition in Japan of the deeper dynamics happening in families in which mothers choose to flee to another country for their own and their children's safety, leading to more emphasis being placed on the safety of parent and child than has been true in U.S. Hague Convention policy'.<sup>159</sup>

Nishitani acknowledges the concerns which existed regarding the way in which these rules would be interpreted by the judges in Japan and the fear that it would lead to non-return of children under 'the Convention' but she states that 'Japanese courts have followed a restrictive interpretation, although the taking parent often invokes the 'grave risk' exception'<sup>160</sup>. In support, she states that:

'While Japan was criticised as a non-compliance state by the US in 2018, it has been removed from the list since 2019. Some areas of improvement remain, but Japan has made strenuous efforts to implement the Convention by conducting comparative studies, taking necessary legislative measures, developing return and enforcement procedures, and establishing cooperation between officers, judges, attorneys and academics'.<sup>161</sup>

There are certainly different views and different experiences of the domestic violence provisions in the Japanese Implementation Act. Domestic violence campaigners continue to advocate for the protection of victims, usually women, while fathers who have been accused of domestic violence feel equally victimised by their treatment regarding this issue'<sup>162</sup>. Morley states that: 'even after foreign diplomatic pressure caused Japan to adopt the Convention, such pressure has continued in an effort to ensure that Japan complies fully with the provisions of the treaty. In 2020, the European Parliament issued a resolution demanding that Japan comply fully with the provisions of the treaty'.<sup>163</sup>

It is possible that a very recent proposal for legislative change in Japan may also herald an important change in attitude and approach to these issues. A fundamental difficulty with Japan's implementation of 'the Convention' relates to its current sole parental custody system. In August 2023, the family law subcommittee of the Justice Ministry's Legislative Council 'recommended that parents decide together on whether they have sole or joint custody of their children, with family courts only intervening if there

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<sup>158</sup> Yamaguchi, S., and Lindhorst T. Domestic Violence and the Implementation of the Hague Convention on the Civil Aspects of International Child Abduction: Japan and U.S. Policy, *Journal of International Women's Studies*, Vol 17, No. 4, July 2016, 25.

<sup>159</sup> Yamaguchi and Lindhorst above, p. 25.

<sup>160</sup> Nishitani, fn 152 above, 209.

<sup>161</sup> Nishitani, fn 152 above, 203.

<sup>162</sup> Freeman and Taylor, fn 1 Domestic Violence and Child Participation, Contemporary Challenges, see fn 94 above, See [https://www.washingtonpost.com/world/asia\\_pacific/parental-child-abduction-becomes-a-diplomatic-embarrassment-for-japan-ahead-of-g-7/2019/08/21/1e51a7fa-bf34-11e9-aff2-3835caab97f6\\_story.html](https://www.washingtonpost.com/world/asia_pacific/parental-child-abduction-becomes-a-diplomatic-embarrassment-for-japan-ahead-of-g-7/2019/08/21/1e51a7fa-bf34-11e9-aff2-3835caab97f6_story.html); <https://www.humanium.org/en/the-black-hole-of-child-abduction-japans-child-custody-laws/>

<sup>163</sup> Morley, International child abduction and non-Hague Convention countries, Research Handbook, 257. See: European Parliament resolution of 8 July 2020 on the international and domestic parental abduction of EU children in Japan: [https://www.europarl.europa.eu/doceo/document/B-9-2020-0205\\_EN.html](https://www.europarl.europa.eu/doceo/document/B-9-2020-0205_EN.html) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020IP0182>

is a dispute'.<sup>164</sup> On 30 January 2024 the subcommittee decided to introduce joint parental authority after divorce, enhance access to the child, and facilitate the recovery of child support. The leading political party is supportive of this change, and it seems likely that the Bill will be adopted shortly in the Diet. Joint parental authority will primarily require the agreement of both parents but, if they are unable to reach agreement themselves, one of them will be able to request this through the Family Court. Although there have been ongoing concerns about the effect of permitting joint parental authority in domestic violence cases, it is now thought that there are sufficient safeguards to exclude inappropriate fathers from sharing parental authority after divorce. This major reform which, if it becomes law as is expected, has the potential to change the landscape of abduction in Japan, is reported to have been influenced by the European Parliament resolution of 8 July 2020.<sup>165</sup>

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<sup>164</sup> Japan gov't panel proposes introducing joint custody after divorce, Kyodo News, Aug 30 2023 <https://english.kyodonews.net/news/2023/08/6a24bd1c06b4-japan-govt-panel-proposes-introducing-joint-custody-after-divorce.html>

<sup>165</sup> The author's thanks are expressed to Yuko Nishitani, Professor at Kyoto University, Japan, who specialises in private international law and family law, and who has provided the information for this study on this very recent development in Japan.

## 4. NON-CONVENTION STATES

### KEY FINDINGS

There are several regions where 'the Convention' does not apply as widely as would be desired and, together with the absence of most Islamic States from 'the Convention', many children are regrettably left without its protection. The available alternatives to secure the return of children abducted to non-Convention countries are largely ineffective, sometimes dangerous, and usually not in the best interests of abducted children. This study concludes that 'The Convention' provides the best protection for abducted children, and that continued efforts should be made to broaden its reach where possible to include those countries which have not yet joined. The Malta Process has provided the incentive and encouragement for some Islamic countries to join 'the Convention' and it is hoped that more will do so following the Malta V meeting due to be held 24-27 September 2024. Specialist mediation in non-Convention cases (as well as more generally in abduction cases) is a very helpful tool.

The Fifth Statistical Study (in the same way as all the previous Statistical Studies) only relates to applications made under 'the Convention'. There are no similar comprehensive statistics concerning abductions to non-Convention States. It may be useful however to consider the situation in the United Kingdom where The Foreign and Commonwealth Development Office (FCDO) deals with abductions to non-Convention countries. In 2012 The Foreign and Commonwealth Office, the predecessor to the FCDO, published a statement reporting that the number of parental child abduction cases dealt with by them had risen by 88% in under a decade. This seems to provide some indication at least of the direction of travel in such cases<sup>166</sup>.

There are several geographical regions where 'the Convention' does not apply as widely as would be desired, including Africa<sup>167</sup> and Latin America and the Caribbean<sup>168</sup>, and efforts are ongoing to encourage their inclusion within 'the Convention' community. Despite these efforts, the notable and widespread reticence on the part of Islamic law countries to become Contracting States to 'the Convention' remains a source of continuing concern.

### 4.1. Islamic Law countries

Emon explains the reasons for there being so few Islamic law countries within the Contracting States to 'the Convention':

<sup>166</sup> <https://www.gov.uk/government/news/parental-child-abduction-is-a-worldwide-problem> Also see Yaqub, Child Rights fn 65 above, p4 reports that The FCDO says it dealt with 493 new non-Hague Convention cases in 2014-15 and 445 new cases in 2015-16.

<sup>167</sup> Although the continent of Africa spans 55 member states, only the following eleven states have ratified the Convention: Burkina Faso, Gabon, Ghana, Guinea, Lesotho, Mauritius, Morocco, South Africa, Seychelles, Tunisia, Zambia and Zimbabwe. Julia Sloth Nielsen states that: 'The Convention should be popularised to a greater extent on the continent, and accompanied by judicial training to support its implementation'. Julia Sloth Nielsen, International child abduction in Africa, Research Handbook, Ch 15, 232.

<sup>168</sup> Of the 32 territories which are countries of the Caribbean region, 'only nine are Contracting Parties to the Convention in their own right: The Bahamas, Barbados, Belize, Cuba, Dominican Republic, Guyana, Jamaica, St Kitts and Nevis, and Trinidad and Tobago. However, the Convention applies to five other territories in the Region by virtue of it being extended to them in their capacity as territorial units', see Diahann Gordon Harrison, The Caribbean and international child abduction – this is my child: catch me if you can! Research Handbook, Ch 16, 235. For a list of the countries which are part of the Caribbean region, see p. 234.

'[t]hey argue that to ratify the Abduction Convention would require them to violate Islamic law, given their understanding of Islamic legal requirements on child custody. As many constitutions in these states posit Islamic law as a source of the state's law, they are not constitutionally permitted to ratify the convention'.<sup>169</sup>

The accession of Morocco in 2010 was therefore especially welcome as it paved the way for Iraq, Pakistan and Tunisia to follow suit. However, the very small number of Islamic countries which are currently parties to the Convention remains a significant cause of regret and concern as it means that children abducted into those countries will not have the protection afforded by 'the Convention'. Instead, their left-behind parents will have to find another way to secure their return to the State of habitual residence or, in some cases, settle for a less desirable outcome in order to maintain contact with their children. As noted by Morley: it can be exceedingly difficult to return children who are wrongfully removed to, or retained in, non-Hague countries',<sup>170</sup> with this situation being recognised as 'a veritable black hole vis-à-vis left-behind parents seeking redress'.<sup>171</sup>

Yaqub's empirical study<sup>172</sup> provides helpful data regarding children abducted from the UK to Islamic law countries.

'...between January 2009 and July 2014, there were 179 reports of parental abduction made to the UK FCDO involving Pakistan alone. There were a further 20 cases involving Pakistan in the latter half of 2014, bringing the total of cases to Pakistan in 2014 to 39 cases... The UK data confirms that there were at least 56 reported cases of abduction from the UK to an Islamic law country in 2017, 21 reports were received concerning Pakistan, 12 reports concerning Egypt, seven for Tunisia, six for the UAE and fewer than five reports for each of Algeria, Bahrain, Iran, Iraq, Jordan, Kuwait, Lebanon, Malaysia, Qatar and Saudi Arabia. In 2018 there were at least 48 reported cases of abduction from the UK to an Islamic law country: 22 cases were reported in relation to Pakistan, 18 reports with regard to the UAE and fewer than five reports for each of the states of Iraq, Iran, Egypt, Lebanon, Malaysia, Oman, Qatar and Tunisia. The data further illustrates that there were at least 58 reported cases of abduction from the UK to an Islamic law country in 2019. There were twenty cases reported in the context of Pakistan, 20 concerning abductions to the United Arab Emirates and seven cases of abduction reported to Iraq. There were fewer than five cases reported for each of Bahrain, Bangladesh, Egypt, Iran, Malaysia, Morocco, Oman, Qatar, Saudi Arabia and Tunisia'.<sup>173</sup>

Wolfreys describes the primary question addressed by Yakub as being:

<sup>169</sup> Anver M Emon, *Islamic Law and Private International Law: The Case of International Child Abduction. How can private international law reconcile differences between not only two parties, but two legal systems?* Institute for Advanced Study (2015) <https://www.ias.edu/ideas/2015/emon-law> Also see Keshavjee, Mohamed M. and Khalaf-Newsome, I., on Perceived Obstacles to Muslim Countries Joining the 1980 Hague Convention in *International Parental Child Abduction to Non-Hague Muslim Countries: Mediation as a Viable Option* in *International Parental Child Abduction, Custody and Access Cases* (see fn 189 below), 86 et seq which reports on the different concepts of parental responsibility in Muslim Family Law and the 1980 Hague Convention

<sup>170</sup> Morley, *Research Handbook*, 264.

<sup>171</sup> Emon, A & Khaliq, U. (2021). *Jurisdictional Exceptionalisms. Islamic Law, International Law and Parental Child Abduction*. Cambridge: Cambridge University Press, 88

<sup>172</sup> Yakub, *Child's Rights*, see fn 65 above

<sup>173</sup> Yaqub, above, 4, 5. Yaqub does not provide data relating to cases reported to the FCDO in 2020 and 2021 due to the Covid-19 pandemic but notes on p5 that reports of parental child abduction from the UK were received by the UK FCDO in relation to Algeria, Bahrain, Egypt, Iran, Malaysia, Pakistan, Qatar, Saudi Arabia and the United Arab Emirate during 2020 and 2021.

'..[W]here a child is abducted by a parent to an Islamic law state, are the child's rights best served by the domestic law of that particular state, or instead by the Hague Convention on the Civil Aspects of Child Abduction 1980?'<sup>174</sup> She states that: '...ultimately the author does not hold back from reaching an overarching conclusion that Islamic law states should accede to the 1980 Convention and that acceptance of their accession by other member states should happen as swiftly as possible'.<sup>175</sup>

Yakub's comment regarding acceptance of accessions is important because, until accepted, 'the Convention' will not operate between the country which has acceded and the other Contracting States to 'the Convention'. It took six years for the UK to accept Morocco's accession to the Convention. Yakub recently noted<sup>176</sup> that the UK law is doing little to prevent British children being kidnapped from their mothers. She explains that of the only Islamic countries to have acceded to 'the Convention' (Morocco, Iraq, Pakistan and Tunisia), Morocco is the only one to have had its accession accepted by the UK (which occurred when the UK was part of the EU which made a collective decision to accept the accession of Morocco) which leaves children abducted from the UK to the other named Islamic countries without the protection afforded by 'the Convention' even though they are now signatory States to it.

An earlier study by Kruger<sup>177</sup> included some cases of abduction from Belgium to Islamic law countries which illustrated some of the difficulties encountered by left-behind parents. She accurately commented:

'mothers who struggle to have contact with their children in countries where the legislation gives them very little rights fight a very hard battle. They might not be the majority, but their stories speak of such distress that their voices must be heard.'<sup>178</sup>

## 4.2. Which routes are open to the left-behind parent to try to secure the return of their abducted child from non-Convention States?

### 4.2.1. Local law

This can be an uphill struggle for a left-behind parent. Firstly, there are some countries which will not accept jurisdiction<sup>179</sup>. Where they will, there are often many hurdles to overcome including: travel to the abducted-to country; access to financial support to pursue proceedings in the absence of public funding; management of language difficulties; negotiation of a legal system which may have in-built biases in respect of foreign litigants.

Morley puts it plainly when he states:

'Recovering children who have been wrongfully removed to, or retained in, non-Hague

<sup>174</sup> Wolfreys, Parental child abduction to Islamic law countries: a child rights analysis of the legal framework. Book Review. *Child and Family Law Quarterly*, Vol 35, No. 2, 2023 197-200, 197.

<sup>175</sup> Wolfreys, above, 197-198.

<sup>176</sup> Yakub, N. The Conversation, July 4, 2023 <https://theconversation.com/uk-law-is-doing-little-to-prevent-british-children-being-kidnapped-from-their-mothers-207876>

<sup>177</sup> Thalia Kruger, *International Child Abduction: The Inadequacies of the Law* (Hart Publishing, 2011)

<sup>178</sup> Thalia Kruger, above, 151, citing a biography by one left-behind mother whose children were abducted from Bali to Saudi Arabia. See Yakub above, fn 27.

<sup>179</sup> For example, Morley states that the courts in China generally refuse to handle family cases concerning foreigners or parties who are not registered as domiciled there, Morley, Research Handbook, 253.



countries is usually extremely challenging and is often impossible'<sup>180</sup>.

He highlights some of the extreme difficulties which may be encountered when he explains that: 'Most non-Hague countries do not have provisions to enforce foreign child custody orders, and any comity principles will be subject to exceptions based on the local public policies. He adds that 'Muslim countries whose laws are based on *Sharia* principles do not enforce foreign court orders'.<sup>181</sup>

In discussing India in this context, he states:

'In India, although an enforcement action might be presented as an application for habeas corpus, or to enforce an order from the courts of the habitual residence, or for another form of emergency relief, the Supreme Court of India has ruled that the Indian courts may not enforce foreign custody orders issued by the country of the child's pre-abduction residency unless and until the courts have 'take[n] into account the totality of the facts and circumstances, whilst ensuring the best interest of the minor child'. [see *Kanika Goel v. The State* (NCT of Delhi) [2018 SCC online709] Consequently, international child abduction cases in India can take many years to be resolved, by which time the children are fully settled in India'.<sup>182</sup>

#### 4.2.2. Bilateral agreements

Engagement in bilateral agreements is encouraged by the United Nations Convention on the Rights of the Child (UNCRC) which, in Article 11, provides for States Parties to take measures to combat the illicit transfer and non-return of children abroad and, to this end, to promote the conclusion of bilateral or multilateral agreement or accession to existing agreements.

Gosselain's Research Paper in 2002 remarked that '[t]he bilateral conventions in this field operate with difficulty'.<sup>183</sup> As currently reported by Morley, this situation does not appear to have changed; he reports that these agreements largely do not work effectively:

'There have been significant efforts in past decades to encourage non-Hague countries to, at least, enter into bilateral arrangements with specific countries to handle problems arising from international child abduction cases. France pioneered the adoption of such agreements. Some are Memoranda of Understanding (MOUs) that merely provide for the establishment of bilateral consultative commissions to facilitate cooperation in civil law matters. Others provided for reciprocal enforcement of court orders concerning child custody and access. These efforts resulted in a variety of bilateral arrangements. Unfortunately, these arrangements have generally been ineffective'.<sup>184</sup>

Morley argues that 'any country genuinely willing to be bound' by arrangements which do work 'should instead simply accede to the Convention'<sup>185</sup>. This, too, was the view expressed by Lowe and Ong who addressed the early regional Protocol which was proposed between Singapore (now party to 'the Convention') and neighbouring states:

<sup>180</sup> Morley, Research Handbook, 250.

<sup>181</sup> Morley, Research Handbook, 253.

<sup>182</sup> Morley, Research Handbook, 253.

<sup>183</sup> Preliminary Document No 7 of August 2002 for the attention of the Special Commission of September / October 2002, 27 [https://assets.hcch.net/upload/abd2002\\_pd7e.pdf](https://assets.hcch.net/upload/abd2002_pd7e.pdf)

<sup>184</sup> Morley, Research Handbook, 246.

<sup>185</sup> Morley, Research Handbook, 248.

'But, as we have argued, the proposed Protocol has its limitations and is no substitute for the Hague Abduction Convention. It only applies to a limited number of States; because of its preservation of domestic law it offers less guarantee of securing children's return and is constitutionally questionable given that it has been negotiated by the judiciary'.<sup>186</sup>

A list of bilateral agreements between Contracting States (some of which are EU countries) and Non-Contracting States appears on the HCCH website:

- Australia – Egypt (2000) [[English](#)] [[Arabic](#)]
- Belgium – Morocco (1981) [[Français](#)]
- Belgium – Tunisia (1982) [[Français](#)]
- Canada – Egypt (1997) [[English](#)] [[Français](#)] [[Arabic](#)]
- Canada – Lebanon (2000) [[English](#)] [[Français](#)]
- France – Algeria (1988) [[Français](#)]
- France – Egypt (1982) [[Français](#)] [[Arabic](#)]
- France – Lebanon (2000) [[Français](#)]
- France – Morocco (1983) [[Français](#)]
- France – Tunisia (1982) [[Français](#)]
- Sweden – Egypt (1996) [[English](#)] [[Arabic](#)]
- Sweden – Tunisia (1994) [[Français](#)]
- Switzerland – Lebanon (2005) [[Français](#)] [[Arabic](#)]
- USA – Egypt (2003) [[English](#)] [[Arabic](#)]<sup>187</sup>.

In the 2023 Annual Report by the US, it was clear that its bilateral agreement with Egypt does not work.

'Egypt does not adhere to any protocols with respect to international parental child abduction. In 2003, the United States and Egypt signed a Memorandum of Understanding to encourage voluntary resolution of abduction cases and facilitate consular access to abducted children. In 2022, Egypt continued to demonstrate a pattern of noncompliance. Specifically, authorities in Egypt persistently failed to work with the Department of State to resolve abduction cases. As a result, 53 percent of requests for the return of abducted children remain unresolved for more than 12 months. On average, these cases were unresolved for two years and nine months. Egypt was previously cited for demonstrating a pattern of noncompliance in the 2015, 2016, 2019, 2020, 2021, and 2022 Annual Reports'.<sup>188</sup>

Why are these agreements ineffective? Van Loon provides the likely reason for the very limited success that they have had: 'The problem is the lack of legal machinery and of clear definitions of mutual obligations between the States concerned, and the absence of clear legal principles, as provided in the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention. These

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<sup>186</sup> See Lowe, N. and Ong, D. Why the Child Abduction Protocol Negotiations should not deflect Singapore from Acceding to the 1980 Hague Abduction Convention, *Singapore Journal of Legal Studies* (2007) 216-239, p238. This also accords with the conclusion of Yakub, see fn 175 above regarding the desirability for Islamic States to accede to 'the Convention'.

<sup>187</sup> <https://www.hcch.net/en/publications-and-studies/details4/?pid=5215> last accessed 23.2.24.

<sup>188</sup> See fn 193 below, 25.

legal principles are indispensable in ensuring that the parents will occupy equal bargaining positions and that the outcome of the bargaining will be in the interest of the child. The Member States of the Hague Conference have asked the Permanent Bureau to keep the development of these bilateral agreements under review. That review made it clear that, in the absence of firm legal principles, exclusive reliance on mediating procedures would not be sufficient to resolve these complex cases of child abduction and parental disputes over contact with children'.<sup>189</sup>

#### 4.2.3. Diplomatic efforts and support under consular protection

In theory, at least, there is the possibility of using diplomatic pressure in non-Convention cases.<sup>190</sup> In practice, it is not an easy route to follow, and is often ineffective. The highest level of diplomatic efforts did nothing to change the outcome in the case of Baroness Catherine Meyer (formerly Catherine Layelle) whose two children were abducted from the UK to Germany (a signatory state to 'the Convention') by her former husband. She pursued her legal remedies but was thwarted by the non-enforcement of the orders which were made by the relevant courts. She subsequently married Sir Christopher Meyer, the British Ambassador to Washington after which President Clinton personally took up her case with Chancellor Schroeder, then Chancellor of Germany, in 2000, but to no avail<sup>191</sup>. It was many years before she was able to make contact again with her, by then, adult sons with whom she now has an ongoing relationship, but that was not achieved through legal processes or diplomatic pressures. It was simply a matter of perseverance and time which achieved this, very belated, outcome.

Other forms of diplomatic efforts can be seen in the actions of some Contracting States to 'the Convention' providing information on their government websites on whether specific countries are Contracting States to 'the Convention'. The United States is one such example where it is possible to easily discover on the government website whether the country concerned is a Contracting State to 'the Convention' and whether its accession has been accepted by the United States<sup>192</sup>. A link to why the Hague Convention matters is also provided. This is a relatively inexpensive way of alerting travellers to the position in the country to which they are going. On the basis that prevention is better than cure in abduction terms, anything which may prevent an abduction from occurring is to be welcomed, and it is possible that this advance information may give someone pause for thought before travelling to a country where 'the Convention' does not operate. As such, it is recommended that greater use is made of this form of awareness-raising by the Contracting States. However, it must be acknowledged that, in most cases, this is unlikely to inhibit such travel which often involves the pressure of family situations which do not easily allow for a decision not to travel.

Another type of diplomatic effort has been put into practice by the United States which publishes an Annual Report of International Child Abduction<sup>193</sup> which details compliance with 'the Convention' as

<sup>189</sup> Keshavjee, Mohamed M. and Khalaf-Newsome, I., International Parental Child Abduction to Non-Hague Muslim Countries: Mediation as a Viable Option" in *International Parental Child Abduction, Custody and Access Cases*, 92; Van Loon, H (2010). Accommodation of Religious Laws in Crossborder Situations: The Contribution of The Hague, 265.

<sup>190</sup> See Chiancone, J., Girdner, J., and Hoff, P. Issues in Resolving Cases of International Child Abduction by Parents. U.S. Department of Justice, Office of Justice Programs. December 2001 <https://www.ojp.gov/pdffiles1/ojdp/190105.pdf>

<sup>191</sup> <https://www.standard.co.uk/hp/front/my-fight-for-my-sons-7286923.html>

<sup>192</sup> An example regarding India, which is a non-Convention State, see <https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction/International-Parental-Child-Abduction-Country-Information/India.html>; an example regarding Australia, a Contracting State, see <https://travel.state.gov/content/travel/en/International-Parental-Child-Abduction/International-Parental-Child-Abduction-Country-Information/aus-csi.html>

<sup>193</sup> <https://travel.state.gov/content/dam/NEWIPCAAssets/2023%20ICAPRA%20Annual%20Report-fv.pdf>

well as an accompanying Action Report<sup>194</sup> which addresses specific actions taken against countries determined to have been engaged in a pattern of noncompliance in the Annual Report. Such documents require considerable resources to produce, and it must be questioned whether the reported success of such action rewards the effort and costs involved. There is continued reference in the reports to countries of noncompliance despite the detailed diplomatic actions taken to address this pattern of noncompliance in the specific countries. These patterns of continued noncompliance appear for countries in the Annual Report, even where there is a specific bilateral agreement between the two countries in existence<sup>195</sup>. Considering these continued acts of noncompliance, it might be thought that those countries which choose not to comply are those which are not overly concerned about being listed as noncompliers in this way<sup>196</sup>. Bearing in mind the disparity in the resources available, it is difficult to envisage such initiatives being possible for many of the authorities in the 103 Contracting States to 'the Convention', and may be even more difficult to justify the spending of those resources in this way.

#### 4.2.4. Re-abduction

Not only is this likely to be unlawful and dangerous, with possible serious consequences for the re-abducting left-behind parent, it will also add to the trauma already experienced by the abducted child. A stark illustration occurred in the case involving Australian mother, Sally Faulkner, whose two children (then aged respectively 5 and 2 years of age) were retained by her estranged husband in Lebanon in 2015 after a consensual holiday. 'The Convention' entered into force in Australia on 1 January 1987 but Lebanon is not a Contracting State to 'the Convention'. Ms. Faulkner used a child recovery agency to try to get her children back and was filmed during the attempt by an Australian media company which had provided some financial support for the enterprise. In April 2016 they snatched the children from the street in Beirut while walking to school with their grandmother. However, the attempt was unsuccessful and resulted in Ms. Faulkner, the media crew and recovery agent being taken into police custody and being warned that they faced kidnapping charges which were subject to long prison sentences if convicted. Ms. Faulkner then asked her former husband to drop those charges in return for her giving up her claims to custody of the children. After he agreed, they were released and Ms. Faulkner returned to Australia without her children.

Ms. Faulkner recently made an updating podcast about her experience in which she said that, while in police custody, she was handcuffed for a day to someone from the accompanying media company whilst sitting up, and remembers 'just waiting and waiting' while hearing the failed recovery attempt driver being beaten up in the interrogation room:

'I just thought we are in the worst country for this to be happening.'<sup>197</sup>

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<sup>194</sup> <https://travel.state.gov/content/dam/NEWIPCAAssets/2023%20ICAPRA%20Action%20Report.pdf>

<sup>195</sup> See fn 188 above and accompanying text.

<sup>196</sup> However, the example of Japan, which was listed as non compliant in 2018 and subsequently removed from the list in 2019, is worth noting in this regard. See fn 161 above.

<sup>197</sup> <https://www.abc.net.au/news/2016-10-17/timeline-of-how-things-went-wrong-for-sally-faulkner/7883866> ; <https://www.dailymail.co.uk/news/article-12597509/Lifeline-Sally-Faulkner-battle-abducted-kids-ex-husband-extends-rare-olive-branch-deals-devastating-blow.html>

It has been reported that Ms. Faulkner's former husband has recently been in touch with her because he wants to obtain Australian passports for their children but has told her that they do not want to see her<sup>198</sup>.

#### 4.2.5. Malta process and mediation

The Malta process emanated from the Malta Judicial Conference on Cross-Frontier Family Law Issues, 2004, which was held under the auspices of the HCCH, and which culminated in a declaration setting out various principles to promote co-operation between different legal systems. As explained by the HCCH:

It 'is aimed at improving co-operation in cross-border family law disputes involving children with a view to finding solutions in situations where the relevant international legal framework is not applicable.. (it ) has developed into a widely cited model for bridging differences between legal systems to solve cross-border family disputes.'<sup>199</sup>

Whilst the aim is undoubtedly laudable, it is important to note that the principles are non-binding, non-enforceable and could be viewed as aspirational. Morley assesses the careful drafting of the principles as an effort to bridge the gap 'or perhaps to paper over the differences - between the representatives of countries which had adopted the Convention and those which had not'<sup>200</sup>. He does, nonetheless, recognise that the Malta Process has led to some Muslim countries who were attendees of the Malta conferences to accede to the Convention, including Morocco (2010), Iraq (2014) and Tunisia (2017)<sup>201</sup>. These are noteworthy and worthwhile achievements<sup>202</sup>.

Similarly, the focus of the Malta Process on the development of mediation in cross-border family law issues has been useful. Although 'the Convention' does not explicitly refer to mediation, it does direct Central Authorities to take all appropriate measures to secure the voluntary return of the child or to bring about an amicable resolution of the issues<sup>203</sup>. The HCCH<sup>204</sup>, as well as other bodies<sup>205</sup>, have encouraged and supported the use of mediation as a way of encouraging the parties to these highly charged conflicts towards co-operation for the future. The advantages are easy to see<sup>206</sup> but it must be remembered that 'not all family conflicts can be resolved amicably'<sup>207</sup> and there will be cases which have to be determined by a judicial authority. It is also the case, as recognised in the GGP Mediation, that the qualifications and experience of the mediator are fundamental to the process, and that specific training in international child abduction cases is required<sup>208</sup>. The author of this study submits that such training should include the available research on the effects of abduction which has the potential to

<sup>198</sup> See Daily Mail article, fn 197 above.

<sup>199</sup> 10<sup>th</sup> Anniversary of the Malta Process, Mar 24 2014 <https://www.hcch.net/en/news-archive/details/?varevent=349#:~:text=The%20Malta%20Process%20is%20aimed,Family%20Law%20Issues%20in%20St>

<sup>200</sup> Morley, Research Handbook, above 249.

<sup>201</sup> Morley, Research Handbook, above, 250.

<sup>202</sup> The Fifth Malta Conference on Cross-Frontier Child Protection and Family Law (Malta V) will take place in Malta from 24-27 September 2024.

<sup>203</sup> Article 7.

<sup>204</sup> See The HCCH Guide to Good Practice on Mediation (2012) (hereafter GGP Mediation) <https://www.hcch.net/en/publications-and-studies/details4/?pid=6561>

<sup>205</sup> See Brussels II-ter see fn 104 above.

<sup>206</sup> W. Duncan, 'Transfrontier Access / Contact and the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Final Report', Prel. Doc. No 5 of July 2002 drawn up for the attention of the Special Commission of September / October 2002.

<sup>207</sup> HCCH GGP Mediation para 38.

<sup>208</sup> GGP Mediation, 36 et seq.

influence the attitude of the parties to mediations in this field<sup>209</sup>. Additionally, there are conflicting views about the suitability of mediation in cases involving domestic violence which must be borne in mind<sup>210</sup>. These were issues raised during a consultation carried out by the Ministry of Justice in 2023<sup>211</sup> following which the UK government very recently announced the greater use of mediation for separating couples as well as the continued rollout of an innovative pilot which better supports domestic abuse victims and children. They did not, however, support making mediation compulsory because of concerns regarding domestic violence victims<sup>212</sup> - thus recognising both the benefits of early resolution of family disputes and, at the same time, the real concerns which exist regarding domestic violence in the context of mediation.

Specialist child abduction mediation training is critical and is available through organisations including the International Mediation Centre for Family Conflict and Child Abduction (MiKK)<sup>213</sup> which has particular expertise in mediation in Muslim contexts. MiKK convened an Experts' Meeting on this topic in Berlin in 2017, and recently published their updated edition of *Cross-Border Family Mediation*,<sup>214</sup> co-funded by the European Union, which includes a chapter on family mediation with parties from non-Hague Contacting States with a specific focus on Muslim countries<sup>215</sup>. In this chapter, the authors, Keshavjee and Khalaf-Newsome, describe the amenability to mediation of family conflicts in Islam, and how this medium may assist in international child abduction cases:

'In summary, it can be said that alternative, religiously inspired conflict resolution processes are deeply anchored in Islamic traditions and are practised in many forms. The long-standing tradition of Alternative Dispute resolution (sulh) in the Muslim world should prove a very helpful condition for getting parents to opt for mediation in parental child abduction cases involving a Muslim country. In particular, as in the Muslim world, the court is generally considered the last port of call "when other attempts to resolve the dispute have already proved futile"<sup>216</sup>

<sup>209</sup> The author has been pleased to learn from specialist mediators around the world that her research into the effects of international child abduction has been useful in this context.

<sup>210</sup> See Zylstra, A. 'Mediation and Domestic Violence: A Practical Screening Method for Mediators and Mediation Program Administrators', *J. Disp. Resol.* (2001); Oppenheim, M. Fears compulsory mediation for separating couples could empower domestic abusers, *The Independent*, 14.7.2023 <https://www.independent.co.uk/news/uk/home-news/domestic-abuse-mediation-family-courts-b2350430.html>

<sup>211</sup> Supporting earlier resolution of private family law arrangements published 23 March 2023, closed 15 June 2023 <https://consult.justice.gov.uk/digital-communications/private-family-law-consultation/>

<sup>212</sup> 'Following consultation on mandatory mediation concerns were raised that the proposed safeguards to protect domestic abuse victims may not go far enough. To avoid forcing a continued relationship between a victim and their abuser the government will not change the law to mandate mediation for separating couples.' <https://www.gov.uk/government/news/childrens-wellbeing-at-the-heart-of-family-court-reforms>

<sup>213</sup> <https://mikk-ev.org/>; Also see reunite <https://www.reunite.org/> and Centrum Internationale Kinderontvoering (IKO) [www.kinderontvoering.org](http://www.kinderontvoering.org)

<sup>214</sup> Paul, C.C., Kiesewetter, S. and Khalaf-Newsome, I. (Eds) *International Parental Child Abduction, Custody and Access Cases*, (Wolfgang Metzner Verlag, Frankfurt am Main, 2023) <https://mikk-ev.org/news/publications/>

<sup>215</sup> Keshavjee, Mohamed M. and Khalaf-Newsome, I., International Parental Child Abduction to Non-Hague Muslim Countries: Mediation as a Viable Option " in *International Parental Child Abduction, Custody and Access Cases* (see above), fn 189 above, 83.

<sup>216</sup> See Keshavjee, Mohamed M. and Khalaf-Newsome fn 189 above at 98.

MiKK's 4 B Mediation Model<sup>217</sup> employs the general principles of the Malta Process Working Party which should apply to mediation in cross-border custody and child abduction cases involving Muslim non-Convention countries:

*Screening for suitability of mediation in the particular case,*

*Informed consent,*

*Voluntary participation,*

*Helping the parents to reach agreement that takes into consideration the interests and welfare of the child,*

*Neutrality,*

*Fairness,*

*Use of mother tongue or language(s) with which the participants are comfortable,*

*Confidentiality,*

*Impartiality,*

*Intercultural competence,*

*Informed decision making and appropriate access to legal advice*<sup>218</sup>

The 4B model was tested at the Expert Meeting convened by MiKK in 2017 (funded by the German Ministry of Justice) where 'one of the key tasks of the Expert Meeting was for the experts to assess if the MiKK Mediation Model, the mediation principles as well as the 5-stage facilitative mediation process employed by MiKK mediators would be suitable for mediations in child abduction cases with a Muslim context'.<sup>219</sup> The Experts concluded that:

'The MiKK concept of Cross-Border Family Mediation (CBFM) "4B" co-mediation was found to offer an ideal model and framework for mediations in Muslim-related cases. What is needed here is sensitisation on the part of mediators with regard to the requirements of the culturally-religiously defined context, such as family involvement, reconciliation, and possible power imbalances as part of a CBFM training programme'.<sup>220</sup>

More specialist mediators need to be trained in these methods so that children abducted to Islamic countries outside of 'the Convention' may benefit from the protective outcomes which can ensue from their employment in international child abduction cases.

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<sup>217</sup> Bilingual, Bicultural, Bi-Professional, Bi-Gender, see <https://mikk-ev.org/mediation/4-bs-mediation-model/>

<sup>218</sup> Keshavjee, Mohamed M. and Khalaf-Newsome fn 189 above, 100.

<sup>219</sup> Above, 101.

<sup>220</sup> Above 103.

## 5. CONCLUSIONS AND RECOMMENDATIONS

### KEY FINDINGS

'The Convention' offers the best available protection against abduction in that it deters some abductions and provides an agreed mechanism for the prompt return of abducted children. Both these outcomes help to avoid some of the trauma associated with abduction. The high number of Contracting States to 'the Convention' demonstrates its widespread appeal which is critical for its success. However, 'more' needs to be done to help 'the Convention' meet the challenges it faces and to avoid it slipping from being a successful instrument of protection into an instrument of harm to those it seeks to protect. This study suggests ways in which that 'more' may be achieved, highlights the positive role which the European Parliament has played to date, and advocates its continued involvement to maintain its leadership in this field.

This study submits that 'the Convention' provides the best protection against abduction, that is to deter it from happening where it is possible to do so, and to return the child promptly if it does happen. 'The Convention' is not perfect and, as this study has shown, more needs to be done to help it meet the challenges it faces. However, its attractiveness to the global community, as evidenced by the number of Contracting States to 'the Convention', offers an invaluable opportunity to address and tackle the misery so often caused by international child abduction. 'The Convention' should be supported in its aim to protect children from the harmful effects of abduction.

This study concludes that **more needs to be done including:**

- Further collaborative evidence-based research on the outcomes of international child abduction, including where the abduction occurred against a background of violence or abuse to the taking parent and/or the abducted child. Evidence-based research provides an important and necessary tool to assist in the required nurturing process of the Convention<sup>221</sup>.
- Further collaborative European fora involving key actors including: the European Parliament Co-ordinator on Children's Rights; The Hague Conference on Private International Law; The Judges Network members; specialist academics/researchers, mediators, and NGOs (for example, those mentioned in this study); psychologists; and government representatives from Convention and Non-Convention States<sup>222</sup>. The study respectfully suggests that such fora could appropriately take place under the aegis of the European Parliament Co-ordinator on Children's Rights who is ideally placed to coordinate and lead on this issue. These fora would provide ongoing discussion opportunities on issues of concern for the international child abduction community including active consideration between key actors of the establishment

<sup>221</sup> IACLaR, supported by the national delegations for the United Kingdom and New Zealand, submitted a proposal for the consideration of the Eighth Special Commission regarding the need for such evidence-based research to address the gaps remaining in our understanding of the issues involved in the field of international child abduction which include the outcomes in cases involving domestic violence. The Special Commission approved the proposal which became Conclusion and Resolution No. 102. In respect of the EU's focus in this study, it may also be timely to consider the commission of research about abductions into the EU from third countries.

<sup>222</sup> Such meetings have an important role to play in informing and supporting The European Parliament on these issues. The very recent encouraging response by Japan (see fn 165 and accompanying text) to the European Parliament Resolution of 2020 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020IP0182> demonstrates the effectiveness of such appropriately targeted action on the part of the European Parliament, and the potential for positive change which may result therefrom.



of a specialist inter-disciplinary, international working group. The rationale and aim of this group would be to consider, address and report on issues relating to the required nurturing of 'the Convention', including those outlined in this study, so that these matters may benefit from the comprehensive, rather than piecemeal, approach that is needed for these issues (see Freeman and Taylor, *Nurturing the 1980 Hague Convention, Research Handbook*, Ch. 26, 404-429).

- Increased awareness-raising about the potentially serious and damaging long-term effects of abduction for children and adults who were abducted as children so that any person considering abduction of their children can understand what the effects of that action may be. The programme for such awareness-raising may be a topic for consideration of the key actors at the proposed European fora.
- Continued collaborative, inter-disciplinary work undertaken by specialist groups including academics/researchers, victim groups, and NGOs on the issues of:
  - (i) prevention and
  - (ii) support for abducted children and their families where it has not been possible to prevent abduction from occurring, and how such aims may be achieved.
- The continued efforts by HCCH and others for wider global membership of the Convention<sup>223</sup>.
- Greater use of government travel websites to provide information regarding the abduction status of specific countries, i.e. (i) whether it is a Contracting State to 'the Convention' (ii) if it is, whether 'the Convention' is in operation between that country and the State of habitual residence, or (iii) whether the country is a non-Convention country, together with (iv) an explanation of why this matters.
- Continued efforts (including through The Malta Process) to engage with countries which remain outside of the 1980 Hague Convention and to the use of specialist mediation in appropriate cases.
- Although outside of the scope of this study, it would be very useful to know more about how abductions into EU countries from third countries, especially non-Convention States, are handled within the individual EU Member States, and research into this issue would make a welcome contribution to the literature in this field.

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<sup>223</sup> See fn 167 above regarding Africa: 'The Convention should be popularised to a greater extent on the continent, and accompanied by judicial training to support its implementation. The annual Miller du Toit Cloete /University of the Western Cape Child and Family Law Conference has provided an ongoing platform for discussing the need for ratification of the Convention, and for collaboration on training. In April 2019, an African Regional Conference on the application of the Hague Children's Conventions was hosted in Cape Town. It was attended by delegates from Botswana, Burundi, Cabo Verde, Ethiopia, France, Ghana, Guinea, Israel, Japan, Lesotho, Mauritius, Mozambique, Namibia, Netherlands, New Zealand, Nigeria, South Africa, Tanzania, UK (England and Scotland), US, Zambia and Zimbabwe. The Conference aimed to promote implementation of the HCCH Children's Conventions in Africa (including the 1980 Hague Convention), discuss their operation, and invite States in Africa to consider becoming Contracting Parties to these conventions, as well as becoming Members of the HCCH. A session on child abduction, coupled with judicial training, next featured at the 25<sup>th</sup> anniversary of the Child and Family Law Conference in March 2023'. NB: A similar session will be held at the 2024 conference at which the author will be participating.

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### **Caselaw; Conclusions and Resolutions: Consultations; Conventions; Guides to Good Practice; Research Projects and Statutes**

#### Caselaw:

- *Re B (A Child) (Abduction: Habitual Residence)* [2020] EWCA Civ 1187
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#### Conclusions and Recommendations of Special Commissions:

- Conclusion and Recommendations of Eighth Special Commission  
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#### Consultation:

- Ministry of Justice consultation on mediation <https://consult.justice.gov.uk/digital-communications/private-family-law-consultation/>

#### Conventions:

- 1980 Hague Child Abduction Convention  
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- The Inter-American Convention on the International Return of Children 1989 (OAS, Treaty Series, No. 70, signed in Montevideo, Uruguay, in 1989  
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- 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 <https://www.hcch.net/en/instruments/conventions/full-text/?cid=70>

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#### Research Projects:

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#### Miscellaneous HCCH publications

- Practitioner's Tool: Cross-Border Recognition and Enforcement of Agreements Reached in the Course of Family Matters Involving Children (2022) <https://assets.hcch.net/docs/333f37cc-28c9-4b6a-864a-8c335101592c.pdf>
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#### US Annual Reports and Action Reports

- <https://travel.state.gov/content/dam/NEWIPCAAssets/2023%20ICAPRA%20Annual%20Report-fv.pdf>
- <https://travel.state.gov/content/dam/NEWIPCAAssets/2023%20ICAPRA%20Action%20Report.pdf>



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Cross-border parental child abductions in the EU are governed by The 1980 Hague Convention on the Civil Aspects of International Child Abduction and (except for Denmark) the Brussels II-ter Regulation. Countries outside of the EU may or may not be Contracting States to ‘the Convention’, but will not be bound by Brussels II-ter. Research has found that the often negative, long-lasting impact of abduction may continue throughout the lifecycle of those who have been abducted. It may also affect future generations of society. This means that every effort to deter abduction should be made. Where that is not possible, the 1980 Hague Child Abduction Convention should be nurtured to support its application in contemporary society. Specialist mediation should be encouraged in relation to international child abduction generally, and specifically in relation to Third Countries which are not Contracting States to ‘the Convention’.

This study was commissioned by the European Parliament’s Policy Department for Citizens’ Rights and Constitutional Affairs at the request of the JURI Committee.

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PE 759.359  
IP/C/JURI/IC/2023-080

Print ISBN 978-92-848-1591-3 | doi:10.2861/847028 | QA-02-24-167-EN-C  
PDF ISBN 978-92-848-1592-0 | doi:10.2861/332 | QA-02-24-167-EN-N