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# Introduction

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## I The Hague Convention on the Civil Aspects of International Child Abduction 1980

The phenomenon of international child abduction by parents has become significantly more widespread over the past half a century inter alia because of greater international mobility, increasing numbers of marriages between parties from different countries and soaring divorce rates.<sup>1</sup> The Hague Convention on the Civil Aspects of International Child Abduction 1980 ('the Abduction Convention') constitutes the response of the international community to this universally condoned phenomenon, which has been referred to as a 'human minefield'.<sup>2</sup> This Convention adopted a mechanism of automatic expedited return of abducted children, subject to a limited number of narrow exceptions. This remedy was designed to protect children from the harmful effects of the unilateral removal or retention, by returning them promptly to the State of their habitual residence.<sup>3</sup>

The Abduction Convention has been widely acclaimed as the most successful of the family law conventions drawn up under the auspices of the Hague Conference on Private International Law.<sup>4</sup> Indeed, it seems likely that the number of states which have acceded to this Convention<sup>5</sup> and the number of applications made thereunder<sup>6</sup> are way beyond the expectations of the drafters. Nonetheless, success cannot be measured solely on the basis of the extent to which the Abduction Convention is used, nor even by the percentage of cases in which the return of the abducted child is ordered.<sup>7</sup> Indeed, the very fact that the number of applications continues to rise<sup>8</sup> may be seen as casting doubt on the extent to which the Convention's professed objective of deterring abductions has been realised. Moreover, it is clear that the drafters of the Convention did not envisage that the typical abduction case

<sup>1</sup> For a sociological analysis of the reasons for the phenomenon, see ch three at I.

<sup>2</sup> M Freeman, 'Effects and Consequences of International Child Abduction' (1998) 32 *Family Law Quarterly* 602, 607.

<sup>3</sup> Preamble to the Abduction Convention.

<sup>4</sup> eg P Beaumont and A McElevay, *The Hague Convention on International Child Abduction* (Oxford, Oxford University Press, 1999) 4.

<sup>5</sup> According to the Status table, there were 89 Contracting States as at 12 December 2012: [www.hcch.net/index\\_en.php?act=conventions.status&cid=24](http://www.hcch.net/index_en.php?act=conventions.status&cid=24).

<sup>6</sup> In 2008, 1961 return applications and 360 applications for access were made under the Convention: N Lowe, 'A Statistical Analysis of Applications Made in 2008 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part I Global Report, Prel Doc 8 (November 2011)', [www.hcch.net/upload/wop/abduct2011pd08ae.pdf](http://www.hcch.net/upload/wop/abduct2011pd08ae.pdf) [2008 Statistical Survey] 4.

<sup>7</sup> R Schuz, 'The Hague Child Abduction Convention: Family Law and Private International Law' (1995) 44 *International and Comparative Law Quarterly* 771. A similar comment was made by Professor William Duncan, then Deputy Secretary-General of the Hague Conference at the opening session of the Sixth Special Commission in June 2011.

<sup>8</sup> A comparison of the data from the 2003 and 2008 Statistical Surveys (taking into account only data from those states which responded to both surveys) shows a 45% increase in the number of return applications, 2008 Statistical Survey (fn 5) 8.

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would involve abduction by the primary carer mother, as is the case today.<sup>9</sup> Indeed, as will be seen, there is evidence to suggest that the return of the child in some such cases may cause him harm, or exacerbate the harm already caused, rather than protect him from harm.

Thus, in order to ascertain the real degree of success of the Abduction Convention, it is necessary to analyse in detail the way in which the Convention has been applied against parameters which test conformity with the objectives of Convention and other relevant norms. Moreover, such analysis must take place against the backdrop of the wider legal and sociological context in which the Convention operates and in which abduction cases arise and are adjudicated.

This book provides a wide-ranging in-depth analysis of the Abduction Convention and the way in which it has been applied. Conclusions are drawn from this analysis and recommendations are made as to how the objectives of the Convention might be better achieved in ways which are more consistent with general, widely accepted legal norms, with particular emphasis on the rights and interests of children.

## II Structure of the Book and Methodology

Part I of the book provides a broad historical, international, practical, empirical and inter-disciplinary overview of the Abduction Convention and its operation. Chapter one considers the background to the Convention and its inter-relationship with other national, regional and global legal instruments. Particular emphasis is placed on the 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 ('Brussels II bis' or the 'Regulation')<sup>10</sup> and the European Convention on Human Rights which have had a significant impact on the application of the Abduction Convention in Europe in recent years. Chapter two explains the practical operation of the Convention. Chapter three considers relevant knowledge from the fields of sociology and psychology. Chapter four discusses the parallel phenomenon of relocation and its inter-relationship with child abduction.

Part II of the book develops two complementary sets of parameters for analysing the way in which the Abduction Convention has been interpreted and applied by the courts. The parameters in the first category are based on principles of treaty interpretation and are designed to test consistency with the text and objectives of the Convention. The purpose of the second set of parameters is to examine consistency with general legal doctrines, principles and policies that are relevant to the subject-matter of the Abduction Convention cases, taken mainly from the fields of family law and private international law. The most prominent of these is the doctrine of children's rights. Each of the parameters in the two categories is explained fully in chapters five and six respectively.

The six chapters in Parts III and IV of the book contain a detailed examination of how the main provisions of the Abduction Convention have been interpreted and applied by courts, followed by an analysis of the trends in the case law, in light of the parameters

<sup>9</sup> See detail in ch three at I B.

<sup>10</sup> [2003] O.J.L 338/1-29.

developed in Part II. Chapters seven and eight consider the two key threshold conditions which have to be established in order to trigger the mandatory return mechanism ('wrongful removal or retention' and 'habitual residence'). Chapters nine to 13 discuss the exceptions to mandatory return.

An important theme in modern child law is the need to give children a voice in relation to matters concerning them. Accordingly, Part V of the book considers to what extent children are, and should be, given a voice in child abduction disputes and the ways in which this can, and should, be done. Chapter 14 discusses methods of ascertaining children's views and chapter 15 examines the status of children in Abduction Convention proceedings.

The central remedy provided by the Abduction Convention is a court-ordered return of the abducted child. Part VI of the book briefly considers other remedies and procedures available in child abduction disputes: the use of mediation as an alternative to adjudication; methods of obtaining compensation for the left-behind parent and enforcement of access rights.

Finally, Part VII summarises the conclusions drawn from the analysis in the book and considers the way ahead. After a discussion of the significance of relevant legal and other developments which have taken place since 1980, recommendations are made as to ways in which the Abduction Convention might more successfully achieve its objectives and be more consistent with other important parameters.

### III Sources and Notation

An analysis of the way in which the Abduction Convention has been applied must be based largely on case law. Over the nearly 30 years since the Abduction Convention came into force, it has been applied in thousands of cases. Whilst many of these were not available to the author because they are not reported at all or not in a source and language accessible to her, there were still large numbers of cases to which she did have access.<sup>11</sup> Clearly, it was only possible to refer to a relatively small proportion of these within the confines of a monograph. In selecting which cases to mention and discuss, the aim has been to provide examples of different approaches and to bring cases from a variety of jurisdictions. However, inevitably there is an emphasis on English and US cases and this can be justified both because of the large number of cases decided by these jurisdictions and because of the considerable influence which the case law from these countries has in other Contracting States. Similarly, whilst reference is made to recent case law (until the end of 2012), many older cases are also discussed, since these continue to be cited by the courts and still reflect the way in which the Convention is interpreted and applied.

Extensive reference is made throughout the book to the large body of academic literature which reviews and analyses the Convention case law and to other relevant legal and social science literature. In addition, use is made of a variety of other sources which cast

<sup>11</sup> The Hague Conference's database Incadat gave the author access to case reports, which would not have otherwise been available to her and she is grateful to the Hague Conference, Professor Peter McEleavy and others who have contributed over the years to this database. However, in order to avoid cumbersome references, the Incadat citation number is only given where the author only had access to the Incadat report and did not have access to the text of the decision itself in a language she could read. In addition, the Incadat citation is given for Israeli cases which are reported there, since most readers will not have access to or be able to read the full decision in Hebrew.

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light on the operation of the Convention. These include documents produced by the Hague Conference on Private International law<sup>12</sup> and empirical research into child abduction and other related phenomena.

For the most part, for reasons of convenience, the masculine form is used in relation to both adults and children and this includes the feminine form. However, where the context is such that in practice most of the adults referred to are women (eg victims of domestic violence, primary carer abductors and relocation applicants), the feminine form is used.

Various terms are used interchangeably throughout the book. Abductors are sometimes referred to as taking parents and left-behind parents are also called applicants. The country to which the child has been abducted is referred to both as the State of refuge and the requested State. Conversely, the place where the child was habitually resident before the abduction is referred to as both the State of origin and as the requesting State. The exceptions to mandatory return are synonymously called defences. Finally, it will be more convenient to use the term 'abduction', as in the title of the Convention, rather than the more cumbersome phrase 'wrongful removal or retention', which appears in the text of the Convention. However, apart from where the context requires otherwise, the term 'abduction' refers to both removals and retentions.

<http://www.pbookshop.com>

<sup>12</sup> See detail in ch 2 at I A.