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# **INTERNATIONAL CHILD ABDUCTION**

Domestic Violence on the Global Arena

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## **ABSTRACT**

### **INTERNATIONAL CHILD ABDUCTION: Domestic violence on the Global Arena**

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Cooperation is elementary for any relationship to prosper and basic values must be respected and reconciled. Consequently Global Cooperation becomes imperative when all kinds of relationships rapidly expand to span the entire globe. Thus personal as well as national concerns become global.

The intention with this essay was to convey some information about the issue of transnational child custody disputes to confirm the hypothesis that The Rights of The Child are still largely neglected and; that lacking cooperation between responsible authorities cause undue suffering.

By the way of a literature study and narrative sample cases this essay does provide some evidence that confirms the thesis. Some of the aspects that have been addressed when examining the instruments and procedures dealing with child abduction are – interpretation issues, unintended consequences, why mothers abduct their children and domestic violence.

The result of this inquiry is primarily a conclusion that further research on the sociological aspects of the phenomenon is necessary and that international as well as national legislation and social policy must adjust to manage problems and needs previously unforeseen.

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## 1. Preamble

Separation and child custody disputes are difficult situations in people's lives as it is. People become emotional and irrational, which in some cases lead to desperate measures such as child abduction. The objective of this essay is to convey some information pertaining to the issue of transnational child custody disputes taken to this extreme and how it is dealt with internationally. Making fair arrangements while considering what is best for a child can be and often is complicated, especially when endeavoring to reconcile legal norms of several nations.

The primary international instruments considered in this investigation are The 1980 Hague Convention on the Civil Aspects of International Child Abduction and the 1989 UN Convention on the Rights of the Child. Naturally there are a myriad of issues connected to the subject matter, which are impossible to all discover and consider in any depth within the scope of this essay. The phenomena of massive increase in mobility that our last century has brought about has numerous global consequences of which the child custody issue is but one. Children born to parents of different cultures is not a new thing, but with the rapid increase in changing family structures (at least in the west) in conjunction with the increased mobility – child custody has become a global concern on the political agenda.

The subject is interesting from several viewpoints. Namely, global cooperation regarding human rights and welfare issues as well as how the world attempts to reconcile the view of, and what is best for, the child – humanities future. To improve and incorporate international instruments, more understanding is imperative in order to avoid unintended consequences. The issue is increasingly becoming an area of interest for further research. "Detailed knowledge is absent as to how an international abduction will impact upon a child, particularly in the long term".<sup>1</sup> "Little is known about the effects on children crossing international borders during a parental abduction".<sup>2</sup> Maarit Jänterä-Jareborg, Professor of Law at Uppsala University in Sweden, reiterates no less than three times the need for further research in this area<sup>3</sup>.

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<sup>1</sup> Beaumont & McEleavy (1999) *The Hague Convention on International Child Abduction* p.11

<sup>2</sup> Greif (1999) *Impact on Children of International Abduction*

<sup>3</sup> Jänterä-Jareborg (2000) *Olovliga bortföranden av barn: dags att ställa Sverige vid skampålen*

Some of the current research has focused on the profile of the abductor. Who is the abductor? It appears a majority of the abductors are mothers. Why do mothers abduct their children? The awareness of domestic violence is no longer something revealed from secrecy only on local and national levels, but has in this day and age become an international topic. Associate Professor of Law at University of Oregon School of Law, Merle H. Weiner writes that; "...depending upon the interpretation...domestic violence perpetrated against the abductor may or may not be relevant to the Hague proceeding."<sup>4</sup> In an effort to promote mutual understanding and to streamline miscellaneous interpretation issues, the Permanent Bureau of the Hague Conference on Private International Law launched The International Child Abduction Database (INCADAT) on the Internet in May of 2000. It is considered essential that the 1980 Hague Convention is interpreted and applied in a uniform manner by the states in order to be effective.

While more research is much needed and called for, I was surprised to find an overwhelming amount of material to sort through in preparation for this essay. Thus I could no longer defend my initial hypothesis that information in this area is seriously lacking. It appears that important progress has been and is being made. Much of the past research (primarily in the field of law) has focused on the definition of the term *habitual residence*. The preoccupation with defining and interpreting *habitual residence* has perhaps been at the expense of much needed awareness of what some of the actual human consequences are of applying the 1980 Hague Convention. To what extent do the international, national, legal and social authorities cooperate when it comes to settle an international custody dispute? How much reverence is paid to the 1989 UN Convention on the Rights of the Child?

My thesis, albeit a dim one, is primarily that the Rights of the Child are still largely neglected and; that the lacking cooperation between responsible authorities with resources at their disposal are causing undue suffering. Towards a resolution of my thesis, this essay explores, through the study of literature, some aspects of the applicable legal mechanisms as well as findings from previous research. Considering international child abduction as an aspect of domestic violence on the global arena, the issue of domestic violence will be addressed as well as shedding light upon the abductors.

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<sup>4</sup> Weiner (2000) *International Child Abduction and the Escape from Domestic Violence*

## 2. Method & Material

The process of gathering material for this essay was primarily through searching the Internet and library search engines for relevant information, i.e. a literature study. However in order to make this project more “alive” and to sample cases in support of my thesis, some qualitative narratives are also included. Regarding the inclusion of the self-biographical narrative, talks with G, there were some deliberations to conquer. Primarily there was the fear that this essay, the statements, all of it being discounted or disregarded through some judgment such as –Oh well, naturally, this is how this issue would be presented by a offended woman grasping for desperate measures to make a ridiculous avenge. –Just consider what she did to begin with – how she put herself and her child in the situation they are in. –She is just trying to reconcile and justify her position against the morally despicable act that she in fact committed. –The act of abduction.

Being prone to turn metaphysical I have dissected maxims such as: "Imagination is God's gift to make the act of self-examination bearable"<sup>5</sup>, "Thoughts held in mind produce after their kind."<sup>6</sup>, "The life which is unexamined is not worth living"<sup>7</sup> and "The probability that we may fail in the struggle ought not to deter us from the support of a cause we believe to be just"<sup>8</sup>, etc. After much deliberation I decided to own my fears and made the choice not to let them prohibit me from participating in making some contribution in an area that calls for increased awareness. This is where I find myself and this issue is close to my heart. This is where I have some inside, micro-sociological, information to contribute towards an issue that is on the political agenda. For my own sense of integrity, through assistance from my advisor and my friends, I finally came to the decision not to withhold the fact that I as the author have a personal experience, which is at the core of my interest for the subject.

“In a social reality that is contradictory, I consider it important not to veil our biases when doing research. I.e. that we reflect about our relations to the various parties within the social reality we study and openly disclose our choices of perception. The principle of a conscious and declared bias could be simply expressed as a common moral rule: thou shalt not lie.”<sup>9</sup>

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<sup>5</sup> Guare, John. Six Degrees of Separation

<sup>6</sup> Charles Fillmore, 1854 – 1948, Cofounder of the Unity movement.

<sup>7</sup> Plato (c.428-348 BC), Dialogues, Apology, 38

<sup>8</sup> Abraham Lincoln (1809 – 1865)

<sup>9</sup> Eliasson Rosmarie (1995) *Forskningsetik och perspektiv* p 167. (my translation)

Regarding the narrative based on talks with M, it came about as a chance meeting with a young woman who during a break from her job as a waitress joined me at my table in a café this past summer. Unprovoked she suddenly poured out her personal experience of being abducted as a child. She accepted to be interviewed for this essay and has reviewed and made corrections to the narrative. The narrative based on talks with J, also came about through another coincidence. A classmate approached me after class when we had just shared what topics we planned write to about in our essays. She said she knew someone who knew someone who is in a life situation relevant to my subject. Hence I was introduced to J who also agreed to be interviewed for this project. J has also reviewed and confirmed the narrative based on talks with J.

By continuously evaluating and comparing the relevance of the information to the purpose of this essay, there has been an ongoing “sorting out” process in order to make sure that the material is valid. As the assessment of validity can be very subjective, it is my intention to be as clear as possible as to why certain information is included. Conceiving research as a never-ending process, where questions give rise to questions, it is clear that there must be additional relevant information my eye has not caught. “Sampling is a major problem for any kind of research. We can’t study every case of whatever we are interested in, nor should we want to. Every scientific enterprise tries to find out something that will apply to *everything* of a certain kind by studying *a few examples*, the results of the study being, as we say, ‘generalizable’ to all members of that class of stuff. We need the sample to persuade people that we know something about the whole class.”<sup>10</sup>

How reliable is the data? Since this primarily is a literature study, the question of reliability is also highly subjective. Depending on the perceptions of the authors, myself included, the data will undoubtedly be steered by unavoidable preconceived notions. “It is now widely acknowledged that the beliefs, values and expectations of the researcher can influence the research process at virtually all of its stages”<sup>11</sup>. Hence the stance now taken is that all potential biases should be brought out into the open by the researcher and every effort made to counter them.”<sup>12</sup> An attorney once told me that law school taught her that no matter what the case, there would always be material to support it. I consider the inclusion of this reflection relevant

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<sup>10</sup> Becker, Howard S. (1998) *Tricks of the Trade* p. 67

<sup>11</sup> Citation by Robson of Rosnow & Rosenthal (1997) *People Studying People: Artifacts and Ethics in Behavioral Research*. W. H. Freeman.

<sup>12</sup> Robson, Colin (2002) *Real World Research* p. 98

since my ambition with this essay is to support my thesis. Regarding the narratives based on talks, it is naturally the case that as time passes and circumstances change even the interview subjects may at a later date convey their stories differently. While I have made every effort to be as objective as possible, I am aware that reconstruction would most likely portray a slightly different picture. “Critical empirical research is from some perspectives seen as impossible to conduct in an honest and explicit way.”<sup>13</sup> As to the trustworthiness of any research based on central concepts such as validity, reliability and generalizability, “there is considerable debate about their applicability for flexible designs with qualitative data.”<sup>14</sup>

Previous research on the topic of international custody disputes has in the past primarily focused on the legal aspects. Investigations on the circumstances surrounding the issue, appears to be a relatively recent phenomena and repeatedly the call for further research is made. Considering the emphasis on what is best for the child, it may appear surprising not to find more studies where children have been heard. While this is a difficult task and ethically sensitive, surely by now there ought to be a number of people who as children were subject to the issue. Greif and Hegar “were surprised at how little systematic social science or psychological research had been undertaken on the topic.”<sup>15</sup> They contribute this deficiency to two reasons. One being that “it is difficult for professionals engaged in research to find and make contact with people who have experienced the abduction of a child by a parent,…” and “abduction of children by their parents is a subject many people might prefer to avoid.”<sup>16</sup> While not by any means significant enough to make a contributory point with regards to the general opinion of a child, it is nonetheless interesting to be able to include the narrative based on talks with M as she was abducted as a child.

Beginning with The Narrative Investigations in order to make this essay more “alive”, the layout of this paper goes on to define and discuss the topic of Child abduction. From there on a focus is put on Law vs. Convention as an opening to continue by taking a closer look at the international instruments that deal with the subject of international custody issues; The UN Convention on the Rights of the Child and the Hague Convention on the Civil Aspects of International Child Abduction. Next considered are some statistics surrounding this

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<sup>13</sup> Alvesson & Deetz (2000) *Kritisk samhällsvetenskaplig metod* p. 214 (my translation)

<sup>14</sup> Robson, Colin (2002) *Real World Research* p. 93

<sup>15</sup> Greif & Hegar (1993) *When Parents Kidnap* p. v

<sup>16</sup> *ibid.*



phenomenon, which leads to a closer look at who the abductor is, the issue of domestic violence and the effect on children.

### **3. Investigations**

This empirical part will give some examples without the ambition to serve as conclusive evidence by any means. In the first narrative, M tells her story of being abducted. The second and third narratives are about women without custody. The last case is a review of the first Hague Convention case ever to have been admitted and judged by The Court of Human Rights.

#### **3.1 Narrative based on talks with M.**

When she was ten years old, M and her two year older brother were kidnapped. M is 21 years old today with a vivid recollection of her childhood. M was born in Sweden and moved with her brother, mother and father to southern Europe when she was seven. Up until then M and her brother had their main residence at their mother's home. Her parents got married and started living together after having been in relationship for twenty years. They all lived together as family for the first time in her father's homeland for the next three years.

M's mother was unhappy and wanted to move back to Sweden. The marriage was deteriorating and M's mother was given the option to move into a small flat nearby the family home without the children. M and her brother would spend their summer holidays with relatives in Sweden. That summer, when M was 10, the Swedish relatives took her and her brother into hiding while M's father was on his way to pick them up to go back home for school start. She remembers being told that this year the summer vacation would be longer and had to hide in the back of a car under blankets. They stayed at some cottage for about four days before being moved to another "more safe" place. Meanwhile the mother drove back up to Sweden on her own to meet up with them. M remembers hearing an announcement over the radio asking the public to assist in finding the whereabouts of her and her brother.

The mother filed for divorce and they stayed in hiding until the divorce proceedings had started. Well into the school year they finally got settled into a home and started a “normal” life with regular routines. During this time they were not allowed to meet with their father. M recalls missing daddy terribly and not really understanding what all the hoopla was about. Psychologists interviewed her and her brother as part of the custody settlement. Apparently the psychologist worked for the Swedish family and constructed stories about the children not liking their father. This is something that M has learned later after resuming a severely bruised relationship with her father. She has seen the documents and read things that she does not recall saying. She does remember that both her and her brother wanted to stay living in Sweden. But she also remembers loving and missing her father.

The divorce ended with M’s mother being awarded primary custody and her father getting visitations rights. Her and her brother would spend their summer holidays in southern Europe with their father after depositing their passports with the authorities. M’s mother was always terribly afraid that the father would revenge. He was prohibited from kidnapping but revenged by not paying any child support. They had a meager existence while living with mom and were spoiled while spending the summers with dad. M’s mother suffered from reoccurring bouts of depression and M remembers having to take a lot of responsibility as a child because the mother was not fit to take care of things. The mother gave them plenty of love but was incapable of managing things like paying bills, buying groceries etc.

When M was 17 her brother had moved out on his own which left her alone to take care of the practical household stuff. M’s mother suffered a major psychosis and was put into the hospital for two weeks. Social services stepped in at this time and offered M either to live with foster parents or to move to her father in southern Europe. Heartbroken, because she did not want to leave her mother, M left to live down south with her father. She remembers social services being very generous in many ways and paying for visitation trips to Sweden.

Once M started living with her father she understood that there was some kind of flirt going on between the father and the social worker. M had trusted the social service worker and confided in her. The social worker came to stay with them while on vacation and M understood that her confidence had been broken. It appeared as if the whole move had been a coup against her mother.

While M has been able to reestablish a relationship with her father after all that happened, her brother has only a superficial relationship with the father. After they first came back to live in Sweden, when she was 10 and the divorce and custody settlement was final, two years passed with no contact with the father. The father became bitter and broke all contact. Mainly due to the psychologists statements about what her and her brother supposedly had said about him. The father blamed the children. This is how M tells her story. Naturally there is always more to every story and some information that the storyteller is not privy to.

### **3.2 Narrative based on talks with J**

N was born 1993 in Sweden to the mother J, a Swedish citizen and the father C, an American citizen. J and C lived an unsettled life of travel and left Sweden for a two-week stopover in America on their way to Africa one month after the birth of N. After an extended stay for about a year in Africa the family continued their travels back and forth between Bali, Australia, New Zealand, Japan and short visits to the US. This went on for about four to five years. J wanted to move back to Sweden to pursue her education and to settle the family in time for N to start school. Sometime during 1997 J went to Sweden alone to make the necessary arrangements while N stayed with C in Bali. Back in Bali C was unwilling to make the move to Sweden. The relationship between J and C was strained and became irreconcilable.

1998 J again went back to Sweden to make arrangements to receive N into a settled environment. J had secured employment, an apartment and daycare but C refused to send N to Sweden. C entered a relationship with another woman in Bali and lived family life with N and the new stepmother. At this time (1998) J sought legal council and called the Swedish ministry of foreign affairs (UD), for assistance in the issue of custody for N. UD told her that while J and C had joint custody there was nothing they could do because N had never lived in Sweden consecutively for at least six months. Legal council informed her that litigation would have to be initiated in Bali and that there was little hope for her to become the primary caretaker of N.

C moved to America with N and the stepmother and settled there 2000. J sought legal council in the US and was told to drop the issue or risk loosing even visitation rights. She contacted

UD in Sweden again but was offered no support or guidance to resolve the issue. From 1998 to 2000 N only met with her mother J twice, with one year between visits. Since 2000 the visits have been more frequent but always at the convenience of C and expense of J.

Summer 2001 C informed J that he was planning to move from the US with N and the stepmother to live in Spain. N was visiting J at that time and J offered C that N could live with her until he got settled in Spain. J enrolled N in school, but two weeks into the semester C changed his mind about moving to Spain and demanded that N be sent back to the US. J considered refusing but feared the consequences and how it would effect N. N went back to the US and J has not dared to take up the issue about custody or even a legal custody agreement with visitation rights again for fear of being denied spending time with her daughter.

N is spending Christmas with J this year (2002) and C has once again mentioned moving to Spain. While N is habitually resident in the US, J has little hopes for a fair custody agreement. If C however decides to move to Spain, J feels she would have better chances to establish a custody agreement also considering that according to Swedish law J and C have joint custody of N.

The relationship between C and J is filled with inconsideration and conflict. C refuses to consider allowing N to live with her mother in Sweden but is agreeable to allow for visitation, albeit at his sole discretion. Naturally J has had thoughts about refusing to return N after a visitation if and when she moves to Spain with her father and stepmother, before N would be considered habitually resident in Spain. Though there is still the fear of the consequences from such action and how this would effect N. The time J and N are able to spend together is precious where every moment counts. J tries to make up for lost time of mothering and it is always like a painful miscarriage every time they part. She worries about how the circumstances of the situation will effect N in the future and feels at a loss about what to do.

### 3.3 Narrative based on talks with G

A was “abducted” to Sweden by his mother G, a Swedish national, when he was eight years old. A was born in the US and his parents lived together in the US until he was two. They were not married and did not establish a custody agreement. A continued to live with his

mother in the US and had irregular visitation with his father until he was six, when S suggested that A live with him and his newlywed wife who was pregnant. At this time the interaction between S and G appeared to be improved. S made the proposal for A to live with him as a means to provide the experience of family life and to make up for lost time and child support. S had at that time also settled on a major lawsuit, which afforded him financial independence. G had, ever since the initial separation, repeatedly approached S about setting up a custody agreement, which he refused, and G did not pursue it on her own. After much deliberation, G agreed to allow A to move in with his father for a trial period of one school year with assurances and good intentions to make sharing the responsibility of parenting work without legal involvement.

A started showing signs of distress very soon after moving in with his father. However S did not want to consider A moving back to G as a solution so soon after the change. G arranged for counseling while S was more inclined to start A on medication for symptoms of ADHD. G, S and the new wife went to one counseling meeting together. Thereafter S started A on medication without G's consent. G continued to go to counseling and sought legal council. She was told that it would be ill received that she had allowed A to move in with S and that her chance of being named primary caregiver in a custody agreement would at that time be slim, also because possession is considered half the battle. Since S never signed a paternity statement and G had sole custody without any legal agreement she did not pursue a custody agreement further.

At times A would have bruises when he came to stay with G. He was difficult to manage and medication caused irreversible ticks. The medication was changed while S had deaf ears to G's suggestions about alternative treatment. The relationship between G and S and his wife was strained to say the least. The initial assurances and good intentions of sharing the responsibility of parenting were not fulfilled. Instead G found herself frustrated and diminished in her role as a parent. Many times G would call to speak with A, but was refused. Visitation was never withheld. Demands however, to take care of A without previous agreements being made, were made of her. G did spend as much time as possible with A and kept herself informed about his schooling. Off and on the situation was felt as unbearable. S was very authoritarian to say the least, and A was often punished by extended time outs and assignments, like having to write "I will obey my father" a 100 times in his best handwriting. Other times he was assigned to do extensive housework or copy pages from the dictionary in

his best handwriting. Come Sunday night after visitations with G, G would be accused of being a bad mother for not having given A a bath before returning him. G was continuously accused for being a bad mother in a number of ways.

In December of 1995 after extended periods of conflict between G and S, S showed up with A at the home of G unannounced at 11pm on a school night. He brought A and A's belongings in a plastic garbage sack and said that he "gave up". G had signed a note from school about "bad" behavior without telling S, which he found since A forgot to turn it in. S left A with G after a shouting monologue in front of A about how G and A would have to do without him from then on. The situation was shocking and quick changes had to be made. During her sixteen years in the US, G had never considered moving back to Sweden. At that time however she consulted an attorney about her legal rights to move with A. She was assured that since S never signed a paternity statement and without a legal custody agreement she had every right to move with A anywhere she wanted to. She shared two options with A. One was to stay in town, which entailed moving closer to school, changing employment and making arrangements for after school care. The other was to move to Sweden, be close to family and get a custody agreement from there so that he could visit his father in the future. G thought that living in Sweden would provide better circumstances in general more conducive to single parenting. A month and a half later they moved without telling S, other than in a letter about where they were going and for him to enter a custody agreement if he was interested in visitation.

In February of 1996, one month after their arrival to Sweden, S showed up and stayed for a few days. When S went back to America he had accepted for A to live in Sweden with G and promised to initiate the draft of a custody agreement so that A could visit him during summer vacations. There are records of a phone conversation between S and the Swedish consulate in the US confirming a pending custody agreement but S never sent a draft. Early April G sought legal counsel in Sweden after a phone call from S inquiring about how much child support she could pay while A stayed with him. Instead of responding to the attorney's letter initiating negotiations for a custody agreement, S filed a suit and initiated a Hague Convention case. G received a phone call in late May from the Ministry of Foreign Affairs informing her she was charged with kidnapping and to appear in court by early June. G appealed the first courts decision to return A to his habitual residence for court proceedings about custody.

A did well in school without being on medication, G found a job within walking distance of school, their apartment and the grandparents home. While anticipating the next court hearing G's attorney in the US secured an official statement from the courts in the supposed US habitual residence, clarifying that neither G nor A belonged to that jurisdiction. This document was presented in the second court. Evidence of S having consented to A living in Sweden by record of phone conversation with the Swedish Consulate in the US was also presented. A's school counselor was called to comment in court on the wishes of A in the matter. The counselor knew A well after many visits specifically dealing with his situation of being caught between two parents unable to cooperate. The counselor's statement made clear that A felt more fairly treated by G than S. G brought up the abusiveness in the relationship with S, but no investigation was initiated to further check the circumstances. It is clear that the statement by A's counselor was not given much consideration as the court referred to a previous statement from the first court by the social services. The previous statement indicated that it was difficult to ascertain A's wishes. A had only met with the social workers once or twice and had no established confidence or relationship with them. The second court ordered the return of A after interpreting the specific US state law and concluding that the word *parent* would be synonymous to the Swedish meaning of *custodian*. G appealed to the highest court. The legal expert who had previously and independently been consulted by the Swedish Foreign Ministry concerning specific state custody proceedings became engaged regarding the specifics of the case. A letter from this expert was submitted with the appeal in which he commented that the Swedish courts had applied the US law in a way that it would never be applied in the US and urged that they correct their mistake. December 30, 1996 G had to turn over A to S after the court denied her appeal. The High Court was not interested in creating a precedent while admitting that circumstances were unclear. G was charged to bear the expenses of S for the court proceedings.

G went to the US for an initial custody hearing where she was treated as a dangerous kidnapper. S was awarded temporary custody and they were encouraged to settle out of court. G went back to Sweden without reaching agreement with S. She tried to initiate a case to the European Court but became ill from depression. The attorneys took over the custody agreement negotiations, which she did her best to keep up with. The final agreement was given her some days after the last date to appeal. This agreement gave S sole custody and left G with no parental influence other than rights to visitation provided she bear all expenses for such. She was to pay child support as well as S's expenses for court proceedings in Sweden.

She was told by the attorneys to accept the situation, to make the best of it and that because the date to appeal was past, a new case would have to be initiated. Initiating a new case would only prolong her being able to have visitation with A. G and A would not see each other again until the summer of 1998. While S had promised A that he would not be as disciplinarian as he previously had been, the abuse resumed. A was put back on medication for ADHD which he had done well without while living in Sweden. Having to practice his best handwriting while being grounded to his room for prolonged periods of time (days) became common again. Spankings and household chores were also methods for punishing as well as threats of being sent to military school. G would at times be unable to reach A by phone at the appointed time and had to call his school in order to be informed about his schooling. Letters to A were read by S and some of the phone calls between A and G were not private.

The attorneys had told G in 1997 that if things did not work out she could at that time start proceedings quickly as the legal aid case would remain open. This has turned out not to be the case. Spring 2002 when G had difficulty to finance visitations S told her that it was irrelevant whether she could get the money together or not as he would not send A to her anyway. He had made plans to send A to summer school instead. S told A that his mother could not get it together for summer visitation. The following day A had a fit of rage in school, which caused him to be expelled for a week and threatened with juvenile detention. Fall of 2002 S threatened A with military school again. A countered this by stating he wanted to move to Sweden and told his father that he is old enough to have his will heard. While G initiated arrangements to bring A to Sweden, A was grounded to his room and had limited communications with his father. S appeared dejected and had some kind of change of heart, which provided A with privileges previously not experienced. Finally A told G that he thought it better if he finished the school year before making any move to Sweden. At this time, spring of 2003, A and G are looking forward to spend time together again in the summer after not seeing each other for two years.

G has spent much time wondering how this situation with S could turn out the way it has. His Norwegian mother abandoned S when he was about ten years old. She moved back to Norway, leaving her two children in a situation she herself considered intolerable to live in. Her husband, A's grandfather, is spoken of as a kind but abusive man. Thus, S himself was subject to abuse as a child. How wide are the boundaries for domestic violence, if there are any? Who are the abductors?



### 3.4 Review of European Court of Human Rights Case<sup>17</sup>

As of 1999, there had only been a total of five cases pertaining to the application of the Hague Convention on the Civil Aspects of International Child Abduction brought before the European Commission of Human Rights which all were dismissed. The first judgment was issued on January 25, 2000 in Strasbourg, France. "It is a very significant judgment that provides support for the Hague Convention. The Court considered that the positive obligations which Article 8 of the European Convention on Human Rights imposed on the Contracting States to help reunite parents with their children had to be construed in the light of the Hague Convention of 1980. A failure to enforce a return order could, as in the circumstances of this case, constitute a breach of Article 8 of the European Convention."<sup>18</sup>

Article 8 of the European Convention on Human Rights says:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others.<sup>19</sup>

In January 1996 a French woman applied to the European Court of Human Rights with a complaint against the state of Romania who had failed to enforce a return order under the 1980 Hague Convention. By the time the judgment was issued the mother and her two daughters had been separated for over nine years, meeting only once, during a brief meeting arranged by the Romanian authorities. The court awarded the mother reimbursement for legal expenses and she was financially compensated for pain and suffering. The mother "won" the case, but that did surely not repair the loss of her children. What about the children's loss of not getting to know their mother?

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<sup>17</sup> European Court of Human Rights, Council of Europe. Hudoc reference #REF00001324

<sup>18</sup> Schultz (1999) "*Das Haager Kindesentführungsübereinkommen vom 25.10.1980...*"

<sup>19</sup> European Court of Human Rights, Council of Europe. <http://www.echr.coe.int/Eng/Judgments.htm>

The father, a Romanian national, took the girls (who were born 1981 and 1984) from France in the summer of 1990 to live in the US. In the fall of 1990 the mother made a court case asserting that her rights of access had been breached. The father remarried and moved around the US evading the courts, so that at times their whereabouts was unknown. At one time the father managed to be awarded sole custody by a Texas court while other court orders demanded the return of the girls to France. There were statements from expert child psychologists that said the girls did not want to see their mother. Later, when the court orders (five judgments) caught up with him in California he left the US and moved back to Romania. In November 1994 the United States' Central Authority requested the Romanian Ministry of Justice to return the children pursuant to Articles 3 and 5 of the Hague Convention. In December 1994 the Central Authority of France requested Romania's Central Authority to return the children pursuant to Articles 3 and 5 of the Hague Convention. There are many turns to this story. Once their whereabouts were located in Romania, they moved and hid again.

The dust must have settled when the father, in the fall of 1995 lodged an application with a Court in Bucharest to be given exclusive parental responsibility. He argued that he afforded the children exceptional living conditions and that they did not want to live with their mother, who belonged to a sect. After a social inquiry was made, the mayor of Bucharest informed the court that the two girls were very well adjusted and that they wished to live with their father and his wife. The court interviewed the children in private and in the absence of hearing or informing the mother, they delivered a judgment in favor of the father. The judgment stressed the importance of the children's interests and based their decision on the social inquiry, statements from the girls' school about good performances and a letter from the Ministry of Religious Affairs about the sect, to which the mother belonged, not being recognized in Romania. The court emphasized that the father had been the one raising the children since the divorce 1989 and that that he was the one best suited to provide for the girls.

### **3.5 Investigations Summary**

In two of these four cases reviewed the mother is the abductor. All cases portray mothers who in some way feel left out and struggle to fulfill their role as parent. This does not mean that the fathers are without struggle, but in three of these cases it is the father who has primary

care of the child. A picture that perhaps runs contrary to common belief – that mothers are the ones who primarily have custody. All cases portray some evidence that involved authorities in one way or another could improve how these matters are handled. These cases portray how parents resort to desperate measures in order to maintain their parental roles. In the review of the European Court of Human Rights case it is blatant how the responsible authorities have failed to cooperate across international borders. The narrative based on talks with J also shows how a parent can become stranded without guiding support even when calling upon authorities for help. In this case it is evident that the Hague Convention on Child Abduction works well as a deterrent while the appointed Central Authority does nothing to assist in bringing about a child's right to both parents. In the case of G, interpretation of judicial principles from another state can take on an entirely different meaning than intended for that state and totally inapplicable in the state doing the interpreting. This case also shows how selective a state can be when applying the Hague Convention on Child Abduction and how legal counsel not necessarily works on behalf of the client.

At the core of all the cases are children who in some way are caught in the crossfire between their parents. What are the wishes of a child? What is best for a child and who is qualified to make such a determination? How much effort is made to ascertain a child's wish? In three of the cases, *experts* were involved to report about the wish of the child. According to M, her and her brother's wishes were twisted into something she did not recall. In the case of G, the initial statement made by social workers, who met with A only briefly without establishing a trusting relationship, weighed heavier in court than the statement by the school counselor who had met with A over an extended period of time. In the European Court case reviewed, it appears that the children's relationship to their mother had been so severely severed that it seems difficult to imagine on what a child's wish would be based, not to desire a relationship with the mother.

It is clear that circumstances differ from case to case and that it is extremely difficult to find blanket solutions that consider all the intricate details. But there are guidelines. Internationally agreed upon guidelines, that if adhered to, may contribute towards prevention of undue suffering and perpetuation of human ignorance. Improving the intended cooperation between responsible authorities and adherence to the Rights of the Child are part of such guidelines. Next we will take a closer look at the meaning of child abduction, some causes, effects, definitions and the instruments in place that deal with the phenomenon.

## 4. Child Abduction

What do we think about when we hear the words "child abduction"? Taking each word and attributing a definition will likely produce several thoughts. First comes a definition of "child". Who is a child? Anyone who is not of age may or may not be considered a child. Is a teenager still a child? Does the adult not still feel as a child in some situations? Looking up synonyms to the word "child" does not help much since a definition still remains highly subjective. In order to understand what is meant by "child abduction" we will turn to the agreed upon definition within the instruments created to deal with the issue.

The definition in Article 1, part 1 of the 1989 UN Convention on the Rights of the Child states, "a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier." It is noteworthy to also consider what is said in Article 38:3, "States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces". In Article 4, chapter 1 – Scope of the Convention, of the 1980 Hague Convention on the Civil Aspects of International Child Abduction it reads, "The Convention shall cease to apply when the child attains the age of 16 years."

Some synonyms to the word "abduct" are: "take", "steal", "kidnap", "make off with", "seize" and "hold somebody against their will". Looking to the 1989 UN Convention we find in Article 11:1 "States Parties shall take measures to combat the illicit transfer and non-return of children abroad". A key for understanding is here "illicit transfer". We also find directive in Article 35, which states, "States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form." Regarding what is considered "illicit transfer", i.e. abduction, we need to look further to the language in the 1980 Hague Convention.

Here we find a definition in Article 3. "The removal or the retention of a child is to be considered wrongful where – a) it is a breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and b) at the time of the removal or retention those rights were actually exercised, either jointly or alone, or

would have been so exercised but for the removal and retention." and "The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State." It is interesting to note that nowhere in the text of the Convention does the word "abduction" appear other than in its title. Thus from the above rhetoric it may be concluded that "child abduction" concerns minors under the age of 16 that have been removed from someone who is attributed guardian.

Child abduction is by no means a new phenomenon as can be observed in studying some older literature such as the bible or stories from mythology, but it appears to be an increasing trend. "Since early times, children have been both economic commodities and emotion-laden targets for revenge by abductors."<sup>20</sup> "A parental abductor rarely seeks material gain; rather, he or she will aspire to the exercise of sole care and control over a son or daughter in a new jurisdiction."<sup>21</sup> While it is clear that abduction is wrong and a desperate measure it is perhaps not so clear what the specific causes are. To understand this and the effects more research is needed. "Detailed knowledge is absent as to how an international abduction will impact upon a child, particularly in the long term."<sup>22</sup> And "...a detailed investigation of the sociological aspects of parental removals or retentions ... would represent a research project in its own right."<sup>23</sup> While understanding about the underlying causes is incomplete, there are legal efforts being made to prohibit the occurrence of abduction. Some of which will be reviewed in the next following sections after a brief look at some clarifications about the instruments and how these efforts are implemented.

#### 4.1 Convention vs. Law

What is a convention and how is it different from a law? These questions can cause Pandora's box to open and become the foundation to another essay. Thus, the following will be a limited synopsis. Both words, *convention* and *law*, share the meaning of *rule*. Another meaning for *convention* is *agreement*, which is not found as a meaning for *law*. A Convention then, can be

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<sup>20</sup> Greif & Hegar (1993) *When Parents Kidnap* p. 4

<sup>21</sup> Beaumont & McEleavy (1999) *The Hague Convention on International Child Abduction* p.1

<sup>22</sup> *ibid.* p. 11

<sup>23</sup> *ibid.* p. 7

understood as “an agreement between states for regulation of matters affecting all of them”<sup>24</sup> while a law for example, “implies imposition by a sovereign authority and the obligation of obedience on the part of all subject to that authority.”<sup>25</sup> The question then is – How do these rules differ in implementation?

Nations have laws that in some ways may differ from one another. These laws affect the individuals within their societies in ways that make the individual directly accountable to the law. A treaty like a Convention however is between nations and in most circumstances it is the state, which is held accountable as supposed to the individual. States may incorporate a Convention into their system of law and thus make the individual more directly liable to it. Generally speaking then, a Convention is an instrument to promote international cooperation and legal unification.

A Law is according to Kant an unconditional commandment on how we should act, which we realize to be correct by reason.<sup>26</sup> This definition appears to be far fetched in this day and age, when we are no longer governed by the rule of some God. In today’s society, metaphysical reason is in itself no longer effective and has at large been replaced by legal systems. Habermas talks about the complexity of today’s post-metaphysical society and the many systems within it that seem to operate by their own laws. He argues that we cannot completely escape the philosophy of the past, but that we can redress it to suit the world of today through *communicative rationality*. “Recasting the basic concepts of 'practical reason' in terms of a 'communicative rationality' has the advantage of not cutting social theory off from the issues and answers developed in practical philosophy from Aristotle to Hegel. In fact, it is far from clear that the price we have to pay for the premises of post-metaphysical thinking must be an indifference to such questions, which in any case continue to be felt within the life world.”<sup>27</sup> “Indeed, in complex societies, morality can become effective beyond the local level only by being translated into the legal code.”<sup>28</sup> Can we then consider the International Conventions to be reflective of such *communicative rationality* that Habermas talks about?

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<sup>24</sup> Merriam-Webster OnLine

<sup>25</sup> *ibid*

<sup>26</sup> Nationalencyklopedin på Internet

<sup>27</sup> Habermas (1998) *Between Facts and Norms* p.9

<sup>28</sup> *ibid.* p. 110

## 4.2 Convention on the Rights of the Child

While a child is under the protection and guidance of his/her custodian(s), a child is not by any means to be construed as the property of the custodian(s). This is implicit in the beginning of Article 2 of the Universal Declaration of Human Rights which reads “Everyone is entitled to all rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>29</sup> *Other status* would include the status of *age* and thus include children who are not separately mentioned as entitled other than that *everyone* must also mean to include the human child. The same wording is reiterated in the preamble of The 1989 UN Convention on the Rights of the Child and elucidated by stating that “... the United Nations has proclaimed that childhood is entitled to special care and assistance, ... ”<sup>30</sup>

The 1989 UN Convention on the Rights of the Child is a Human Rights Convention that expressly reiterates those very rights to also be applicable for young humans under the age of 18. Children’s rights are already considered in other Human Rights Conventions, such as for example the 1966 International Covenant on Civil and Political Rights, but apparently insufficiently so in order not to be neglected. Also, there are specific circumstances and issues that primarily affect children due to their dependency during the early years of life, which need to be spelled out in order to defend children’s unequivocal human rights. It was in 1978 that the Polish government took the initiative to create a legally binding instrument to protect children’s rights. Prior to this there were other international agreements, though not legally binding, that specifically addressed children’s rights such as the League of Nations 1924 Declaration of Geneva and subsequently the second UN Declaration on the Rights of the Child. It would take over ten years of work before this Convention was implemented on September 2, 1990.

All in all there are 54 articles in the Convention on the Rights of the Child. Throughout this convention international co-operation is explicitly and repeatedly urged. Next are excerpts specifically considered relevant to the objective of this essay. *Some of the excerpts are followed by my ponderings in italic.*

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<sup>29</sup> Universal Declaration of Human Rights <http://www.un.org/Overview/rights.html>

<sup>30</sup> The Convention on the Rights of the Child <http://www.unicef.org/crc/crc.htm>

**Preamble.** A child “should grow up in a family environment, in an atmosphere of happiness, love and understanding.” We are encouraged to take “due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child, ...” *How far can we take the definition of family? How do societies at large reflect the same values?*

**Article 2** 1. “States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, ...” and 2. “... take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.”

**Article 3.** 1. “In all actions concerning children, ... the best interests of the child shall be a primary consideration.” 2. “... taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, ... take all appropriate legislative and administrative measures.” *The best interest of the child is primary while tanking into account the rights and duties of the custodians are secondary.*

**Article 9.** 1. “States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.” *If there is any indication of abuse – which an act of abduction in and of itself may indicate – ought this not be utmost urgent to ascertain prior to considering the issue of habitual residence?* 2. “In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.” 3. “States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.” *Both parents.*

**Article 10.** 1. “In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of



family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.”

2. “A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances, personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 2, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.”

**Article 11.** 1. “States Parties shall take measures to combat the illicit transfer and non-return of children abroad.” And 2. “To this end, States Parties shall promote the inclusion of bilateral or multilateral agreements or accession to existing agreements.”

**Article 12.** 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. And 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law. *If not hearing the child in person is for the purpose of saving the child from such an experience, would it be considered unethical to provide the court with a recorded audio or video record from hearing the child in private?*

**Article 16.** 1. “No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honor and reputation.” And 2. “The child has the right to the protection of the law against such interference or attacks.” *How can the law protect a child unless the law is informed? And if the law is informed, what is the threshold for interference by the law?*

**Article 18.** 1. “States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. ... or, as the case may be, legal guardians, ... The best interests of the child will be their basic concern.” And 2. “For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.”

**Article 19.** 1. “States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.” 2. “Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.”

**Article 29.** 1. “States Parties agree that the education of the child shall be directed to: (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential; (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations; (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living; the country from which he or she may originate, and for civilizations different from his or her own; (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin; (e) The development of respect for the natural environment.”  
*Surely education is not limited to the institutions of school? Does not life itself; experience within society at large educate human beings?*

**Article 35.** “States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.”

**Article 39.** “States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.”

#### **4.3 Convention on the Civil Aspects of International Child Abduction**

This begins with a brief presentation of the history of The 1980 Hague Convention on the Civil Aspects of International Child Abduction (hereinafter the Convention on Child Abduction), followed by considering certain key aspects.

While the problem of international child abduction had been known to the Permanent Bureau of the Hague Conference since the early 1970s it was in January 1976 that a Canadian representative first suggested that the issue be added to the agenda on Miscellaneous Matters. A preliminary survey was conducted and presented in October 1976. This report concluded that a convention would not be able to deal with the issue and suggested efforts be made toward promoting cooperation between national authorities instead. One year later it was the Canadian government who again initiated further discussion. At that time another investigation had already begun that analyzed the legal aspects as well as the sociological. This research was carried out in collaboration with the International Social Service. In 1978 the governments were given the final report and asked to answer a questionnaire. Nearly all governments responded against an international tribunal while support for increased cooperation was equally unanimous. While some argued for a semi-automatic return mechanism, others wished to be able to ascertain the merits of a case. In March of 1979 a small group of three people convened with the intention of finding an approach towards a future convention. This became the first Special Commission meeting. They came to an agreement that the establishment of a Central Authority system to promote administrative cooperation would be the best approach. This small group continued to work out the specifics for a preliminary draft to begin detailed negotiations. Their work was presented at the second Special Commission meeting in November of 1979. “It did not go into the merits of the custody issue, rather it focused on the premises that the best interest of the child required that children should not be subjected to unilateral removals or retentions. Consequently they

should be returned as quickly as possible to their habitual residence.”<sup>31</sup> Canada, France, Greece and Switzerland were the first to sign the convention on the 25th of October 1980.<sup>32</sup>

At the core of this convention is a consensus that wrongful removal and retention of a child should be prevented. This is a cornerstone upon which the convention is built. What then constitutes wrongful?

“The removal and retention of a child is considered wrongful where–

- a) it is a breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
- b) at the time of the removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.”<sup>33</sup>

There is however a catch-22 situation, which is how I perceive the effect of the term *revoi*. *Renvoi* is the bouncing of a case back and forth without a choice of law ever being determined by virtue of the interaction of two states' rules. “...the circularity of deciding who has custody rights by reference to the law of the habitual residence of the child, when it is not known where the child is habitually resident without knowing which parent has custody rights.”<sup>34</sup> This is the potential quandary depending on interpretation of Article 3 of the Convention. Beaumont & McEleavy point out that courts tend to ignore this theoretical weakness as a means to achieve the result of fulfilling the Convention's aim of speedy return to status quo before the abduction. Already in the early drafting stages of the Convention it was agreed that the instrument would not deal with the merits of a custody issue, but rather facilitate the quick return of children subjected to unilateral removals and retentions to their habitual residence. The stance of this convention is that custody proceedings belong in the jurisdiction of the habitual residence.

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<sup>31</sup> Beaumont & McEleavy (1999) *The Hague Convention on International Child Abduction* p.21

<sup>32</sup> This historical review is primarily extracted from Beaumont & McEleavy, (1999) chapter 3.

<sup>33</sup> Article 3, 1980 Convention on the Civil Aspects of International Child Abduction

Considering the dilemma created by interpretation of Article 3 it may have been expected that attempts for clarification would have been directed towards how to determine who has legal custody whenever it is unclear. Comprehensible guidelines for communication and cooperation between the States involved would perhaps facilitate making such determinations. Instead we find in the past a preoccupation with the concept of Habitual Residence. “In no other area of private international law has so much case law been generated on the meaning of the concept”<sup>35 36</sup> Directives for interpretation of Article 3 are found in Article 14 and 15 – but are put forth in a way that is more like suggestions rather than clearly directing in that the word *may* is used instead of *shall*. Consequently a Central Authority is given the prerogative to interpret subjectively.

While the convention begins by stating that the interests of children are of paramount importance in matters relating to their custody, and that it aims to protect children internationally from the harmful effects of their wrongful removal or retention it appears that administrative procedures, such as the objective of a *speedy return*, have taken priority. The convention does protect children in some ways by functioning as a deterrent to abduct. Yet it clearly states that its objectives are “a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.”<sup>37</sup> Since rights of custody and access are attributed to custodians and not to children, the intentions of the convention appear to only serve the children indirectly.

Article 19 states that “a decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.” Though it is difficult to imagine that a subsequent legal process deciding on the merits of custody would be unbiased towards the parent previously charged with abduction (which outside of the Child Abduction Convention is considered a criminal offense).

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<sup>34</sup> Beaumont & McEleavy (1999) *The Hague Convention on International Child Abduction* p.265

<sup>35</sup> *ibid.* p. 4

<sup>36</sup> To understand the preoccupation with the concept of Habitual Residence one may consider that it is an issue of Jurisdiction, which is a general nucleus point of The Hague Conference on Private International Law which held its first session in 1893. “Between 1893 and 1904 the Conference adopted seven international Conventions, six of which have been subsequently replaced by more modern instruments. From 1951 to 1999 the Conference adopted 34 international Conventions.” (Organizational info – FAQ: Hague Conference on Private International Law, Internet) “Article 1. The purpose of the Hague Conference is to work for the progressive unification of the rules of private international law.” Statute of 1955 (*ibid*)

<sup>37</sup> Article 1, 1980 Convention on the Civil Aspects of International Child Abduction

Article 13 specifically deems the interest of children to be of paramount importance, providing guidelines for States on when they are not bound to order the return of a child. If “*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.” And further stating that “The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views. In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.”

Article 13 also provides reason, pertaining to the applicant (parent or other supposed custodian), for why a State would not be bound to order the return of a child. If “*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 ...” a return order may be refused.

Article 12 says that a child may be ordered to return even after one year has elapsed unless it is demonstrated that the child is now settled in its new environment. The previous sentence within the same article indicates that an application initiated before one year has elapsed is cause for a return order. This may appear contradictory at first. What it really says is that a child cannot be regarded as being settled in a new environment until a year has elapsed. That being settled will not be taken into consideration unless a year has elapsed. Article 20 gives a provision that the return “under the provisions of Article 12” may be refused “... if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.”

It is in chapter III – Return of Children – that articles 8 through 20 specifically address the issues pertaining to the well being of the child. Yet Article 18 states “The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.” Hence it appears that the signatory States to a large degree are unrestricted to apply this convention as they wish. Considering the intention and purpose of The Hague Conference to work for the progressive unification of the rules of private

international law, the provision of Article 18 seems contradictory. This dilemma is addressed in a Good Practice Report specifically dealing with the procedures and practices of applying the Child Abduction Convention. “While the objectives of the Hague Convention are well defined, the treaty lacks clear procedural requirements, which leads to problems on a practical level”<sup>38</sup> Professor Nigel Lowe, who conducted the research for this report, considers all in all the Convention to be a success and says: “In part this success is due to the fact that the Convention sets out broad objectives whilst not defining procedural requirements. This makes it an adaptable instrument capable of being implemented in a diverse range of cultures.”<sup>39</sup>

It is fairly recent that more serious efforts are being made towards improving communication and cooperation between States. With the launch of INCADAT<sup>40</sup> and regular sessions where judges and experts participate it is hopeful that the intent of this instrument will not be enforced at the expense of violating human and legally established rights. Another suggestion to promote unified interpretation has been that a court of a State could turn to The Special Commission for guidance in individual case decisions. This suggestion would appear to be a matter of resources. However, perhaps only a short term one considered in a wider perspective. Eventually there would be enough case law to refer to – decided by The Expert Special Commission – to aid in the resolution of interpretation questions. There is evidence of courts not consulting previous case law, which is regrettable. This may indicate an attitude of national superiority by States, or a lack of faith in other States legal systems. A project for The Special Commission might be to review past case law and make definitive interpretations available to States. This in conjunction with already initiated efforts to strengthen the reliability of the convention will no doubt ensure the validity for this to not only serve the purpose of prohibiting child abduction, but also serve as a means to fulfill the purpose in Article 1 of the statute of the Hague Conference of Private International Law. (See footnote 36.)

In the beginning when this instrument was in the drafting stages it was envisioned that the majority of cases were situations when a father, who felt shortchanged after custody proceedings, would snatch the kids away from the mother. In most cases the child’s primary caretaker had been his/her mother. In such instances, abduction would undeniably be a

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<sup>38</sup> Allen, Ernie, President and Chief Executive Officer, NCMEC – Foreword of the report (see next footnote)

<sup>39</sup> Lowe, Nigel & Armstrong, Sarah (2002) *Good Practice in Handling Hague Abduction Convention Return Applications*

<sup>40</sup> “INCADAT” The International Child Abduction Database

traumatic and harmful experience. Since the 70's however much headway, while uphill, has been made to give more consideration to the importance of the fathers role in a child's life. Today fathers in general are less frequently being so severely discounted in child custody proceedings, that as a majority, they are also less inclined to illegally take their children away from the mothers. Case history now reveals a different picture than that envisioned in the drafting stages of the convention. Since 1996 the collection of statistics reveal that a large majority of cases involve abductors who have primary custody and in many cases it is the mothers who abduct.<sup>41</sup>

What if a parent actually has grounds for abducting the child? But the application of this convention fails to investigate such grounds prior to enacting the established procedures that ensures the prompt return of the child to a habitual residence? In such cases, not only may this convention become a double-edged sword causing irreparable damage to both child and parent, but also Article 26 would add further insult to injury. Article 26 gives an indication on how the expense of applying this convention should be administered and reads in part that: "Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child." It most certainly would be a sad and unintended consequence that this convention could be used as a tool for legally supported abduction and perpetuation of abuse. "While acknowledging the stresses and strains to which the Convention is subject, as well as its occasional tragic failures, it is wise always to consider the broad question of whether the predicament of abducted children would be better or worse without it."<sup>42</sup>

#### 4.4 Statistics

Prior to the third Review Special Commission 1997 there was no organized standard for collecting statistics for review and analysis. Since many countries have joined the convention

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<sup>41</sup> There are no all-conclusive statistical records prior to 1996.

<sup>42</sup> Duncan, William (2000) *Action in Support of the Hague Child Abduction Convention: A View From the Permanent Bureau*



only recently, previous statistics would not yet be of relevance to analyze any trends. Though there are some statistics from individual countries that can be analyzed and compared to that of 1999, which was presented at the fourth Review Special Commission meeting 2001.

Beaumont & McEleavy talk about statistics and have some figures, from the report presented at the 1997 Review Special Commission, on numbers of applications made between 1994 and 1997, that they compare and comment. However these are not all conclusive and provide little information other than for speculation, which is often the lot of what statistics provide for anyway. “Of one matter there is no doubt: the importance of all Contracting States being required to compile and submit detailed statistics on an annual basis. Only then will it be possible to assess the true effectiveness of the instrument.”<sup>43</sup> I would like to add – that only then will certain trends become known and subject to analysis for corrective measures to cure their cause.

The objective of the 1999 report “was to obtain a clearer profile of the types of cases which are typically being dealt with in the context of the 1980 Convention, to map their outcomes and to provide some information concerning the time it takes for cases to be processed by the different national systems.”<sup>44</sup> 39 Contracting States completed a questionnaire and 954 cases involving 1394 children were analyzed. Throughout the report the abductor is referred to as the ‘taking person’ in an effort “To avoid being judgmental and to remain objective, we have been careful in the terminology used.”<sup>45</sup> Abductor is a harsh label usually construed as a negative. Considering that the merits of a case are not to be considered it is also not known if the act of abduction always is a negative. Changing the verbiage appears as a diplomatic stance taken by the authors of the report. Perhaps there is also a notion of trends deviating from those preconceived at the drafting of this treaty.

Considering the gender of the taking person, statistics reveal that 69% were female. In almost all applications females and males correspond to mothers and fathers. There are differences between regions, such as the taking person being female in between 88% and 100% of the applications received by Scandinavian countries. While all taking persons to Hong Kong and Bosnia were male. 52% of the taking persons were nationals of the state receiving the

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<sup>43</sup> Beaumont & McEleavy (1999) *The Hague Convention on International Child Abduction* p.15

<sup>44</sup> Hague Conference on Private International Law (2001) *A Statistical Analysis...* preface

<sup>45</sup> *ibid.* p.3

application. This figure however does not give a clear indication of how many were actually going home, since many of the taking persons are dual nationals. The proportion of male and female children was relatively equal in most Contracting States. “Of the 1363 children included, 42% were aged between 5 and 9 years old, 38% were aged between 0 and 4 years old, and 21% were aged between 10 and 16 years old.”<sup>46</sup> “50% of the applications, assuming the agreements or orders were actually enforced, ended in the return of the child. Of all applications that resulted in the return of the child, 64% were the result of judicial orders and the remaining 36% were the result of voluntary agreements.”<sup>47</sup> Here the statistics reveal that Contracting States ought to refine their process methods to comply with both Article 7c and 10 of the Convention. “The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.”<sup>48</sup> The primary reason (21%) for judicial refusal to return a child was Article 13b, which states “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 second most common reason (13%) was the objections of the child. A special note was made to comment the fact that Article 13b is the primary cause for refusal to return – “as general jurisprudence requires extreme justification for the use of this defense.”<sup>49</sup> Extreme justification?

#### 4.5 The Abductors

Who is the abductor? What kind of person commits such an act? Is it possible to delineate specific traits and establish descriptive profiles? Attempts have been made, yet conclusions often resolve that: “Sorting out motivations in an abduction is a difficult and complex task; ... no single profile of the abductor exists. Parents who abduct are motivated by a range of reasons, some seemingly noble and others clearly egocentric, such as when the child is being used as a pawn in a marital dispute. Rarely is a child snatching carried out with a clear intent to harm the child.”<sup>50</sup> However, since 1970s and the drafting of the Child Abduction Convention, there has been a change in the perception of who is likely to abduct. “The stereotype of a non-custodial father so desperate to have permanent contact with his children

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<sup>46</sup> *ibid.* p.11

<sup>47</sup> *ibid.* p.13

<sup>48</sup> Article 10, 1980 Convention on the Civil Aspects of International Child Abduction

<sup>49</sup> Hague Conference on Private International Law (2001) *A Statistical Analysis...* p. 17

<sup>50</sup> Greif & Hegar (1993) *When Parents Kidnap* p. 98

that he is willing to take them abroad would no longer appear to hold true. In most instances abductors now hold custody rights in respect of the removed or retained children, and abductors are just as, if not more, likely to be mothers as fathers.”<sup>51</sup> This fact is also clearly established by the recent statistics, as noted in the preceding chapter.

U.S. Department of Justice has published an information bulletin to help prevent and reduce the problem of parental abduction for families identified as at risk. “Social policy, consequently, is focusing on finding ways to identify potential custody violators early on and methods to prevent these painful and costly traumas.”<sup>52</sup>

In this bulletin, six profiles and five subgroups are identified.

1. When there has been a prior threat of or actual abduction.
2. When a parent suspects/believes abuse has occurred and friends and family members support these concerns.
3. When a parent is paranoid delusional.
4. When a parent is severely sociopathic.
5. When parents who are citizens of another country end a mixed culture marriage.
6. When parents feel alienated from the legal system and have family/social support in another community.

Specifically worth reiterating, is subgroup 5, as it directly pertains to the title of this essay. Also in light of what current statistics reveal about the most used judicial reason (Article 13b) to refuse the return of a child under the Child Abduction Convention. “Parents who are victims of domestic violence are at risk of abducting their child, especially when the courts and community have failed to take the necessary steps to protect them from abuse or to hold their abuser accountable, Joint custody, mediated agreements, and visitation orders too often leave victims vulnerable to ongoing violence, despite their separation from the abuser. When such victims abduct their child, the violent partners may successfully obscure the facts about the abuse and activate abduction laws to regain control of their victims.”<sup>53</sup> “Courts that place children with abusive parents or force visitation with them create some of the most compelling motivations for parental abduction. These are children who have been failed, at

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<sup>51</sup> Beaumont & McElevay (1999) *The Hague Convention on International Child Abduction* p.13

<sup>52</sup> U.S. Department of Justice (2001) *Family Abductors: Descriptive Profiles and Preventive Interventions*

<sup>53</sup> U.S. Department of Justice (2001) *Family Abductors: Descriptive Profiles and Preventive Interventions*

first by one parent, then by the system. The other parent may risk everything in an abduction attempt rather than fail them also.”<sup>54</sup>

What appears evident is that parental abductions in general are preceded by severe frustrations and lengthy unresolved conflicts between the parents. Which in most cases would be considered abusive toward a child in and of itself. While alienation is not synonymous to physical distance, it may in the case of parental abduction be thought of as a way to make it visible.

#### 4.6 Domestic Violence

“The Convention makes almost every domestic violence victim who goes abroad with her child subject to the remedy of return.”<sup>55</sup> “Common sense might dictate that a victim who removes her child from a country in order to escape domestic violence has not engaged in a ‘wrongful removal’... but the case law of the Hague Convention sometimes lacks common sense.”<sup>56</sup> While the Convention is effective in dealing with those abductions it was intended for, it does little to protect the victims of domestic violence. “Because the Convention has been such a welcome development, it has generally been insulated from the scholarly and critical examination to which any area of the law should be subjected.”<sup>57</sup>

As previously mentioned, a vast amount of case law has been generated concerning the interpretation of *habitual residence*. “In no other area of private international law has so much case law been generated on the meaning of the concept.”<sup>58</sup> This preoccupation with *habitual residence* has perhaps been to the detriment of discovering valuable insights sooner about unforeseen outcomes of the Convention, such as those surrounding the issue of domestic violence. “... Judges, practitioners, and researchers around the world have recently realized that domestic violence sometimes exists in the lives of women who ‘abduct’ their own children.”<sup>59</sup> “The formal recognition that child abductors can be victims of domestic violence

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<sup>54</sup> Greif & Hegar (1993) *When Parents Kidnap* p. 256

<sup>55</sup> Weiner (2000) *International Child Abduction and the Escape from Domestic Violence*

<sup>56</sup> *ibid.*

<sup>57</sup> Kaye, Miranda (1999) *The Hague Convention and the Flight from Domestic Violence*

<sup>58</sup> Beaumont & McEleavy (1999) *The Hague Convention on International Child Abduction* p. 4

<sup>59</sup> Weiner (2000) *International Child Abduction and the Escape from Domestic Violence*.

is relatively recent.”<sup>60</sup> Since the Convention’s primary aim is a speedy return to the habitual residence, there is also caution to narrowly interpret the defenses for such returns, as they tend to delay the return where the defense is found to be insufficient. “This overriding concern not to undermine the Convention has meant that a decision to return a child will generally be considered a ‘good’ decision per se.”<sup>61</sup>

One story that the world has been made aware of is that of Betty Mahmoody<sup>62</sup> who managed to flee the abuse of her husband and rescue/abduct her daughter from a terrible situation of captivity. This dramatic story was made into a movie and few would not agree that she did the right thing, considering the given circumstances. Yet, in light of the principles of the Convention, enough time had been spent in the father’s country for it to be considered the habitual residence. Thus, had the father been able to make an application for the return of the child under the Convention, it is likely that Mrs. Mahmoody and her daughter would have been ordered to return and be subjected to the abuse again. After the return to the U.S., Mahmoody<sup>63</sup> tells of the difficulties in readjusting to ‘normal’ life, how she constantly feared retaliation from her daughter’s father and how distraught she was that legislation had little to offer her and her daughter in the form of protection.

Talking about domestic violence in relation to the Child Abduction Convention, Miranda Kaye<sup>64</sup> has through case study revealed the reoccurring position of courts to give little or no consideration for a mother’s reason to abduct. The abducting mother is considered the problem instead of the violent other parent. The abductor should have sought to resolve the problem in the habitual residence instead. Given the indications that a proportion of women who abduct their children are women who are seeking to protect themselves and/ or their children, it is clear that decision-makers in Convention cases need an understanding of domestic violence. However, ... such understanding is often not apparent in Hague cases.”<sup>65</sup>

Perhaps to justify turning deaf ears to a domestic violence victim’s plea, there appears to be an unrealistic faith in the legal systems of the countries to which children are returned. Another “reason that is sometimes given by the court for ordering return is that it would be

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<sup>60</sup> Ibid.

<sup>61</sup> Kaye, Miranda (1999) *The Hague Convention and the Flight from Domestic Violence*

<sup>62</sup> Mahmoody & Hoffner (1988) *Inte utan min dotter*

<sup>63</sup> Mahmoody & Dunchock (1992) *Kärleken till ett barn*

<sup>64</sup> Kaye, Miranda (1999) *The Hague Convention and the Flight from Domestic Violence*

'presumptuous and offensive' for a court in the overseas country to conclude that the wife and the children are not capable of being protected by the courts of the country of habitual residence."<sup>66</sup> A political game of diplomacy, where those in need become subjected to the arbitrary presumptions of those administering the Convention. "The discretionary test of the best interests of an individual child is not the paramount concern under the Convention. The Convention operates on the basis that it is in the best interest of all children for issues of their welfare to be determined by the courts of the country in which they are habitually resident."<sup>67</sup>

Knowledge about the effects of abduction on children is incomplete. "Despite a greater understanding today of who abducts and why, some individuals continue to suggest that abductions almost always harm children."<sup>68</sup> At the same time the effects on children who witness domestic violence is proportionally not taken into consideration. "Specific research comparing the benefits and disadvantages of abduction for children who are taken from abusive households by their primary caretakers would be extremely useful."<sup>69</sup> "Once we acknowledge that harm does not befall every abducted child, or that the harm experienced from abducting may be less than the harm encountered from not abducting, we can begin to appreciate that some abductors do not abduct for selfish reasons."<sup>70</sup>

Another appalling challenge to deal with when considering domestic violence in conjunction with the Child Abduction Convention is the normalizing of violence. Clearly the best interest of a child is not considered when a court dismisses the defense of Article 13b by stating "as so many women are targets of violent men then to recognize such violence in Hague cases would effectively undermine the Convention."<sup>71</sup> "Because violence against women is so common it is not exceptional."<sup>72</sup> "Language and themes in the Hague cases which minimize, trivialize or normalize violence against women and children are in danger of colluding with the violent partner."<sup>73</sup> One major remedy would be for all countries to improve legislation, international cooperation and social work encompassing issues of domestic violence and family relations. The development and expansion of men's crisis centers is a positive stride in that direction. It

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<sup>65</sup> *ibid.*

<sup>66</sup> *ibid.*

<sup>67</sup> Kaye, Miranda (1999) *The Hague Convention and the Flight from Domestic Violence*

<sup>68</sup> Weiner (2000) *International Child Abduction and the Escape from Domestic Violence*

<sup>69</sup> *ibid.*

<sup>70</sup> *ibid.*

<sup>71</sup> Kaye, Miranda (1999) *The Hague Convention and the Flight from Domestic Violence*

<sup>72</sup> *ibid.*

<sup>73</sup> *ibid.*

is not only about women and children, but humanity as a whole and we benefit from both parents. World Peace starts at home.

## **5. Concluding Reflections**

Whenever my experience appears to be beyond reason – my propensity is to turn toward the metaphysical. In the vein of Habermas I understand that the metaphysical explanations are not always well received – while I also tend to believe that my metaphysical understanding is beyond explanation. Thus, my effort in dealing with the subject of this essay has been to expose some of the oversights within the established system that regulates the issue. My personal answer to the problem is ultimately metaphysical, though in this essay I refrain from that direction, as my perception is that the lot of such a solution would be discounted as imaginary.

Having just stated that I will refrain from the metaphysical direction in this essay it is difficult for me, and would be out of character, to completely eradicate all traces of such thinking within me in my written expression. It will seep through. Having said that, I begin by stating that it is advantageous to look for the silver lining surrounding every dark cloud until the cloud disappears, as an alternative strategy to relate to everything considered problematic. While contemplating problem areas I find my internal search engine still wanting to move in familiar tracks. Searching out all the areas that are complicated and engaging to analyze the difficulties. To what end? Is it really interesting to understand the construction of the difficulty? Yes, but once a clue is given – the primary effort should be directed towards constructive resolution. Yet, for the sake of enrolling others to support the solution, it is at times perceived as necessary to expand on the extent of the problem. In order to achieve the necessary consensus required in implementing a legally binding structure change – historically it seems the problems need to be expounded and stretched to their extreme.

Consider for example a current issue: Is it not bad enough that 20 million people in Iraq live under the oppression of a dictator before starting to sketch on constructive solutions. Even among the people who are directly subject to the imposed horrible consequences of war, there are those who have resolved that war is the only and ultimate solution for change to come

about. Does the rest of the world really need to stand by and watch while a few others are actively engaged in driving an already unacceptable situation towards explosive, destructive and extreme ends? What will it take to create a critical shift in human consciousness to begin moving in a more humane and constructive direction? Must we first once again face the horrific consequences of war? How much proof about the consequences of applying the Child Abduction Convention do we need to produce before certain procedures and support mechanisms will begin to improve?

While this essay is an assignment towards earning my academic degree, my intention is also to convey some information about the issue of transnational child custody disputes taken to an extreme. This is done with an ambition to be descriptive but will hopefully also at least hint that the initial thesis: *that The Rights of the Child are still neglected and that lacking cooperation cause undue suffering* is supported. In order to remedy unintended consequences it is imperative that global cooperation concerning human rights and welfare issues improve. A reconciliation of the views of what is best for the child, i.e. adherence to the Child Convention, is fundamental in order to support such global cooperation. In order to maximize the efficacy of the Child Abduction Convention, uniform application through the sharing of information and interpretations is also necessary. Learning that some mothers abduct their children in order to flee domestic violence ought to trigger nations to continue to improve legislation and social work programmes. Some children may be spared the experience of abduction if there are national social support mechanisms and effective legislation dealing better with domestic violence.

There remains however some blind spots still needing exposure to light. Further studies examining the effects on children subjected to abduction is only one such blind spot. This is ethically difficult until the child is considered to be of age. Nonetheless, invaluable information could be derived from such research. Since the bulk of the existing research in this area is produced from judicial perspectives, it is high time that more sociological research makes a contribution, as this definitely is a social concern.

In the end I want to express appreciation towards circumstances and coincidences of life, which have pointed me in the direction of choosing the subject issue for my thesis paper. "Difficult" situations and people have provided uncanny learning opportunities. As a mother I have been privileged to learn more about the meaning of detachment and unconditional love



than had been the case under “normal” circumstances. As a student I have been challenged to learn more about the meaning of objectivity and integrity. My heartfelt gratitude goes to everyone I have encountered who in various ways have enlightened and supported me to make this investigation and writing assignment a part of my healing process.

*Experience is not what happens to a man,  
it is what a man does with what happens to him.*<sup>74</sup>

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<sup>74</sup> Aldous Huxley (1894-1963) *Texts and Pretexts*, 1932, Introduction

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**CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION**  
(Concluded October 25, 1980)

The States signatory to the present Convention,  
Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,  
Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,  
Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions -

**CHAPTER I - SCOPE OF THE CONVENTION**

*Article 1*

The objects of the present Convention are -

- a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
- b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

*Article 2*

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

*Article 3*

The removal or the retention of a child is to be considered wrongful where -

- a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
- b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

*Article 4*

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

*Article 5*

For the purposes of this Convention -

- a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;
- b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

**CHAPTER II - CENTRAL AUTHORITIES**

*Article 6*

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

Federal States, States with more than one system of law or States having autonomous territorial organizations shall be free to appoint more than one Central Authority and to specify the territorial extent of their powers. Where a State has appointed more than one Central Authority, it shall designate the Central Authority to which applications may be addressed for transmission to the appropriate Central Authority within that State.

*Article 7*

Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective State to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures -

- a) to discover the whereabouts of a child who has been wrongfully removed or retained;
- b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;
- c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;
- d) to exchange, where desirable, information relating to the social background of the child;
- e) to provide information of a general character as to the law of their State in connection with the application of the Convention;
- f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;
- g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;
- h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;
- i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.

**CHAPTER III - RETURN OF CHILDREN**

*Article 8*

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain -

- a) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;
- b) where available, the date of birth of the child;
- c) the grounds on which the applicant's claim for return of the child is based;
- d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by -

- e) an authenticated copy of any relevant decision or agreement;
- f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;
- g) any other relevant document.

#### *Article 9*

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

#### *Article 10*

The Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

#### *Article 11*

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.

#### *Article 12*

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

#### *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.

#### *Article 14*

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

#### *Article 15*

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

#### *Article 16*

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

*Article 17*

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

*Article 18*

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

*Article 19*

A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

*Article 20*

The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

CHAPTER IV - RIGHTS OF ACCESS

*Article 21*

An application to make arrangements for organizing or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child.

The Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfillment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.

The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

CHAPTER V - GENERAL PROVISIONS

*Article 22*

No security, bond or deposit, however described, shall be required to guarantee the payment of costs and expenses in the judicial or administrative proceedings falling within the scope of this Convention.

*Article 23*

No legalization or similar formality may be required in the context of this Convention.

*Article 24*

Any application, communication or other document sent to the Central Authority of the requested State shall be in the original language, and shall be accompanied by a translation into the official language or one of the official languages of the requested State or, where that is not feasible, a translation into French or English.

However, a Contracting State may, by making a reservation in accordance with Article 42, object to the use of either French or English, but not both, in any application, communication or other document sent to its Central Authority.

*Article 25*

Nationals of the Contracting States and persons who are habitually resident within those States shall be entitled in matters concerned with the application of this Convention to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.

*Article 26*

Each Central Authority shall bear its own costs in applying this Convention.

Central Authorities and other public services of Contracting States shall not impose any charges in relation to applications submitted under this Convention. In particular, they may not require any payment from the applicant towards the costs and expenses of the proceedings or, where applicable, those arising from the participation of legal counsel or advisers. However, they may require the payment of the expenses incurred or to be incurred in implementing the return of the child.

However, a Contracting State may, by making a reservation in accordance with Article 42, declare that it shall not be bound to assume any costs referred to in the preceding paragraph resulting from the participation of legal counsel or advisers or from court proceedings, except insofar as those costs may be covered by its system of legal aid and advice.

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

*Article 27*

When it is manifest that the requirements of this Convention are not fulfilled or that the application is otherwise not well founded, a Central Authority is not bound to accept the application. In that case, the Central Authority shall forthwith inform the applicant or the Central Authority through which the application was submitted, as the case may be, of its reasons.

*Article 28*

A Central Authority may require that the application be accompanied by a written authorization empowering it to act on behalf of the applicant, or to designate a representative so to act.

*Article 29*

This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

*Article 30*

Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.

*Article 31*

In relation to a State which in matters of custody of children has two or more systems of law applicable in different territorial units -

- a) any reference to habitual residence in that State shall be construed as referring to habitual residence in a territorial unit of that State;
- b) any reference to the law of the State of habitual residence shall be construed as referring to the law of the territorial unit in that State where the child habitually resides.

*Article 32*

In relation to a State which in matters of custody of children has two or more systems of law applicable to different categories of persons, any reference to the law of that State shall be construed as referring to the legal system specified by the law of that State.

*Article 33*

A State within which different territorial units have their own rules of law in respect of custody of children shall not be bound to apply this Convention where a State with a unified system of law would not be bound to do so.

*Article 34*

This Convention shall take priority in matters within its scope over the Convention of 5 October 1961 concerning the powers of authorities and the law applicable in respect of the protection of minors, as between parties to both Conventions. Otherwise the present Convention shall not restrict the application of an international instrument in force between the State of origin and the State addressed or other law of the State addressed for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organizing access rights.

*Article 35*

This Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States.

Where a declaration has been made under Article 39 or 40, the reference in the preceding paragraph to a Contracting State shall be taken to refer to the territorial unit or units in relation to which this Convention applies.

*Article 36*

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

CHAPTER VI - FINAL CLAUSES

*Article 37*

The Convention shall be open for signature by the States which were Members of the Hague Conference on Private International Law at the time of its Fourteenth Session.

It shall be ratified, accepted or approved and the instruments of ratification, acceptance or approval shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

*Article 38*

Any other State may accede to the Convention.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The Convention shall enter into force for a State acceding to it on the first day of the third calendar month after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Kingdom of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the first day of the third calendar month after the deposit of the declaration of acceptance.

*Article 39*

Any State may, at the time of signature, ratification, acceptance, approval or accession, declare that the Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect at the time the Convention enters into force for that State.

Such declaration, as well as any subsequent extension, shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

*Article 40*

If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to matters dealt with in this Convention, it may at the time of signature, ratification, acceptance, approval or accession declare that



this Convention shall extend to all its territorial units or only to one or more of them and may modify this declaration by submitting another declaration at any time.

Any such declaration shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands and shall state expressly the territorial units to which the Convention applies.

*Article 41*

Where a Contracting State has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or ratification, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of Article 40 shall carry no implication as to the internal distribution of powers within that State.

*Article 42*

Any State may, not later than the time of ratification, acceptance, approval or accession, or at the time of making a declaration in terms of Article 39 or 40, make one or both of the reservations provided for in Article 24 and Article 26, third paragraph. No other reservation shall be permitted.

Any State may at any time withdraw a reservation it has made. The withdrawal shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

The reservation shall cease to have effect on the first day of the third calendar month after the notification referred to in the preceding paragraph.

*Article 43*

The Convention shall enter into force on the first day of the third calendar month after the deposit of the third instrument of ratification, acceptance, approval or accession referred to in Articles 37 and 38.

Thereafter the Convention shall enter into force -

(1) for each State ratifying, accepting, approving or acceding to it subsequently, on the first day of the third calendar month after the deposit of its instrument of ratification, acceptance, approval or accession;

(2) for any territory or territorial unit to which the Convention has been extended in conformity with Article 39 or 40, on the first day of the third calendar month after the notification referred to in that Article.

*Article 44*

The Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 43 even for States which subsequently have ratified, accepted, approved it or acceded to it.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Kingdom of the Netherlands at least six months before the expiry of the five year period. It may be limited to certain of the territories or territorial units to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

*Article 45*

The Ministry of Foreign Affairs of the Kingdom of the Netherlands shall notify the States Members of the Conference, and the States which have acceded in accordance with Article 38, of the following -

(1) the signatures and ratifications, acceptances and approvals referred to in Article 37;

(2) the accessions referred to in Article 38;

(3) the date on which the Convention enters into force in accordance with Article 43;

(4) the extensions referred to in Article 39;

(5) the declarations referred to in Articles 38 and 40;

(6) the reservations referred to in Article 24 and Article 26, third paragraph, and the withdrawals referred to in Article 42;

(7) the denunciations referred to in Article 44.

In witness whereof the undersigned, being duly authorized thereto, have signed this Convention.

Done at The Hague, on the 25th day of October, 1980, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Kingdom of the Netherlands, and of which a certified copy shall be sent, through diplomatic channels, to each of the States Members of the Hague Conference on Private International Law at the date of its Fourteenth Session.