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Some Challenging Issues in the Application of the
Convention on the civil aspects of International Child Abduction

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SOME CHALLENGING ISSUES IN THE APPLICATION OF THE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

The 1980 Child Abduction Convention¹ was adopted in response to the problem of cross-border child abductions in the context of domestic disputes.

The Convention is premised on the recognition of the need to protect children internationally from the harmful effects of their wrongful removal. The authorities of the child's "habitual residence" are, in principle, in a better position to determine issues of fact and to decide any disputes involving custody and access, including the right of a parent to relocate with the child in another country.

The Convention's central operating feature is the return remedy. When a child is "wrongfully removed" (or retained) he will promptly be returned to the State of his habitual residence, save for a few exceptional circumstances.

As simple as the return remedy may look, its day to day application over the last 40 years or so has proven to be more complicated than expected.

In the context of this session which invites us to delve into the challenging issues that arise in cross-border disputes, I will speak about three specific challenges related to parental child abduction that confront those charged with the day-to-day application of the 1980 Convention:

- Time is of the essence
- The "best interests" of the child
- The "grave risk" exception and domestic violence

Time is of the essence

The Convention's central operating feature is the return remedy.

¹ The Convention on the Civil Aspects of International Child Abduction was adopted on 24 October 1980 by the Fourteenth Session of the Hague Conference on private international law and signed on 25 October 1980.

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The Convention seeks to secure the “prompt return” of the children wrongfully removed to (or retained in) any Contracting State (Preamble).

The Contracting States shall use the “*most expeditious procedures available*” in order to secure the implementation of the objects of the Convention, including the restoration of the *status quo* by means of the prompt return of the child (article 2).

The authorities of the State of refuge shall act “expeditiously” in proceedings for the return of a child (article 11).

If the authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the left behind parent and the Central Authority shall have the right to request a “statement of the reasons for the delay” (article 11).

When a child under the age of 16 has been wrongfully removed (or retained), the authorities of the requested State must order his/her return “forthwith” (article 12).

Article 11 refers to “a decision”, but I suggest that one should read in these words the word “enforceable” – an enforceable decision – in order for the expeditious treatment of the return applications to be meaningful and faithful to the objectives of the Convention.

There is a recent example involving the return of a child from State Y to Canada.

The child, a five-year old boy, was wrongfully taken to State Y by the mother in early May 2014.

It was not before mid-September that the child was finally located.

In a judgment rendered orally from the bench on February 11, 2015, the judge ordered the return of the child to Canada within a delay of 2 weeks.

So far so good! The problem however is that the return order is not enforceable in State Y until a written judgment is prepared and signed by the judge.

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In this case, it took 10 months for the written decision to be available for the parties, on December 10, 2015.

And, of course, as could be expected, the decision was immediately brought to appeal by the mother.

Her appeal was dismissed in the following weeks, but the child has not yet returned to Canada.

And I do not know if he will, or when he will, inasmuch as the media and the politicians are now involved.

It is quite obvious to me that time is of the essence if the *1980 Child Abduction Convention* is to be efficient and meaningful. The very words of the Convention do confirm this. So does the judicial experience in the handling of these cases.

This is an area where all efforts should be made for the applications to proceed expeditiously, from the legislative branch in providing for the most expeditious procedure available to the judicial and administrative authorities seized with the return application.

We all know how difficult it is to order the return of a child when time goes by.

There is a direct relationship between the delay elapsed since the removal of the child and the difficulty of the case.

The longer the delay, the more difficult the decision.

In the end, the delay elapsed since the removal of the child becomes a reason not to return the child, even when it is not presented this way by the party contesting the application for return. The reality is that the clock of time always runs in favour of the parent opposing the return, and often against the child's best interests.

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The challenge for the judge seized with a return application is to move expeditiously, while making sure at the same time that the voice of those opposing the return is heard.

The challenge is particularly difficult in those cases where the facts are contested and experts' testimony, required.

In my experience, there is no doubt that, in order for a return application to proceed expeditiously, it must be subjected to close case management by the requested court, from the very date of commencement of the proceedings to the end.

It may sound outrageous to some but it is clear in my mind that the matter cannot be left in the hands of counsel representing the parties if it is to proceed expeditiously.

The *1980 Child Abduction Convention* was built around a summary process to be decided within six weeks. The Convention has no future if judges, counsel and parties enter into 10, 15 or 20 day trial to decide return applications.

The convention has no more future if judges take months to render an enforceable decision.

Time is of the essence in child abduction cases.

THE BEST INTERESTS OF THE CHILD

The *1980 Child Abduction Convention* provides for a civil remedy designed to restore the pre-abduction *status quo* by mandating the immediate return of the child to the State of his/her habitual residence, save in the presence of the few exceptional situations provided for in the Convention.

The *Convention* invites judges to proceed in a manner that may seem, at first blush, unusual, i.e. to resist their natural and professional inclination of tending to the child's best interests based on their own appreciation of the circumstances.

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The *Convention* explicitly sets out that a decision concerning the return of the child shall not be taken to be a determination on the merits of any custody issue (article 19).

The premise of the *1980 Child Abduction Convention* is that the authorities in the child's habitual residence are the proper ones to make decisions about the long-term custody arrangement required to foster her/his best interests. The underlying assumption is therefore that the prompt return of the child to the country where he/she was habitually resident before the removal will serve his/her best interests.

There are however circumstances where this assumption is wrong. The exceptions set out by the Convention reflect this reality. There are exceptional circumstances in which the return of the child is no longer in his/her best interests.

This is the case when the child, who has attained an age and degree of maturity at which it is appropriate to respect his/her views, objects to being returned (article 13).

This is also the case when there is a grave risk that the return would expose the child to physical or psychological harm or otherwise place him/her in an intolerable situation (article 13b).

This is the case when the proceeding for return is brought more than one year from the date of the wrongful removal (or retention) and the proof is made that the child is now settled in his/her new environment (article 12).

Finally, this is also the case when the return of the child would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms (article 20).

The approach and structure of the *1980 Child Abduction Convention* suggest that one would be misguided to subordinate the return of the child, outside these few exceptions, to a consideration of his/her best interests or welfare.

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The return application is not, and should never be, a proceeding in which the upbringing of the child is at issue.

Even the “grave risk” exception (article 13b), albeit created to take into consideration the interests of the very child concerned by the return application, should not serve as a pretext for a full-scale inquiry into the custody issue. This issue ought to be left to the authorities of the State of habitual residence.

Spanish professor Elisa Perez-Vera was the *Rapporteur* to the Special Commission that negotiated the *1980 Child Abduction Convention*. Her report serves as the official commentary on its provisions.

Professor Perez-Vera explains why the return of the child ought not to be subordinated, in all cases, to a consideration of his/her best interests.

Essentially, this “best interests in all cases” approach was discarded for two reasons. Firstly, the “best interests of the child” legal standard is so vague that one can hardly put flesh on its bare bones without delving into assumptions derived from the moral framework of a particular culture (para. 21). Secondly, it is by invoking “this standard” that judges have in the past often awarded the custody to the taking parent. It can happen that such a decision is the proper one – who knows? – but the fact is that the recourse by the authorities of the State of refuge to such a standard involves the risk of their expressing particular cultural and social attitudes which themselves derive from a given national community and therefore, basically imposing their own subjective value judgments upon the national community from which the child was abducted (para. 22).

For these reasons, the *Convention* contains no explicit reference to “the best interests of the child” standard qualifying the Convention’s stated object to secure the prompt return of the child who has been wrongfully removed (or retained).

However, the silence of the Convention on this point ought not to lead one to the conclusion that it ignores the social paradigm which declares the necessity of

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considering the interests of the child in every decision concerning him or her. The Preamble of the Convention makes it clear that the signatory States are “firmly convinced that the interests of children are of paramount importance in the matters related to their custody”. And it is precisely because of this conviction that they drew up the Convention with the desire “to protect children internationally from the harmful effects of their wrongful removal or retention”, “to establish procedures to ensure their prompt return to the State of their habitual residence”, and finally, “to secure protection for right of access”.

The *1980 Child Abduction Convention* is not premised on the best interests of each individual child as measured in the context of a given case. It is rather premised on the best interests of children collectively, as a matter of principle across all abduction cases.

The two objectives of the *Convention* – the one preventive (to ensure that rights of custody are respected) and the other, curative (to secure the prompt return of the child to his/her habitual environment) – both correspond to a specific idea of what constitutes the “best interest of the child”.

Abduction is generally perceived to be a bad thing for the child and, by extension, a prompt return to his/her habitual residence, to be a good thing. However, given the fact that there may be some situations where the removal of the child was justified by objective reasons, and not harmful, the Convention recognises the need for certain exceptions.

These exceptions must be applied only so far as they go if the Convention is not to become a dead letter. An expansive, or generous, application of the exceptions would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual trust which is its inspiration.

Domestic violence and article 13b

The application of the “grave risk exception” in a context of domestic violence is a difficult issue in the modern world we live in.

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The use of the word “otherwise” in the last part of article 13b points to the conclusion that the physical or psychological harm contemplated is “harm to a degree that also amounts to an intolerable situation”,² a “situation which this particular child, in the particular circumstances, should not be expected to tolerate”.³

Despite the wisdom and clarity of these words, judges may have different views about the level of harm that a child should not be expected to tolerate. This in itself represents a serious difficulty in any effort to strive for a consistent application of the Convention throughout the world.

Nowadays, the most common case of parental child abduction is that of a primary caregiver (generally the mother) whose relationship with the other parent has broken down and who flees with the child, often to go back to her own family, far away.

And a vast majority of these mothers claim to be victims of domestic violence.

It is not contested that domestic violence is relevant where it relates to the “grave risk” exception.

There are things which it is not reasonable to expect a child to tolerate.

Among these, courts now say, “can be exposure to the harmful effects of seeing and hearing the physical or psychological abuse of her own parent”.⁴ Domestic violence may have a far greater impact than the immediate harm caused. It may have devastating consequences for the immediate victims and a traumatic effect on those who witness it, particularly the children.

The notion of “domestic violence” is not defined in the Convention.⁵

² *Thomson v. Thomson*, [1994] 3 S.C.R. 551, p. 596.

³ *Re D (A Child) (Abduction: Rights of Custody)*, [2006] UKHL 51, [2007] 1 AC 169, at para. 52.

⁴ *Re E (Children) (Wrongful Removal: Exception to return)*, [2011] UKSC 27, para. 8.

⁵ The social science literature refers to domestic violence as a pattern of abusive and threatening behaviour that may include physical, emotional, economic and sexual violence, as well as intimidation, isolation and coercion. The overall goal of domestic violence is for one partner to

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In the light of the broad definition of domestic violence proposed in the social science literature, the difficulty for the judge seized with a return application is to identify the situation of domestic violence where there is a grave risk that *the return* of the child will expose him/her to physical or psychological harm amounting to an intolerable situation and no adequate arrangements can be made to secure his/her protection of the child after the return.

It is important to understand that returning the child to his/her home State is not necessarily the same as returning him/her to the person requesting the return or to the family environment he/she lived in before the abduction.

Where allegations of domestic violence are made, the first difficulty may well be to identify the role of the court seized with the return application.

At one end of the spectrum, there are courts that, in order to ascertain the presence or absence of a “grave risk” related to the return of the child, do not hesitate to investigate actively the veracity of the allegations made by the taking parent.

At the other end of the spectrum, there are courts taking the position that their task is to assess a risk, not to resolve factual disputes such as “she says/he says”; their task is therefore perceived to be essentially forward-looking, requiring them to focus on the conditions and circumstances of the child’s return and to determine whether this would place him/her at a grave risk of harm, including assessing the availability and adequacy of possible measures of protection to ensure the safe return of the child.

Whatever its position on this spectrum, any Court seized with a return application must be mindful of its *summary* nature and of the need to proceed expeditiously.

Counsel for the taking parent in a case where allegations of domestic violence are made will often feel the necessity of informing the judge about the dynamics of domestic

establish and exert power and control over the other. The essence of this approach to domestic violence is that perpetrators of violence will use any available form of control to coerce their less powerful partner into compliance.

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violence. This may include informing the judge about coercive control and the dynamics of domestic abuse in order to explain their client's often passive behaviour before fleeing and to show that their client cannot safely return to the State of habitual residence, with or without undertakings on the part of the left-behind parent or mirror orders.

All of this takes time! The challenge of balancing the objective of prompt return with the taking parent's legitimate need to prepare him/her case may prove to be a difficult one. The difficulty is compounded by the fact that the left-behind parent is at a serious disadvantage, at least in respect of distance, in his/her efforts to contest the allegations of abuse.

There is no easy solution to the challenge of applying the *1980 Child Abduction Convention* in a context of domestic violence. Any solution must be respectful of the objectives, letter and spirit of the Convention and, at the same time, be sensitive to the needs of the victims of domestic violence.

For one, I believe that the only pragmatic solution lies in the efficacy of the protective measures to be put in place in the State of the habitual residence to ensure the safety of the child upon his or her return and, when the circumstances command it, that of the taking parent.

The difficulties relevant to the application of the grave risk exception in the context of domestic violence stem from the fact that we are confronted here with two social evils – international parental child abduction and domestic violence – which we would both like to fight vigorously and efficiently.

Yet, the *1980 Child Abduction Convention* was designed to address child abduction, not domestic violence.

Domestic violence is a real problem, a social evil that no one can pretend to ignore. However, nothing positive will be achieved by applying the “grave risk” exception liberally when the wrongful removal of a child occurs in a context of domestic violence.

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CONCLUSION

The *1980 Child Abduction Convention* was conceived to deter parents from abducting their children when their relationship breaks down. If the child is illegally removed, he/she will be returned forthwith to the State where he/she came from, leaving the authorities of the State of habitual residence to decide what is best for his/her future.

The return mechanism is simple, efficient. If applied properly, and expeditiously throughout the Hague community of States, it will deter parents from abducting their children.

But the *Convention* is also a fragile instrument. It is built on trust. Trust that the authorities of the requested State will be faithful to the letter and to the spirit of the *Convention* when called upon to apply it. Trust that the authorities of the State of habitual residence are in a better position to decide all questions regarding the future upbringing of the child.

Time is of the essence in child abduction cases. The return remedy is the *1980 Child Abduction Convention's* central operating feature. It works if the return applications are decided expeditiously. If not, it will not work.

The best interests of the child is, of course, a very important social paradigm but, be that as it may, the *Convention* contains no reference to this paradigm qualifying the *Convention's* stated objet of securing the prompt return of a wrongfully removed or retained child. It would be misguided to subordinate the return of a child to a consideration of his/her best interests or welfare, save, of course, for the few exceptions found in the *Convention*.

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