

THE HAGUE CONVENTION ON PARENTAL CHILD ABDUCTION: IMPLICATIONS OF THE „MISSING“ PRIMARY CARER

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Abstract

In this work I analyze application of the Hague Convention on Parental Child Abduction (1980) in growing number of maternal abduction cases today. These often respond to a different and largely gendered set of factors, such as domestic violence or financial vulnerability due to caretaking responsibilities. In the gender-legal analysis of the Convention, I demonstrate that these factors are not provided necessary attention in the original text since maternal abductions were not anticipated by the drafters of the Convention. This contributes to further disadvantaging of the primary carers, mainly in their choices regarding life and residence of the child after separation of the parents. Selected cases of abductions by mothers from Poland, Hungary, the Czech Republic and Slovakia show largely homogeneous practices across the region. Such unchallenged compliance however narrows the already limited possibilities to address the role of the primary carer in the Convention and eventually to respond to the growing incidence of maternal abductions.

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Introduction

As a result of globalization and people moving relatively freely across the globe, temporarily or migrating for a lifetime, international marriages have become a largely commonplace practice. This shift has necessarily added a new layer to the practice of family law, going beyond national levels and arriving with new legal instruments to address the complex situations when such marriages fail. In this context, international parental child abduction emerges as one of the most problematic issues, followed by a need for an adequate response beyond the national level. The 1980 Hague Convention on the Civil Aspects of International Child Abduction¹ (hereafter referred to as “the Hague Convention” or the “Convention”) was designated to provide precisely the much needed response to the growing incidence of children who are wrongfully removed or retained by one of the parents.

Beaumont and McEleavy identified the Convention as a “ground-breaking instrument within the realms of private law.”² Yet, as they along with others point out,³ new issues and challenges have surfaced since its ratification in 1980, the most important being the rapidly changing ratios of mothers and fathers abducting, with mothers becoming the majority abductors in the signatory-states, even sole abductors in some.⁴ The original paradigm of the non-custodial father abducting to gain more control over the life and cultural/religious upbringing of the child is thus being replaced by mother abductors, who are in most cases also the primary carers of the children. Fulfilling its deterrent function, the Convention helped decrease numbers of the would-be father abductors. Yet it did not foresee, that in cases of

¹ *Convention on the Civil Aspects of International Child Abduction*. <http://www.hcch.net/upload/conventions/txt28en.pdf> (accessed June 2, 2013).

² Paul R. Beaumont, and Peter E. McEleavy, *The Hague Convention on International Parental Child Abduction*, (New York : Oxford University Press, 1999).

³ Beaumont and McEleavy, Lubin, Bruch, Buck, Norris

⁴ Anne Tuohey, *Living in Limbo: The experience of International Parental Child Abduction*, (Melbourne: International Social Service Australian Branch, 2005) [http://www.iss-ssi.org/2009/assets/files/Mediation/ISS_Australia_Living in Limbo.pdf](http://www.iss-ssi.org/2009/assets/files/Mediation/ISS_Australia_Living%20in%20Limbo.pdf) (accessed June 2, 2013).

abductions by the primary carers, a more sensitive approach might be required to ensure a fairer case resolution with respect to wellbeing of the child. The function and the different relationship of the child and the primary carer, who in most cases is the mother,⁵ are not recognized and as such not incorporated in the text. This further reflects in the rulings where the abducting mothers are left with two options, returning the child alone, or returning together with the child. This might be specifically difficult in the context of domestic violence at the place of habitual residence.

Therefore, the main question in my study is whether the Hague Convention on Parental Child Abduction (unintentionally) contributes to shaping of an unfavorable position of the primary carer and if yes, how this plays out in cases of maternal child abductions. In order to elicit answers to these, I will first analyze the specific elements of the Hague Convention which are believed to be working towards disregarding of the primary carers. Secondly, I will examine how the absence of the primary carer in the Convention reflects in the case resolutions of maternal child abductions in Poland, Hungary, the Czech Republic and Slovakia.

In my analysis, I will show that by not considering the often gender-specific motivations for abduction and by insisting on reestablishing of the child's *status quo ante* without recognizing the primary carer as a crucial component of it, the Convention contributes to disadvantaging of the primary carers and further limits their decisions regarding the life and residence after separation of the parents. And thus, the main hypothesis of this paper is that, as a result of being disregarded in the original text, mothers as primary carers are often disadvantaged by the Convention. This further translates into strict and typically insensitive court rulings. The importance of a more sensitive and primary-carer inclusive approach will

⁵ Pamela Laufer-Ukules, "Selective Recognition of Gender Difference in the Law: Revaluing the Caretaker Role," *Harvard Journal of Law & Gender*, 31 (2008): 1-66.

be emphasized also in respect to growing numbers of maternal abductions in the Convention-signatory countries.

In the following chapter, a theoretical background on some of the main factors contributive to the shift in parental abductions paradigm will be explored to outline the different and sometimes uneven position the primary carers occupy in the host countries, often as a result of caretaking responsibilities or domestic violence.

In the analytical part, which is divided into two chapters, I will argue that mothers as the primary carers, unlike the non-custodial fathers three decades ago, remain without necessary response in the framework of the Convention. I will also demonstrate that this further reflects in a position of disadvantage when making decisions regarding life and residence of the primary carer and the child. In the first part of the analysis, in chapter two, the objectives as designed in 1980 and the concept of habitual residence will be explored to uncover the vacuum when it comes to addressing the role of the primary carer. It will be argued, that the current framing of the main objectives of the Convention, the prompt return of the child to the place of habitual residence and promotion of access, respond directly to the main motivations of the abducting non-custodial parents, yet do not take primary carers into consideration. Finally, in chapter three, selected court cases of maternal abductions as recoded in the official International Child Abduction Database (hereafter referred to as the “INCADAT”),⁶ will demonstrate the largely uniform approach when it comes to the abducting primary carers. The county selection (Poland, Hungary, the Czech Republic and Slovakia) follows expectations regarding similarities in application of the Hague Convention mainly tied to the geographical location, cultural and religious context, parallel historical developments as well as increase in abductions with the European Union accession in 2004. Moreover, all four countries report

⁶ International Child Abduction Database.. <http://www.incadat.com> (accessed June 2, 2013).

significantly higher number of maternal abductions, hence a need exists for a more substantial examination of the issue in the region.

The main contribution of this study is an analysis of the absence of the primary carer within the framework of the Convention, therefore not recognizing the different function and relationship attached to it. This absence further reflects in a failure to sufficiently and sensitively respond to the scenarios of maternal abductions. It will be argued that these might be qualitatively different and not necessarily opposed to the best interest of the child. Insisting on the original and often quite ineffective definitions and objectives, the Convention presently tends to bring about uneven results for mothers and fathers.

Methodology

This thesis is primarily concerned with utilization of the Hague Convention in cases of child abductions by the primary carers, and with implications of its current design in the new context of maternal abductions. Therefore, I will primarily use gender-legal approach to demonstrate, how the absence of the primary carer in the framework of the Convention deprives the mothers of the possibilities to make more substantial decision regarding the future of the child, and consequently their own future. Special attention will be dedicated to the context of domestic violence which is seen as marginal in the framework of the Convention, and since in majority of the analyzed cases the mothers reported risk of harm, this also contributes to further disadvantaging of the position of the primary carer.

Legal analysis of gender bias

As outlined earlier, the analytical part is divided into two major sections to provide more substantive grounds for formulation of the findings:

- Chapter two: close reading of the Hague Convention, namely of its objectives as only responsive to the early parental child abduction scenarios with fathers as the main abductors
- Chapter three: analysis of selected court cases from Poland, Hungary, the Czech Republic and Slovakia as recorded in INCADAT and examination of the responses of the national courts in terms of issuing of the return order despite the appeals made by the abducting primary carers. Issuing of the return order and dismissing the appeals made by the mothers despite the reported context will be identified as the main factor in assessing how the status of the primary carer is disregarded.

Data sources

Regarding selection of the cases, the International Child Abduction Database⁷ (hereafter referred to as “INCADAT”) will serve as the main source as it contains some of the important court rulings along with description of the cases and the legal proceedings. The database has been established by the Permanent Bureau of the Hague Conference to provide access to some of the main decisions taken by national courts in respect of the 1980 Hague Convention. As for search criteria, the four countries have been chosen as the requested state⁸ and the search

⁷ INCADAT, is used by judges, Central Authorities, legal practitioners, researchers and others interested in this rapidly developing branch of law. INCADAT has already contributed to the promotion of mutual understanding and good practice, essential elements in the effective operation of the 1980 Convention (International Child Abduction Database.. <http://www.incadat.com> (accessed June 2, 2013).

⁸ The country the child has been removed to or retained in

returned thirteen cases. As will be further discussed, in eleven of the thirteen cases, mothers were the main abductors. Out of these cases eight were further selected as in these mothers invoked Article thirteen of the Convention, emphasizing the risk of harm if the child is returned to the place of habitual residence. In all 8 cases, mothers were the sole abductors.

In terms of statistical data, the last comprehensive summary of national application of the Convention, the 2008 Global Report,⁹ provides quantitative information for the signatory countries, and in case of Poland a more extensive interpretation of the situation is also available. For the Czech Republic, Hungary and Slovakia, more detailed information is offered by the Central Authorities¹⁰ and in the annual reports if available. However, it will be mentioned that the data as recorded by the Central Authorities and in the Hague Convention reports are not capable of mapping the real numbers of abductions and the phenomenon in its complexity as many incidents are not reported due to variety of factors.

Limitations

Given the small number of available court cases in the INCADAT database, which might not necessarily reflect the more alarming statistical data in the region, the cases might not be representative of the overall trend. Moreover, each case is complex on its own and the description of the context and legal proceedings might not be capable of conveying the real events and context accurately. Some assumptions underlying this study are that presence of the primary carer is always positive for the wellbeing of the child, yet in some cases, the

⁹ Nigel Lowe , and Victoria Stephens, "A statistical analysis of applications made in 2008 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. Part I - Global Report," <http://www.hcch.net/upload/wop/abduct2011pd08ae.pdf> (accessed June 2, 2013).

¹⁰ "Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children," *Permanent Bureau* (2010), http://www.hcch.net/index_en.php?act=publications.details&pid=5291&dtid=33 (accessed June 2, 2013). Poland, Hungary, Czech Republic, Slovakia

primary carers might not be able/willing to ensure the necessary care for the child. Additionally, the mothers might report violence or otherwise unsatisfactory conditions even when these do not exist in reality. Other important factors might also have an impact on legal proceedings and resolution of the cases in the individual countries, and disregarding these might result in false findings.

1. International parental child abduction and emergence of the maternal abductor

With the increase in transnational and intercultural marriages, international parental child abduction has become a serious issue affecting not only individual parties and the children involved, but also the international community. It has subsequently emerged as a subject of interest across different disciplines and practices. Yet, it is necessary to recognize that there has been a change in nature of abductions as opposed to the moment when the need to address the issue first arised in the 70s. Since then, growing number of children removed across borders by one of the parents or a family member has been reported and the issue kept receiving media attention both in the nation states and worldwide.

In this section, the changing face of the phenomenon as well as the emergence of the mother abductor will be discussed to highlight how the current parental child abduction discourse reflects more general shifts in the society. Main motivations contributing to higher numbers of abduction, as identified by the experts, will also be outlined to demonstrate the often very gender-specific conditions men and women respond to. While the father abductor scenario is still pervasive, and various disadvantaging factors also exist in cases of removal of the children by their fathers, Bruch argues that these typically prevail in countries that have not signed the Convention.¹¹ Additionally, the situation and the main motivations of the fathers have been of main interest to the drafters of the Convention for three decades now which has reflected in the current text of the Convention. Yet, the change in discourse has not had a significant impact on the authorities towards considering a more primary carer-inclusive

¹¹ Carol S. Bruch, "The Hague Child Abduction Convention: Past Accomplishments, Future Challenges," *European Journal of Law Reform* 97(1998/1999): 97-118, p. 106. http://heinonline.org/HOL/Page?handle=hein.journals/ejlr1&div=12&g_sent=1&collection=journals (accessed June 2, 2013).

approach. The primary carers, who are in most cases the mothers,¹² have remained without necessary response within the framework of the Convention and the current objectives of the text have worked towards their further disadvantaging, as will be argued in the following chapters. The section dedicated to the main motivations in cases of maternal abductions will demonstrate the often very different conditions mothers face in the host countries, and it will be argued that these are not taken into consideration in the text of the Convention. Eventually, since the main argument refers to the Convention as contributive to the actual change in the numbers¹³, the latest statistical data will be provided to demonstrate the necessity of addressing the mothers-primary carers more adequately.

1.1 International parental child abduction

The phenomenon of parental child abduction may be defined in variety of ways. While it tends to receive much attention in media as a result of terms such as abduction and kidnapping, in reality the resolution of cases tends to be lengthy and the context and motivations of the abducting parents complex. Officially and in the framework of international private law, parental child abduction refers to “unilateral removal or retention of children by parents, guardians or close family members”.¹⁴ Beaumont and McEleavy¹⁵ further emphasize that no material gain is sought and an exclusive care of the child is typically the main motivator for proceeding with abduction of one’s own child.

When the parental abduction involves crossing borders of a country where the child resides, this is defined as international parental child abduction and a great number of

¹² Pamela Laufer-Ukules, "Selective Recognition of Gender Difference in the Law: Revaluing the Caretaker Role," *Harvard Journal of Law & Gender*, 31 (2008): 1-66.

¹³ In the signatory countries

¹⁴ Paul R. Beaumont, and Peter E. McEleavy, *The Hague Convention on International Parental Child Abduction*, (New York : Oxford University Press, 1999), p. 1.

¹⁵ *Ibid*

additional layers are added when seeking resolution of the cases. Diplomatic relations, cultural and religious norms and concepts of parenthood as well as diverse legal practices are the grounds for potential clashes and difficulties that arise between the two parties. Aside from these, the phenomenon itself has been gradually transforming, mainly in terms of identity of the abducting parent as well as reflecting application of the main legal instrument, the Hague Convention (1980).

1.2 Worldwide statistics

International parental child abduction emerges as one of the most severe and problematic phenomena resulting from breakdowns in inter-cultural marriages. Globally, a 164% increase in the number of abduction cases was reported between 1995 and 2010 by the leading international NGO, Reunite¹⁶. According to Nigel Lowe's Global Report for the year 2008, which is the latest official statistical overview on abduction cases under the Hague Convention, international parental child abduction rates show a 44% increase in the total number of applications made under the Convention between 2003 and 2008.¹⁷ However, the figure of 2705 applications in 2008 is lower than the actual number of children removed across borders by one of the parents or a family member, as some of the applications involved several children. In fact, at least 3182¹⁸ children were petitioned by a left-behind parent via the Hague Convention. The report emphasizes that the figures regarding parental abductions

¹⁶ Reunite International, "Reunite Statistics." Accessed June 2, 2013. http://www.reunite.org/pages/media_centre.asp.

¹⁷ Nigel Lowe and Victoria Stephens, "A statistical analysis of applications made in 2008 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. Part I - Global Report," <http://www.hcch.net/upload/wop/abduct2011pd08ae.pdf> (accessed June 2, 2013) p. 8

¹⁸ *Ibid*, This compares with 2,218 children involved in Hague applications in 2003 and 2,030 children in 1999

are likely to be even higher as not all abductions are resolved under the Hague Convention¹⁹ and the number of abductions within state boundaries was not included.

1.3 The changing face of parental child abductions

Aside from the growing total numbers of children abducted across borders, the patterns of abductions also appear to reflect more general shifts in society. In the past, fathers tended to be the main abductors and the wish to control cultural upbringing of the child or fear of losing relationship with the child were listed as the main motivating factors for the abductions by fathers²⁰. Tuohey²¹ further point out that during the 1970s and early 1980s this was the default scenario as the male abductor typically had rather limited contact with the child as a result of being the non-custodial parent. Therefore, an unfavorable custody settlement was usually the main motivation to abduct. Research²² conducted by Tuohey and the International Social Service (hereafter referred to as “ISS”) network in 1970s involving ninety-nine abduction cases across different countries confirmed that the international character of the parents was in fact the first common condition which constituted and worked towards higher risk of abductions²³. Cultural differences were identified as the second most common risk factor. Most incidents took place after the separation of parents, yet before issuing of a divorce order. In the analysis, the issue of access was identified as crucial in half of the cases and the legally granted visits provided the opportunity for abduction in most of these cases.

¹⁹ Ibid, 9, Applications may have been made under European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children (1980), or under bilateral and multi-lateral agreements and treaties, for instance the Inter-American Convention on the International Return of Children, additionally some may have been made under the Hague Convention but not via the Central Authorities, rather directly to the national courts of countries involved

²⁰ Anne Tuohey, *Living in Limbo: The experience of International Parental Child Abduction*, (Melbourne: International Social Service Australian Branch, 2005) http://www.iss-ssi.org/2009/assets/files/Mediation/ISS_Australia_Living_in_Limbo.pdf (accessed June 2, 2013), p. 7

²¹ Ibid

²² Ibid

²³ Ibid, out of the ninety-nine cases, seventy-nine couples were of different origins

Most importantly, in eighty cases out of the analyzed sample, the father was the abductor and most of the abductions were to home countries of the abducting parents. The main reasons for abducting identified in the report include:²⁴

- A wish to control cultural upbringing of the child
- Fear of loss of the relationship with the child
- Frustration in relation to residence and contact arrangements

The general trends in abductions and the most commonly reported reasons along with high numbers of paternal abductors in the 1970s, as visible in the ISS report, largely reflected the insecurities regarding access to the child after separation of the parents. Therefore, one of main factors contributing to the change in paradigm nowadays has certainly been the incorporation of child contact principle into the legal practice. This has translated into greater emphasis on children having the right for access to both parents after their divorce. Such rhetoric and reframing of status of the child in legal terms affected the dynamics of the abductions, and consequently the number of father abductors has been gradually dropping. According to the ISS report,²⁵ men represent a mere 29% of abductors today. In the 2008 Global Report,²⁶ Lowe confirmed the trend and figures for father abductors for 2008. On the other hand, the numbers have been rising for maternal abductors, making them the sole abductors in some regions. For example, the mother is most likely to abduct in Scandinavian countries (in 87.5% – 100% of cases).²⁷ The later 2008 Global Report showed that return applications made in 2008 for Estonia, Cyprus, Lithuania, Luxembourg, Paraguay and UK -

²⁴ *Ibid*

²⁵ Anne Tuohey, *Living in Limbo: The experience of International Parental Child Abduction*, (Melbourne: International Social Service Australian Branch, 2005) http://www.iss-ssi.org/2009/assets/files/Mediation/ISS_Australia_Living_in_Limbo.pdf (accessed June 2, 2013).

²⁶ Nigel Lowe and Victoria Stephens, "A statistical analysis of applications made in 2008 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. Part I - Global Report," <http://www.hcch.net/upload/wop/abduct2011pd08ae.pdf> (accessed June 2, 2013) p. 14

²⁷ Anne Tuohey, *Living in Limbo: The experience of International Parental Child Abduction*, (Melbourne: International Social Service Australian Branch, 2005) http://www.iss-ssi.org/2009/assets/files/Mediation/ISS_Australia_Living_in_Limbo.pdf (accessed June 2, 2013), p. 8

Scotland only involved mother abductors.²⁸ The regional differences may also be understood as reflecting specific concepts of parental roles and ideas of motherhood and fatherhood in each particular region, however any extensive analysis of these is beyond the scope of this paper.

An equally important factor in shaping the current abduction paradigm and the drop in father abductors in specific regions has certainly been the ratification of the Hague Convention on the Civil Aspects of International Child Abduction (1980), which will be closely analyzed in the next chapter. As Bruch²⁹ outlines, many non-custodial parents realize that there are no justifiable reasons to defend the act of abduction in the signatory countries, therefore they either do not proceed with the abduction or eventually return the child rather than face enforcement and the extra costs. However, as Lowe admits in the framework of the 2008 Global Report, it is not possible to determine a precise number of cases in which the Convention had a deterrent effect.³⁰ Yet this logic would explain why fathers are more likely to abduct to non-Convention countries where no obligations exist to enforce return of the child to the place of habitual residence. These are frequently the countries where fathers are favored based on their gender rather than their role as a caregiver and therefore would still be granted custody.³¹ Thus, the Convention could be understood as directly contributive to the drop in incidence of paternal abductions.³²

²⁸ Nigel Lowe and Victoria Stephens, "A statistical analysis of applications made in 2008 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. Part I - Global Report," <http://www.hcch.net/upload/wop/abduct2011pd08ae.pdf> (accessed June 2, 2013) p. 14

²⁹ Carol S. Bruch, "The Hague Child Abduction Convention: Past Accomplishments, Future Challenges," *1 European Journal of Law Reform* 97(1998/1999): 97-118, http://heinonline.org/HOL/Page?handle=hein.journals/ejlr1&div=12&g_sent=1&collection=journals (accessed June 2, 2013).

³⁰ Nigel Lowe and Victoria Stephens, "A statistical analysis of applications made in 2008 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. Part I - Global Report," <http://www.hcch.net/upload/wop/abduct2011pd08ae.pdf> (accessed June 2, 2013) p. 9

³¹ Carol S. Bruch, "The Hague Child Abduction Convention: Past Accomplishments, Future Challenges," *1 European Journal of Law Reform* 97(1998/1999): 97-118, http://heinonline.org/HOL/Page?handle=hein.journals/ejlr1&div=12&g_sent=1&collection=journals (accessed June 2, 2013).

³² Rates for father abductors remain significantly higher in the Middle East or Japan

As for the emerging maternal abductor discourse, neither of the above factors can be identified as the most crucial. Abductions by mothers seem to be responding to a different set of factors which have been resonating in the last two decades, yet without an answer in the framework of the Hague Convention. A link between the shift in abductions and recognition of domestic violence as a violation of women's human rights will be drawn, as one of the possible factors which might be responsible for the growing incidence in maternal abductions. This continuing absence of the primary carer in the text also translates into growing discontent in the practice under the Convention.

It is important to emphasize that these are also gendered factors, which means that concrete situations or conditions typically play out differently for men and women, and necessarily bring about different results regardless of the neutrality of the text of the Convention. Or rather as a result of the same neutrality. Therefore, recognizing the gendered nature of maternal abductions will allow us to analyze why the Convention in its current form is not able to respond effectively to the emerging paradigm of abducting mothers.

1.4 Why mothers abduct

Although the role and profile of the abductor were not articulated directly in the Convention to ensure neutrality, many scholars and family law practitioners³³ agree that the father abductor was implied in the framing of the objectives and interpretation of child's best interests. Such a position further reflects in current gendered implications of the new scenarios where mothers are the dominant abductors. In fact, as demonstrated earlier, abducting mothers have become the predominant pattern in most countries that are signatories to the Hague Convention, typically returning to the home countries along with the children.

³³ Lubin (2005), Bruch (1998/1999), Tuohey (2005), Norris (2010), Klein, Orloff, Martinez, Rose Joyce Noche (2004) and others

The main reasons and motivations for abducting the children by mothers might provide help in grasping the current nature of the phenomenon. A mixture of factors might be responsible for this situation, among others women's empowerment, more women having sufficient or higher education as well as increase in cross-border mobility, which provide women with more opportunities to travel, relocate and eventually proceed with the abduction. Yet, as Lubin³⁴ and Norris³⁵ argue, there are important factors which seem to significantly contribute to growing numbers of abductions, domestic violence being the crucial one.

1.4.1 Child abduction and domestic violence

As Norris³⁶ argues, precisely because of domestic violence and the home state's failure to protect women, many of them choose to flee the country. Yet while domestic violence discourse has strengthened and gained on relevance in the past decades, the specific context when a child is also removed across borders seems to be creating a very different response. As will be discussed in this section, the maternal abductors have become more and more frequent in many regions. However, the changing nature of the phenomenon has barely reflected in the legal practices of different countries. The abducting mother hence occupies a very ambivalent position, on one hand, fleeing domestic violence in search of safety for both the child and herself, and violating international law on the other.

³⁴ Barbara E. Lubin, "International Parental Child Abduction: Conceptualizing New Remedies Through Application of the Hague Convention," *Washington University Global Studies Law Review*, 4, no. 2 (2005): 415-445, <http://digitalcommons.law.wustl.edu/globalstudies/vol4/iss2/8/> (accessed June 2, 2013).

³⁵ Catherine Norris, "Immigration and Abduction: The Relevance of U.S. Immigration Status to Defenses under the Hague Convention on International Child Abduction," *California Law Review*, 98, no. 1 (2010): 159-195, <http://www.californialawreview.org/assets/pdfs/98-1/Norris.pdf> (accessed June 2, 2013).

³⁶ *Ibid*, p. 159

As both Hester³⁷ and Engle³⁸ emphasize, there has been a change in how we think about domestic violence which has further positively affected the way the issue was translated into legal framework. One of the most important shifts in tackling domestic violence has been its increasing recognition as a serious violation of human rights.³⁹ It has thus been widely acknowledged that domestic violence represents a serious enough factor for an abused spouse to leave the relationship. On the other hand, the situation significantly changes once a child is involved. The reality of escaping domestic violence is often secondary and, as Norris⁴⁰ emphasizes, not taken into consideration by courts. The best interests of a child are understood merely in terms of him or her being able to stay in the place of habitual residence, as will be discussed in the next chapter. The context of domestic violence which the mother attempts to flee is deemed secondary by courts, and similarly by the Convention. The mother herself is often seen an enemy of the child. She is framed first and foremost as an abductor, and the situation of domestic violence might not even be considered relevant.

Although this change of consciousness in terms of discussing and addressing domestic violence was reflected in the drafting of the Hague Convention, the extent to which it covered all the possibilities of the issue which can emerge is currently being challenged in specific national contexts as well as internationally. As already argued by Norris,⁴¹ the various national practices show that not every country assesses the cases beyond simply ordering of the child's return to the country of habitual residence regardless of the abducting parent's appeals. Additionally, many national courts tend a priori to favor the petitioner, applying the Convention very narrowly without evaluation of the context and possible threat of harm or

³⁷ Marianne Hester, "The Three Planet Model: Towards an Understanding of Contradictions in Approaches to Women and Children's Safety in Contexts of Domestic Violence," *British Journal of Social Work*, 41, no. 5 (2011): 837-853

³⁸ Sally Merry Engle, *Gender violence: a cultural perspective. "Naming and Framing the Problem*, (Malden, MA: Wiley-Blackwell, 2009).

³⁹ *Ibid*, p. 1

⁴⁰ Catherine Norris, "Immigration and Abduction: The Relevance of U.S. Immigration Status to Defenses under the Hague Convention on International Child Abduction," *California Law Review*, 98, no. 1 (2010): 159-195, <http://www.californialawreview.org/assets/pdfs/98-1/Norris.pdf> (accessed June 2, 2013), p. 160

⁴¹ *Ibid*

violence regardless of the option to do so under the Convention (Article 13 (1) *b*)), though in a very limited way. It will be demonstrated in chapter five, that none of the assessed cases where mothers from Central Europe reported risk of physical or psychological harm were successful in their appeals. Thus, while domestic violence is recognized to be a sufficient factor to flee the violent partner, when the removal of a child across borders is involved, the context of violence which the abused partner escapes typically loses its relevance.

There is a consensus⁴² that the recognition of domestic violence as a violation of women's human rights may be linked to growing numbers of maternal abductors. And while the actual numbers of women who experience domestic violence might not necessarily be higher than three decades ago, the greater awareness of violence being generally inexcusable in a relationship might have resulted in more women opting for termination of such relationships. Considering greater education options, more women entering the public through extensive work opportunities, and as a result of general emphasis on gender equality and equal opportunities, in certain regions women are becoming more aware of domestic violence as inexcusable. The connection can therefore be indirect, although not improbable.

1.4.2 The role of the primary carer

There is no doubt that regarding maternal abductions, some of the frequently named reasons⁴³ for abductions by men apply equally to women. Yet, as Lubin⁴⁴ highlights specifically in situations when women are the ones to relocate as a result of international marriage, they might find themselves limited by the care work and consequent barriers (as

⁴² Norris (2010), Bruch (1998/1999), Lubin (2005) and others

⁴³ „extensive hostility between the former or estranged parents, resulting in a strong desire by one to wreak the ultimate revenge against the other parent; a deep sense of unfairness felt by one parent in relation to Family Court contact arrangements; fear of and inability to communicate between former partners and the proprietorial nature of some parents' relationships with their children“ ISS report, p. 7

⁴⁴ Barbara E. Lubin, "International Parental Child Abduction: Conceptualizing New Remedies Through Application of the Hague Convention," *Washington University Global Studies Law Review*, 4, no. 2 (2005): 415-445, <http://digitalcommons.law.wustl.edu/globalstudies/vol4/iss2/8/> (accessed June 2, 2013), p. 434

well as language and cultural) in finding or maintaining work, which might result in their dependency on the husband's income. If a separation becomes relevant in such settings, the women have a position of disadvantage, with very little space to maneuver while waiting for the court decision regarding custody. The practicalities hence become a very tangible and pressing element in the decision-making process of the mothers who might have limited or no income of their own and no safety net while proceeding with the separation or divorce. Both Lubin⁴⁵ and Laufer-Ukeles⁴⁶ agree that typically the financial disadvantage is gender-specific as it is tied to the woman's reduced possibilities and amount of paid working hours as a result of their primary carer role.

Laufer-Ukeles⁴⁷ points out that the issue is mainly located in not recognizing the different roles that the primary carer and primary earner have and perform during marriages, while mothers are still most likely to be the sole primary carers.⁴⁸ These roles are active in shaping of the financial possibilities that the former spouses will have after separation or divorce which directly reflect in assessment of the child's wellbeing with the individual parents. She confirms that as a result of the care work, the mother is still in most cases the one who modifies her potential for income to be able to care for the children. Lubin also insists that one of the major differences when looking at the new character of abductions is precisely the different function of the primary carer which naturally implies different relationship with the child. This creates a very different dynamics to the initially prevalent scenarios of non-primary carers abducting to gain access to the child. As Beaumont and McEleavy⁴⁹ speculate, abduction by a custodial parent might be less harmful than in the original context. Lubin goes further and argues that a removal of a child by the primary carer is qualitatively different and,

⁴⁵ *Ibid*

⁴⁶ Pamela Laufer-Ukules, "Selective Recognition of Gender Difference in the Law: Revaluing the Caretaker Role," *Harvard Journal of Law & Gender*, 31 (2008): 1-66

⁴⁷ *Ibid*, p. 2

⁴⁸ According to 2008 Global Report, in 2008, 88% of abducting mothers were the primary or joint primary carers of the child compared with 36% of abducting fathers

⁴⁹ Paul R. Beaumont, and Peter E. McEleavy, *The Hague Convention on International Parental Child Abduction*, (New York : Oxford University Press, 1999), p. 8

essentially, less harmful for the child.⁵⁰ Thus the new dynamics stemming from higher incidence of maternal abductions should be taken into consideration in responding to the already complex cases of parental child abductions. Moreover, domestic violence and the obligation to stay within reach so the non-primary carer can exercise the right of access are in most cases specific for women.

Further on, not being familiar with the legal system of the host country or, conversely, being aware of the disadvantages stemming from ones gender or less materially satisfying conditions (which can work towards questioning ones ability to provide for the child) might contribute to the mothers' decision regarding abduction. This becomes especially relevant considering the importance of child's best interests principle in the current framework of the Hague Convention.⁵¹ However, if those are in particular legal practices understood as equivalent to the parent's ability to provide or maintain certain material wellbeing of the child, the dependant status of the mother may fail to provide reassurance in this regard, despite her role as a primary carer. Lubin⁵² argues that this financial dependency on the husband will likely decrease the chances of the mother being granted custody. And thus, with limited options for employment in the host country and without financial support of the husband, women might feel trapped and not see a sustainable future if staying in the host country, where they initially relocated as a result of the marriage. Frustration in relation to residence, material wellbeing of the child as well as other practicalities might therefore significantly contribute to women's decision to leave the country and take the child along.⁵³

⁵⁰ Barbara E. Lubin, "International Parental Child Abduction: Conceptualizing New Remedies through Application of the Hague Convention," *Washington University Global Studies Law Review*, 4, no. 2 (2005): 415-445, <http://digitalcommons.law.wustl.edu/globalstudies/vol4/iss2/8/> (accessed June 2, 2013), p. 432

⁵¹ Child's best interest of paramount importance, HC preamble

⁵² Barbara E. Lubin, "International Parental Child Abduction: Conceptualizing New Remedies through Application of the Hague Convention," *Washington University Global Studies Law Review*, 4, no. 2 (2005): 415-445, <http://digitalcommons.law.wustl.edu/globalstudies/vol4/iss2/8/> (accessed June 2, 2013), p. 434

⁵³ Of course, the fathers might find themselves facing the same challenges and concerns if they were the ones to relocate for the marriage, yet considering the general lower or limited employability of mothers who are primary carers at the same time as well as the wage gap, these might generally expect more disadvantage (Pamela Laufer-

In line with these concerns, the national legal practices have been blamed for not responding to the new patterns involving mothers as the main actors. However, when it comes to conceptualizing the changing paradigm and the emerging discourse of abducting mothers, only a regionally limited scholarship is available. And although international parental child abduction as such can hardly be located in one country as it necessarily involves another country nationals, most of the cases and scenarios assessed have involved a United Kingdom or U.S. nationals as one of the parties. The relatively high numbers of mothers originally from the new EU member states,⁵⁴ particularly Central Europe, have been largely left out from the scholarly discussion or limited to cases involving a United Kingdom or U.S. national as the second party, and therefore deserve further attention.

In the following section, the CEE region, namely Poland, Hungary, the Czech Republic and Slovakia, will be introduced in respect to the issue of growing number of parental child abductions which are left without necessary response in the practice of the national courts.

1.5 Abductions by mothers in Central and Eastern Europe

In 2008, growing number of parental abductions worldwide has been reported as compared with the last comprehensive data collected in 2003.⁵⁵ However, after U.K – Northern Ireland and Mexico, the greatest increase has been recorded for countries like Romania (629%), Estonia (400%) or Poland (272%)⁵⁶. According to the European Parliament

Ukules, "Selective Recognition of Gender Difference in the Law: Revaluing the Caretaker Role," *Harvard Journal of Law & Gender*, 31 (2008): 1-66

⁵⁴ The 5th enlargement of the European Union

⁵⁵ Nigel Lowe and Victoria Stephens, "A statistical analysis of applications made in 2008 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. Part I - Global Report," <http://www.hcch.net/upload/wop/abduct2011pd08ae.pdf> (accessed June 2, 2013) p. 11

⁵⁶ *Ibid*

Mediator for International Parental Child Abduction,⁵⁷ the higher incidence of abductions can be linked to the number of Eastern and Central European countries recently entering the EU. As highlighted in the Global Report from 2008,⁵⁸ the numbers of parental child abduction cases to/from the region were growing in the past decade. The authors stress that this applies especially to cases of the new member states which accessed the EU in 2004⁵⁹ and 2007.⁶⁰ And thus, it can be justified that a need arises for a more extensive research of the phenomenon of abductions in cases involving CEE nationals as one of the parties.

As noted by The European Parliament Mediator for International Parental Child Abduction,⁶¹ in the EU, where citizens are free to move across borders, the abduction of children by one of the parents or a relative has been a growing problem. In many cases, abductions occur among EU citizens who reside in one of the member states as traveling and migration have intensified.⁶² The increased incidence in cases of parental abductions in the four countries might hence be seen as closely following the act of accession of the EU. And although the transition period already presented opportunities to travel to Western Europe and look for higher salary opportunities, it is widely recognized that entering the EU resulted in a significant increase in travel and work-related migration. Kaczmarczyk and Okólski⁶³ as well

⁵⁷ European Parliament, "The European Parliament Mediator for International Parental Child Abduction." (accessed June 2, 2013) <http://www.europarl.europa.eu/aboutparliament/en/000c205a13/Child-abduction-mediator.html>

⁵⁸ Nigel Lowe and Victoria Stephens, "A statistical analysis of applications made in 2008 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. Part I - Global Report," <http://www.hcch.net/upload/wop/abduct2011pd08ae.pdf> (accessed June 2, 2013) p. 11

⁵⁹ EU member states after the fifth enlargement in 2004: Malta, Cyprus, Estonia, Latvia, Lithuania, Poland, the Czech Republic, Slovakia, Slovenia, Hungary

⁶⁰ EU member states after the fifth enlargement in 2007: Bulgaria, Romania

⁶¹ European Parliament, "The European Parliament Mediator for International Parental Child Abduction." (accessed June 2, 2013) <http://www.europarl.europa.eu/aboutparliament/en/000c205a13/Child-abduction-mediator.html>.

⁶² *The European Parliament Mediator for International Parental Child Abduction Handbook*, (European Parliament, 2011) http://www.europarl.europa.eu/pdf/mediator_children/Child_abduction_handbook_en.pdf (accessed June 2, 2013).

⁶³ Pawel Kaczmarczyk, and Marek Okólski, "International Migration in Central and Eastern Europe-Current and Future Trends," *United Nations Expert Group Meeting on International Migration and Development* (2005), http://www.un.org/esa/population/migration/turin/Symposium_Turin_files/P12_Kaczmarczyk&Okolski.pdf (accessed June 2, 2013).

as Wallace⁶⁴ confirm that already the opening of borders in the region after 1989 resulted in a new strategic position of mainly Poland, Slovakia, Hungary and the Czech Republic in terms of migration and work mobility. Yet, after entering the EU, the former limitations largely disappeared,⁶⁵ and many CEE nationals found themselves traveling extensively to other regions of the EU for work or study and not seldom entering into marriages with the local residents in the host countries. Moreover, the EU citizenship presented the CEE nationals with more opportunities even beyond the EU borders as traveling has become less problematic too.

Poland, the Czech Republic, Hungary and Slovakia have been chosen because similarities can be expected based on their geographical location, parallel historical developments and relatively intensive travel between the countries during the previous regime as well as after its collapse. Kaczmarczyk and Okólski⁶⁶ agree that also the intensity of intra-regional migration increased after 1990 which could have further impacted some parallel developments.

In terms of the parental abductions, these similarities surface in rising numbers of abductions after entering the EU. As visible in the INCADAT database, the number of abductions in these countries has been significantly higher after 2004.⁶⁷ Moreover, very low numbers of father abductors were recorded in the four countries. Out of the total of 13 cases listed in the INCADAT database for all four countries, in 11 cases mother was the main abductor. For both, Poland and The Czech Republic, INCADAT recorded 1 case of abduction

⁶⁴ Claire Wallace, "Opening and closing borders: migration and mobility in East-Central Europe," *Journal of Ethnic and Migration Studies*, 28, no. 4 (2002): 603-625, <http://www.abdn.ac.uk/socsci/research/nec/reset/Wallace.pdf> (accessed June 2, 2013).

⁶⁵ Marek Okólski, "Costs and benefits of migration for Central European countries," *CMR Working Papers*(2006).

⁶⁶ Pawel Kaczmarczyk, and Marek Okólski, "International Migration in Central and Eastern Europe-Current and Future Trends," *United Nations Expert Group Meeting on International Migration and Development* (2005), http://www.un.org/esa/population/migration/turin/Symposium_Turin_files/P12_Kaczmarczyk&Okolski.pdf (accessed June 2, 2013).

⁶⁷ Ten out of thirteen cases for all four countries date after 2004, International Child Abduction Database.. <http://www.incadat.com> (accessed June 2, 2013).

by the father. On the other hand, the mother emerges as the sole abductor in Slovakia and Hungary. It is therefore of interest how the courts in these countries respond to the issue of international parental child abduction and especially to the growing numbers of abductions by mothers through application of the Hague Convention. In the analytical chapter, it will be demonstrated whether and to what extent has the Convention contributed to satisfactory case resolutions and how the mothers as primary carers are affected by the narrow definitions and objectives of the Convention, which still largely responds to the father abductor scenario. I believe, by looking at the four countries, the insufficient design of the Convention will transpire as selected cases of maternal abductions will be analyzed and references to the weak points of the Convention will be made.

2. The 1980 Hague Convention on the Civil Aspects of International Child Abduction: analysis of the main objectives and definitions

The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction⁶⁸ is the main international legal instrument to be applied in cases of international parental child abduction. Designed to bridge variety of legal jurisdictions, the Hague Convention is supposed help unite the practices in the signatory countries, with the ultimate goal of ensuring return of the abducted child to the place of his or her habitual residence.

In this section, specific parts of the Convention will be identified as active in bringing about uneven results in cases of abducting mothers-primary carers today. It will be argued that the specific framing of the main objectives as reduced to serving as a deterrent, promoting access and restoring the habitual residence of the child does not sufficiently reflect the nature of the current abductions. In fact, these objectives might often contribute to further disadvantaging of the mothers-primary carers, who were not identified as possible future abductors, often with a different set of needs and motivations to respond to. Additionally, as a result of being the primary carer, their financial situation may worsen after the separation, yet due to the father's right to access, they are limited in their life choices to the place of habitual residence of the child in the host country. Therefore, the Convention which once successfully answered the non-custodial fathers' motives and concerns no longer serves its purpose sufficiently, as the specific needs of the mothers remain unrecognized.

In my analysis of the Convention, I will primarily rely on its extensive interpretation written by Beaumont and McEleavy (1999),⁶⁹ which mapped the process of drafting of the Convention in response to the prevalent model of abductions in the 1970s. However, in their

⁶⁸ *Convention on the Civil Aspects of International Child Abduction*. full text, <http://www.hcch.net/upload/conventions/txt28en.pdf> (accessed June 2, 2013).

⁶⁹ Paul R. Beaumont, and Peter E. McEleavy, *The Hague Convention on International Parental Child Abduction*, (New York : Oxford University Press, 1999)

analysis of the specific articles, Beaumont and McEleavy managed to highlight and closely analyze the main future challenges, which are in a line with the current shift in abductions and resonate in national legal practices.

2.1 General overview

The Hague Convention is a multilateral treaty designed and gradually implemented by signatory states to help navigate through the diverse legal systems, as these often respond to divergent religious and cultural norms which in turn shape specific national legal practices. The Convention in its current form aims to initiate and facilitate prompt return of the child to the place of his or her habitual residence. By March 2011, eighty-nine states have become the signatories. The Convention is applicable in abduction cases of children under sixteen years of age, typically in situations when the left-behind parent is also the custodial parent. More precisely, this was the paradigm when the Convention was put in practice in early 80s. The rights of access can be petitioned on the same grounds if these were violated as a result of child abduction by the custodial parent.

To secure cooperation on national level, contracting states are obliged to designate a Central Authority to exercise the duties which are imposed by the Convention.⁷⁰ According to Article 6, the authorities further function as both point-of-contact for other signatory states and similarly for affected parents who turn to the authorities when filling an application and to receive further guidance in the process of resolving the case. Article 6 emphasizes that the Central Authority is responsible for acting promptly and working towards reestablishing of the *status quo ante* which is believed to reduce the harm done to the child. The original

⁷⁰ Convention on the Civil Aspects of International Child Abduction. full text, <http://www.hcch.net/upload/conventions/txt28en.pdf> (accessed June 2, 2013), Article 6

understanding of harm has however been challenged by Lubin,⁷¹ who claims that the status of the taking parent directly influences how harmful the abduction is for the child, and whether it is harmful at all (such as in cases of removals of infants by their mothers). This or other more complex scenarios were most likely not foreseen by the drafters of the original text. However, even in today's conditions and with many instances of precisely these scenarios, the content of the Convention remains largely unchanged since its ratification in 1980.

Although the Convention was authorized on the 25th of October, 1980, the issue has come to attention of the international community and legal practitioners in the early 1970s.⁷² This was possibly due to intensification of international travel and consequent rise in numbers of international marriages. As Bruch points out, higher rates of international couples naturally reflected in an increase in divorces and undoubtedly complex international child custody disputes.⁷³ The Convention aimed to minimize the negative impact of cases of wrongful removal of children when it was likely that a parent will be unsatisfied with the result of the custody dispute and possibly remove the child to maintain contact. As many⁷⁴ argue, its text was then drafted with single scenario in mind: a father who is rejected custody and only awarded access and who fears that a satisfactory level of contact with the child is impossible after divorce. This scenario is undoubtedly gender-specific as mothers typically have been awarded custody unless specific obstacles emerged. Fathers as would-be-abductors then emerge as the main target group of the Convention. The current era with its new child abductions paradigm finds the Convention's main objectives, the deterrent function and promotion of access, limited in scope and mostly inapplicable. It will be argued that the

⁷¹ Barbara E. Lubin, "International Parental Child Abduction: Conceptualizing New Remedies through Application of the Hague Convention," *Washington University Global Studies Law Review*, 4, no. 2 (2005): 415-445, <http://digitalcommons.law.wustl.edu/globalstudies/vol4/iss2/8/> (accessed June 2, 2013), p. 432

⁷² Paul R. Beaumont, and Peter E. McEleavy, *The Hague Convention on International Parental Child Abduction*, (New York : Oxford University Press, 1999), p. 16

⁷³ Carol S. Bruch, "The Hague Child Abduction Convention: Past Accomplishments, Future Challenges," *1 European Journal of Law Reform* 97(1998/1999): 97-118, http://heinonline.org/HOL/Page?handle=hein.journals/ejlr1&div=12&g_sent=1&collection=journals (accessed June 2, 2013), p. 98

⁷⁴ Norris (2010), Bruch (1998/1999), Lubin (2005) and others

objectives, especially the return to the place of habitual residence and promotion of the right to access for the non-custodial fathers, limit the primary carers in their decisions regarding their life and residence.

2.2 Framing the main objectives

The main objectives as stated in Article 1 of the official text demonstrate how the Convention operates as a deterrent while insisting on access as equally important with custody and therefore to be guaranteed:

„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 States⁷⁵

Although no direct reference to the role of the mother or the father is present, it has been agreed⁷⁶ that the text does imply the underlying pattern according to which the mother is awarded custody and the father access. Additionally, framing any non-consented removal of the child across borders as wrongful and return of the child as mandatory, the Convention has somewhat contributed to creation of the non-custodial father abductor as the only existing scenario, and the return of the child as always desired.

⁷⁵ *Convention on the Civil Aspects of International Child Abduction*. full text, <http://www.hcch.net/upload/conventions/txt28en.pdf> (accessed June 2, 2013)

⁷⁶ Paul R. Beaumont, and Peter E. McEleavy (1999), Bruch (1998/1999), Lubin (2010)

2.2.1 Deterrent function

As Beaumont and McEleavy⁷⁷ argue, one of the aims of the Convention has been to act as a preventive tool for those parents who would otherwise consider abduction as an option. At the time of drafting of the Convention, non-custodial fathers were generally identified to be the risk-posing parents. Additionally, a clear definition of any removal of the child without consent of the other parent as wrongful and illegal and subject to possible investigation, or criminalization on national level⁷⁸ contributed to construction of parental child abduction as highly risky. The deterrent function resonates precisely in the Article 1 (a) of the Convention.

Considering the currently lower numbers of paternal abductions as discussed in the previous chapter, the deterrent function of the Convention has certainly positively reflected in the decrease in numbers of father abductors in signatory countries. As a result, the originally prevalent scenario of non-custodial fathers abducting is now typically limited to abductions to non-signatory countries where fathers remain the main abductors' as also discussed earlier. Anne-Marie Hutchinson, Chair of Reunite,⁷⁹ the British child-find organization argues that ratification of the Hague Convention seemed to have specifically affected the fathers, who now have valid basis for complaint. And thus, considering abduction to a convention-signatory state now represents higher risk while child contact approaches advocate and highly encourage allowing contact of the father with the child after separation of the parents. This factor also relates to the concerns that were typically responsible for fathers opting for abduction of their child. Hence, the existence of a powerful legal instrument, such as the Hague Convention might be seen as contributing to the dropping numbers of father abductors.

⁷⁷ Paul R. Beaumont, and Peter E. McEleavy, *The Hague Convention on International Parental Child Abduction*, (New York : Oxford University Press, 1999), p. 16

⁷⁸ The Convention itself does not criminalize, yet, the national regulations vary from country to country

⁷⁹ Reunite International, "Media center." Accessed June 2, 2013. http://www.reunite.org/pages/media_centre.asp.

2.2.2 Promotion of access

Possibly, an even more powerful factor active towards gender recomposition of parental abductor aggregate was the argument for ensuring of the rights of access, as formulated in the second objective of the Article 1 of the Convention.⁸⁰ This development resonated with intensification of the child's best interests concept.⁸¹ As Beaumont and McEleavy add,⁸² the current framing of child's best interests has contributed to a shift in the nature of parental abductions, since having access to both parents is understood to be in child's best interests as also promoted by the UN Convention on the Rights of the Child (1989).⁸³ Drawing on this Convention, the overall goal is to ensure that a child will have both parents even after their separation. As Hester⁸⁴ points out, the underlying idea of this relatively recent approach is that contact between a child and the non-resident parent is positive, therefore desired, and should be ensured. As she further elaborates, granting access is in fact inevitable whatever the context or history of the marriage even if allegations of risk arising from domestic violence were reported. Consequently, any contact-related concerns that would-be-father abductors might have are effectively covered by the general desirability and guarantee of access as visible in the Article 1 of the Convention.

The Convention, along with shifts in child contact practice in the last three decades then managed to respond to the motives and fears leading to the originally high numbers of father abductors. And as having access to both parents was agreed upon to be of paramount importance for a healthy development of the child, the former motive of abducting fathers

⁸⁰ *Convention on the Civil Aspects of International Child Abduction*. full text, <http://www.hcch.net/upload/conventions/txt28en.pdf> (accessed June 2, 2013), Article 1

⁸¹ Paul R. Beaumont, and Peter E. McEleavy, *The Hague Convention on International Parental Child Abduction*, (New York : Oxford University Press, 1999)

⁸² *Ibid*

⁸³ *Convention on the Rights of the Child*, (1989) full text, http://www.unesco.org/education/pdf/CHILD_E.PDF (accessed June 3, 2013).

⁸⁴ Marianne Hester, "The Three Planet Model: Towards an Understanding of Contradictions in Approaches to Women and Children's Safety in Contexts of Domestic Violence," *British Journal of Social Work*, 41, no. 5 (2011): 837-853, p. 847

being concerned about not having access to their children after divorce has been effectively resolved through articulating and ensuring the right to access. The decrease in numbers of father abductors can thus be seen as closely linked to ratification of the Hague Convention.

On the other hand, neither of the two objectives has been as useful in situations of mother abductors who are in most cases also the primary carers. Abducting to gain more control over child's life and upbringing is not typically an issue for mothers who are generally the ones to be awarded custody, as discussed in the previous chapter. Neither has the deterrent function of the Convention been effective in cases of mother abductors. In that sense, the objectives as currently in use have contributed to rather gender-specific results, responding to the motives of the fathers and not recognizing the limitations they may pose on the primary carers who abduct. And while the Convention might not be directly connected to the growing numbers of mother abductors, it certainly does not seem to be providing the same securities as in cases of non-custodial fathers. On the contrary, it contributes to shaping of a reality in which women are effectively tied to the place of child's habitual residence, despite their caretaking role and in most cases also the awarded custody.

2.3 Habitual residence as in the best interests of the child

As already mentioned, the status of the primary carer has played no role in the context of abductions as it is believed that reestablishing of the *status quo ante*, in this cases identical with child's habitual residence, is the sole factor relevant in determining best interest of the child. And thus, emphasizing child's best interests as the main objective, the Hague Convention declares 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 “⁸⁵

The best interests of the child can then be identified as equivalent to the *status quo ante*, and consequently, reestablishing of the *status quo ante* is seen to be in child's best interests. It is in fact the first paragraph of the Preamble where the interests of the child are defined as being of paramount importance.

The 'best interest of the child' principle was initially introduced in the 1970's by the book "Beyond the Best Interests of the Child"⁸⁶ and since then gained on relevance and significance in legal practice as well as across other disciplines. As Beaumont and McEleavy⁸⁷ note, the child's right to have a meaningful relationship with both parents and the child's right to be heard strongly resonate within in the Convention. The right to have a meaningful relationship with both parents in fact emerges as one of the main objectives of the Convention as stated in Article 1. At the same time, as mentioned above, the child's best interests are understood as equal to reestablishing of the child's *status quo ante* which is typically done via issuing the order requiring return of the child to the place of his or her habitual residence. Habitual residence and its restoration can be understood as both the tool and the desired outcome of application of the Convention. And thus, following the logic of the Convention, limiting the time spent away from the place of habitual residence reduces the harm to children removed across borders by one of the parents.

⁸⁵ *Convention on the Civil Aspects of International Child Abduction*. full text, <http://www.hcch.net/upload/conventions/txt28en.pdf> (accessed June 2, 2013).

⁸⁶ Joseph Goldstein, Anna Freud, Albert Solnit, and Dorothy Burlingham, *Beyond the Best Interests of the Child*, (New York : Free Press, 1973).

⁸⁷ Paul R. Beaumont, and Peter E. McEleavy, *The Hague Convention on International Parental Child Abduction*, (New York : Oxford University Press, 1999)

The issue of habitual residence has in fact been essential to the success of the Convention in the past, as Beaumont and McEleavy⁸⁸ point out. Yet, as previously mentioned, the Convention being drafted and agreed in 1980, having in mind the original non-custodial father abductor scenario, does not necessarily respond to the motives and fears of the current majority abductor – the mother. The mother as a in most cases the primary carer and the custodial parent, was typically the one who shared the place of habitual residence with the child. Such return would then undoubtedly result in restoration of the *status quo ante*. However, considering the changed nature of the abductions today, an essential part of the desired *status quo ante* would be impossible to restore. In Lubin's⁸⁹ view, the presence of a primary carer is essential and as such should be taken into consideration as the dynamics and effect of the removal are often qualitatively different in cases of abductions by the primary carers.

Generally, reestablishing of habitual residence, as exercised under the Convention, merely equalizes the best interests of the child with a pre-abduction geographical location without bringing into the picture the function and the status of the abducting mother-primary carer and reflecting on the context of the abduction. Consequently, in cases of mother abductors who are also the primary carers, and as such an important element of child's *status quo ante*, the required return of the child to the place of his or her habitual residence would still not contribute to the desired outcome, restoration of the *status quo ante*. Lubin emphasizes that the specific scenarios of child abductions by primary carers who are escaping domestic violence or other unsatisfactory conditions in the host country, should be assessed more carefully and sensitively, as such removal is typically less harmful to the child.⁹⁰ The same might apply to cases of children too young to have extensive connections to the

⁸⁸ *Ibid*

⁸⁹ Barbara E. Lubin, "International Parental Child Abduction: Conceptualizing New Remedies through Application of the Hague Convention," *Washington University Global Studies Law Review*, 4, no. 2 (2005): 415-445, <http://digitalcommons.law.wustl.edu/globalstudies/vol4/iss2/8/> (accessed June 2, 2013), p. 434

⁹⁰ *Ibid*, p. 435

environment at the place of habitual residence. In such cases, the primary carer is not merely a symbolic element of the habitual residence, it is its tangible component. Additionally, as Lubin⁹¹ and Norris⁹² agree, if the conditions in the place of habitual residence are unsatisfactory or even harmful, this needs to be given more attention and protection beyond current exceptions as present in the framework of the Convention. These will be outline in the following section.

And thus, as argued by both Lubin,⁹³ the framing of the child's best interests has been largely inflexible in the Convention, as visible in complex cases of child removals and retentions. This is not to mention its application in particular national practices where the authorities are often unwilling to look beyond the habitual residence as the only synonym of the best interests of the child. Following this pattern, rulings insisting on a narrowly framed habitual residence are effectively leaving out question of the primary carers whose presence is fundamental for healthy development of the child, and as such naturally in the child's best interests.

2.4 Grounds for appeal

As Beaumont and McEleavy⁹⁴ as well as Lubin⁹⁵ emphasize, the Convention in its current form provides very limited space for the abducting parent to appeal against issuing of

⁹¹ *Ibid*, p. 441

⁹² Catherine Norris, "Immigration and Abduction: The Relevance of U.S. Immigration Status to Defenses under the Hague Convention on International Child Abduction," *California Law Review*, 98, no. 1 (2010): 159-195, <http://www.californialawreview.org/assets/pdfs/98-1/Norris.pdf> (accessed June 2, 2013), p.160

⁹³ Barbara E. Lubin, "International Parental Child Abduction: Conceptualizing New Remedies through Application of the Hague Convention," *Washington University Global Studies Law Review*, 4, no. 2 (2005): 415-445, <http://digitalcommons.law.wustl.edu/globalstudies/vol4/iss2/8/> (accessed June 2, 2013), p. 434

⁹⁴ Paul R. Beaumont , and Peter E. McEleavy, *The Hague Convention on International Parental Child Abduction*, (New York : Oxford University Press, 1999)

⁹⁵ Barbara E. Lubin, "International Parental Child Abduction: Conceptualizing New Remedies through Application of the Hague Convention," *Washington University Global Studies Law Review*, 4, no. 2 (2005): 415-445, <http://digitalcommons.law.wustl.edu/globalstudies/vol4/iss2/8/> (accessed June 2, 2013), p. 434

the return order and to defend the act of removal of his or her child. Essentially, this situation can be interpreted as in alignment with the original deterrent function of the Convention.

As Beaumont and McEleavy⁹⁶ summarize, the child is not required to be returned to the place of habitual residence if 1) the petitioning parent consented prior to removal of the child; 2) a return may result in physical or psychological harm or otherwise unsatisfactory situation (Article 13 (1) *b*)); 3) return of the child would violate fundamental freedoms; and eventually, the court may refuse issuing of a return order if the child reached age and maturity to be able to object, so that his or her views can be taken into account.⁹⁷ The right of a child to object to a return can be understood within a wider context of a child's right to be heard. Such framing is a reflection of recent evolution of the legal perception of the child in contemporary family law.

As Lubin⁹⁸ emphasizes, these exceptions were designed to be limiting and largely narrow so as to prevent the abductors and the states from not complying with the overall purpose of the Convention, which is restoring of the *status quo ante* of the child via return to his or her place of habitual residence. In the opinion of the drafters, a broader framing would ultimately undermine the effectiveness of the Convention. Yet, as previously emphasized, these largely consider the father non-custodial abductor who removed the child from a familiar environment where he or she was integrated and well-established. Having such scenario in mind, as little space as possible to maneuver was desired to be offered to the abductor. And as national practices confirm, the appeals against issuing of the return order are rarely successful.

⁹⁶ Paul R. Beaumont , and Peter E. McEleavy, *The Hague Convention on International Parental Child Abduction*, (New York : Oxford University Press, 1999), p. 191

⁹⁷ *Ibid*, p. 191-192; According to Beaumont and McEleavy, this exception was designed for mature adolescents however no specified lower age limited is given; if maturity is questioned valid reasons must be provided for not returning as well as sufficient intelligence to form views must be shown

⁹⁸ Barbara E. Lubin, "International Parental Child Abduction: Conceptualizing New Remedies through Application of the Hague Convention," *Washington University Global Studies Law Review*, 4, no. 2 (2005): 415-445, <http://digitalcommons.law.wustl.edu/globalstudies/vol4/iss2/8/> (accessed June 2, 2013), p, 424.

However, as discussed earlier, the factors contributing to defining a certain situation (even the act of abduction) as in child's best interests are undoubtedly more complex today. And thus, primary carers often find themselves unable to succeed with their appeal as the criteria for invoking specific articles are purposely narrow. As will be demonstrated in the next chapter, to invoke Article 13 (1) *b*) is in most cases very challenging as it was designed to be very strict in order to minimize the space for the abducting non-custodial parents to justify the act of abduction. The scope of Article 13 (1) *b*) is thus rather narrow, and it will be demonstrated, extensive evidence is needed to support the suspicion of existence of risk at the place of habitual residence. As a matter of fact, majority of the analyzed cases invoked precisely this article, aiming to articulate the specific context of domestic violence or unsatisfactory conditions at the place of habitual residence, yet in none of the cases was the appeal reflected upon. And thus, with the changing face of the abductions in mind, the existing possibilities to respond to the maternal abductions remain rather limited.

2.4. 1 Responding to the risk of harm

Considering the current framing of the Convention and its main objectives, Article 13 (1) *b*) might appear to be the only ground on which to respond to both the threat of domestic violence and the importance of the primary carer for maintaining the *status quo ante* of the child. The latter is yet rather challenging and only represents potential to be exhausted when addressing the importance of the primary carer - child bond. However, the psychological risk factor could be seen as an option available for addressing relationship of the child and the primary carer. As Beaumont and McEleavy⁹⁹ admitted, the non-presence of the primary carer could be articulated precisely within the framework of psychological harm. In reality, the

⁹⁹ Paul R. Beaumont , and Peter E. McEleavy, *The Hague Convention on International Parental Child Abduction*, (New York : Oxford University Press, 1999)

instances when psychological harm as a result of non-presence of the primary carer is invoked tend to be unsuccessful.¹⁰⁰ In the next chapter, most of the examined cases invoked Article 13 (1) *b*), hence it will be possible to see to what extent can the Convention provide a sufficient response in cases of reported risk of harm.

While the Convention might not be directly linked to reported growth in numbers of mother abductors, by not providing these with the same kind of securing rhetoric and a higher level of consideration of the role of a primary carer, mothers are left alone to tackle the often unequal conditions which life abroad along with caretaking responsibilities might bring about. As currently argued by many experts and public advocates, greater sensitivity is needed to proceed to a fairer case resolution in most cases of maternal abductions. Moreover, the best interests of the child need to be assessed beyond insisting on return of the child to his or her place of habitual residence prior to the abduction. And thus, through insisting on the original design of the text, the Convention frequently contributes to further disregarding of the abducting mothers – primary carers and the importance of their relationship with the child for his or her wellbeing.

¹⁰⁰ *Ibid*

3. Analysis of the court cases involving mother abductors from Poland, Hungary, the Czech Republic and Slovakia

In her “The Hague Child Abduction Convention: Past Accomplishments, Future Challenges”,¹⁰¹ Bruch argues, that most national courts tend to honor the spirit of the Convention as agreed in 1980 and order return of the child even when the Convention allows for an exception. Some courts might favor specific type of objection and ensure more time for examination of the appeal when such objection is raised, for instance the child’s objection.¹⁰² Yet, as Bruch rightly points out, the definitions and the main objectives of the Convention remain largely unchallenged in cases of maternal abductions in numerous national legal practices.

Similar attitude is also apparent in the CEE region as very little public discussion presenting standpoints of both parties is available for consideration and fairer evaluation of the context. Moreover, by insisting on the former positive effects of the Convention, the space available for articulating the different position of the abducting primary carer remains limited to the narrow exceptions as defined by the Convention. The cases of abducting mothers – primary carers, originally from Poland, Hungary, Czech Republic or Slovakia will show how application of the Convention and insistence on the original framing of habitual residence and the access tend to overwrite the exceptions available to the abducting parents. The taking parent, in these cases the mother, and the primary carer status, often receive little attention since literal application of the Convention is typically favored.

¹⁰¹ Carol S. Bruch, "The Hague Child Abduction Convention: Past Accomplishments, Future Challenges," *European Journal of Law Reform* 97(1998/1999): 97-118, http://heinonline.org/HOL/Page?handle=hein.journals/ejlr1&div=12&g_sent=1&collection=journals (accessed June 2, 2013), p. 100

¹⁰² *Ibid*

As will be visible in the selected cases from Poland, the Czech Republic, Hungary and Slovakia, the role and status of the primary carer are missing in the decision-making process of the courts. The original objectives as defined in 1980 continue to be the main referential point and the context of abduction plays a rather limited role. It is very likely that mainly as a result of these, the return order was issued in most cases, regardless of the context and reported risk of harm. Issuing of the return order and maintaining that the removal was wrongful despite the conditions and preferences of the primary carer will therefore serve as the main indicator of the position of disadvantage which the primary carer occupies. It will also be demonstrated that the Convention, by insisting on the original text and by restricting the grounds for appeal to requirement of a very narrow and mainly material evidence proving the risk of harm, narrows the already limited possibilities to address the changed paradigm and the growing incidence of maternal abductions in general.

Yet, it will be shown that application of the Convention may also differ within a relatively homogeneous region and the nation states may choose different approaches. Other factors might thus be contributive to the application of the Convention in particular national contexts, such as nationalist narratives, media representation of the issue, the effectiveness of domestic courts and others. These are however beyond the scope of this paper. The main focus is on how the national courts apply the Convention and respond to cases of maternal abductions.

Along with relying on Beaumont and McEleavy,¹⁰³ the analysis will draw on Bruch's¹⁰⁴ study of future challenges to the Convention and Lubin's¹⁰⁵ framing of its gender

¹⁰³ Paul R. Beaumont , and Peter E. McEleavy, *The Hague Convention on International Parental Child Abduction*, (New York : Oxford University Press, 1999)

¹⁰⁴ Carol S. Bruch, "The Hague Child Abduction Convention: Past Accomplishments, Future Challenges," *European Journal of Law Reform* 97(1998/1999): 97-118, http://heinonline.org/HOL/Page?handle=hein.journals/ejlr1&div=12&g_sent=1&collection=journals (accessed June 2, 2013).

¹⁰⁵ Barbara E. Lubin, "International Parental Child Abduction: Conceptualizing New Remedies Through Application of the Hague Convention," *Washington University Global Studies Law Review*, 4, no. 2 (2005): 415-445, <http://digitalcommons.law.wustl.edu/globalstudies/vol4/iss2/8/> (accessed June 2, 2013).

implications, specifically how the originally successful design works towards further disadvantaging of the mothers today. As will be demonstrated, in most cases the women either followed the husbands abroad or decided to stay in the host country where they once relocated for work or other purposes. In some cases, the couple had the same country of origin and relocated together, yet in situations when the woman also becomes the primary carer of a child, naturally limiting her work opportunities in the host country where other disadvantaging factors¹⁰⁶ might also exist, this works towards her greater vulnerability. Several cases will be analyzed to demonstrate the mothers' motivations as well as the status of primary carer being disregarded. Additionally, the data collected for the purposes of 2010 Survey on Application of the Hague Convention will complement the national contexts in which particular practices take place.¹⁰⁷

3.1 Analysis of selected cases

The type of criticism mentioned above and in the previous chapters has mainly addressed the American and British legal discourse where more scholarship exists on the subject matter and extensive analyses of gender implications of the Convention help advocate a more sensitive approach and engaging of mediation.¹⁰⁸ This situation also reflects the fact that the U.S.A. and the United Kingdom have relatively high numbers of Hague Convention applications.¹⁰⁹ However, in the following analysis, the context of Central Europe and cases

¹⁰⁶ For instance, insufficient knowledge of the official language, limited social insurance, limited work opportunities, housing, etc.

¹⁰⁷ "Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, Czech Republic," *Permanent Bureau* (2010), http://www.hcch.net/index_en.php?act=publications.details&pid=5291&dtid=33 (accessed June 2, 2013).

¹⁰⁸ For instance UK's major child find and mediation NGO, Reunite

¹⁰⁹ Nigel Lowe, and Victoria Stephens, "A statistical analysis of applications made in 2008 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. Part I - Global Report," <http://www.hcch.net/upload/wop/abduct2011pd08ae.pdf> (accessed June 2, 2013), p.1

of maternal abductors from CEE home countries, specifically Poland, Czech Republic, Hungary and Slovakia, will be assessed and the application of the Convention will be evaluated with a special focus on the abducting mothers. In all selected countries, mothers significantly outnumber the father abductors. Out of the thirteen cases recorded in the INCADAT database, in eleven of them mothers represented the taking mothers, mainly removing the children to their home countries.

In this section, it will be demonstrated that the originally successful framing of the habitual residence as defined by the Convention and the promotion of right of access effectively work towards limiting the primary carers in their decisions regarding the life of the children and necessarily their own lives. Especially the decisions regarding their residence and residence of the children after separation of the partners become problematic as the access of the non-primary carer has to be allowed. According to the Convention, the geographical location of the child prior to the removal is essentially more desired than the presence of the primary carer. Therefore, throughout the whole chapter, issuing of the return order independently of the context will be the main reference point.

In most examined cases, the maternal abductors invoked Article 13 (1) *b*) when justifying the act of removal of the child from the partner and the place of habitual residence. In fact, based on the 2010 survey,¹¹⁰ mapping application of the Convention in signatory countries, the stance of the Central Authorities regarding utilization of Article 13 (1) *b*) in each of the four countries has been very similar. The individual responses largely confirmed that only limited number of cases is successful although the actual number of abducting parents invoking the article is high in all four countries. Yet very small number of cases

¹¹⁰ Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, 2010, Permanent Bureau

succeeds at providing sufficient evidence.¹¹¹ All responses also seem to agree that domestic violence and abuse strongly resonate as issues of great importance and in need of addressing. Yet, while in domestic context gender-based violence in its different forms is gaining on importance, in the framework of the international parental child abduction, the agreed-upon requirements are often impossible to acquire.

3.1.1 Habitual residence and the right of access

The proclaimed neutrality of the Convention in facilitating child abduction cases, and consequent choice of habitual residence as the main reference point, once served the purpose of generating positive outcomes, such as drop in number of father abductors. By ensuring access, the Convention simultaneously responded to fathers' concerns regarding contact with the child. Yet, it currently seems to lack the same positive effect on mothers as primary carers who find themselves abandoned in their often qualitatively different motivations for removal. Lubin¹¹² goes further and talks about injustice in the process of resolution of child abduction cases when the primary carers abduct as the principle of habitual residence and granting of access may work towards trapping women in their existing conditions.

For instance, in case no. 54429/00 *Couderc v. Czech Republic*,¹¹³ the European Court of Human Rights (hereafter referred to as "ECHR") ruled in a case of a Czech mother who lived in France with her partner and their child. She was the primary care of the child and later removed the child from France to the Czech Republic. After the removal, the father petitioned under the Convention and the removal was recognized wrongful. Since the mother did not

¹¹¹ police documents with certified translations from the country of habitual residence, medical documentation

¹¹² Barbara E. Lubin, "International Parental Child Abduction: Conceptualizing New Remedies through Application of the Hague Convention," *Washington University Global Studies Law Review*, 4, no. 2 (2005): 415-445, <http://digitalcommons.law.wustl.edu/globalstudies/vol4/iss2/8/> (accessed June 2, 2013), p. 434

¹¹³ *Couderc v. Czech Republic* no. 54429/00 (2001) <http://www.incadat.com/index.cfm?act=search.detail&cid=859&lng=1&sl=2> (accessed June 2, 2013)

want to comply with the return order, the father requested her provisional imprisonment. Eventually, the child was returned to France to the father under the Hague Convention. ECHR justified the father's right under the Convention to take measures towards the reunion, even justifying enforcement.

However, it can be argued that the mother, who was at the same time the primary carer, was disregarded as a result of the abduction, despite her status and relationship with the child. The child was returned to the father in France based on the rule of habitual residence and following issuing of the return order. In that sense, the mother was effectively limited to a life in France and since this did not seem to be an option for her, she was left out of the discussion regarding future of the child. The child was three at the age of the removal and five when returned to the place of habitual residence.¹¹⁴ Yet, referring to France as the place of habitual residence in the case of a 3-year old child may not be sufficient since no substantial connections or ties could have been established at this age. And if so, the two years spent outside of France with the mother would have provided a reasonable justification of a more sensitive approach, for instance mediation. Therefore, insisting on restoration of the *status quo ante* as the desired outcome could hardly represent the actual needs of the child in this particular case and at this age. And although officially accomplished, the return without the primary carer, who was otherwise a fundamental element of the prior conditions, could only contribute to restoring of the *status quo ante* in limited way.

A somewhat similar scenario could be observed in a case no. 8677/03 *P.P. v. Poland*,¹¹⁵ where the ECHR ruled in a case of a mother who abducted her two children from Italy to her home country, Poland. The father petitioned under the Convention and the return was ordered. The mother appealed against his petition. However, the Poznan Family Consultation Center

¹¹⁴ *Ibid*

¹¹⁵ *P.P. v. Poland*, no. 8677/03 (2008).

<http://www.incadat.com/index.cfm?act=search.detail&cid=941&lng=1&sl=2> (accessed June 2, 2013)

confirmed that if the children were returned without their mother, their development could suffer. Yet, the ECHR ordered the authorities to enforce return of the children to the country of habitual residence, Italy. In this instance, a more reluctant approach could be observed on the side of Poland, with expert evidence confirming the risk if the children were to be returned to the place of habitual residence, hence detached from the primary carer. Yet, ECHR ruled that the removal was wrongful under the Convention and return of the children had to be ensured.

In another case, *JR v SIR* [2007] NICA 50, [2008] N.I. 252,¹¹⁶ Northern Ireland Court of Appeal ruled in a case of a Slovak mother who abducted her two children from their Slovak father from the home country, Slovakia, to Northern Ireland. Although the parents were separated and a district court in Slovakia ordered that the mother will provide care for the children and the father should have access, the mother opposed the access claiming that contact of the father with the children could result in harm. Having her appeal dismissed, the mother abducted the children from Slovakia to Northern Ireland. Consequently, the father filled an application under the Convention and the removal was considered wrongful. The mother appealed under the exception of Article 13 (1) *b*) of the Convention but the appeal was dismissed and return ordered. According to later submitted evidence, there was a history of situations in which the children were prone to self-harm or running away from home when in Slovakia, and thus risk of physical or psychological harm could be expected if children were returned. Yet, even considering the desire of the children to stay in Northern Ireland with their mother and the risk of physical and psychological harm if returned to Slovakia, the return order was not dismissed and the evidence in favor of the mother considered insufficient. The court further noted that necessary support would be ensured for the children to reintegrate at the place of habitual residence with their father.

¹¹⁶ *JR v SIR* no. 252 (2007)

<http://www.incadat.com/index.cfm?act=search.detail&cid=1190&lng=1&sl=2> (accessed June 2, 2013)

Return to the place of habitual residence along with ensuring room for access to the children undoubtedly worked in favor of the non-primary carer in this case. The mother's appeal under the exception of Article 13 (1) *b*) together with the child objection, both in favor of removal of the children, were not found sufficient to open room for discussion regarding the return order. And thus, the hierarchy of priorities shows that return to the place of habitual residence as well as access (as the district court in Slovakia ordered), were of greater importance and relevance than presence of the primary carer and possibility of harm if returned. Instead, Social Services in Slovakia were expected to be engaged in making sure that the children integrate well in Slovakia, where effectively only the father resided, not taking into account absence of the primary carer.

It could be argued that remaining in Slovakia, or returning back, would pose less obstructions for the mother, unlike in cases of mothers who abduct their children from abroad, as Slovakia was the country of her origin too. However, her preference was to withdraw from Slovakia, and the evidence submitted later confirmed the risk such return would represent for the children. To what extent she could have acted differently and with what result is a mere speculation. It is also beyond the scope of this paper. The aim is to highlight the great power of the notion of habitual residence and the right of access as crucial in shaping of the important choices of the mothers – primary carers.

On the other hand, the case no. 3684/07 *Strömblad v. Sweden*¹¹⁷ is an example when the place of habitual residence did not serve as the main referential point in the ruling of the host country's (Sweden)¹¹⁸ court, where the father appealed. In this case, The ECHR ruled in a case of a Ukrainian mother who was a primary carer of a daughter whom she later retained

¹¹⁷ *Strömblad v. Sweden* no. 3684/07 (2012)

<http://www.incadat.com/index.cfm?act=search.detail&cid=1151&lng=1&sl=2> (accessed June 2, 2013)

¹¹⁸ The statistics for Sweden prove maternal abductions as the only form international parental child abductions, (Anne Tuohey, *Living in Limbo: The experience of International Parental Child Abduction*, (Melbourne: International Social Service Australian Branch, 2005)http://www.iss-ssi.org/2009/assets/files/Mediation/ISS_Australia_Living_in_Limbo.pdf (accessed June 2, 2013).)

at the maternal grandparents' house in Prague in the Czech Republic. Yet, the ECHR later responded to the father's complaint and did not confirm the Sweden's ruling. It held that the removal had prevented the father from exercising his right of access. However, the ECHR recognized that the return of the child after five years from her removal will not necessarily be in her best interests.

In sum, regardless of her role and status as a primary carer, the mother seems largely prevented from making major decisions regarding place of residence of the children if this is also not in reach of the non-primary carer. Aside from the last case, the children involved were ordered to return to the place of habitual residence in all instances. Based on the Convention, such proceeding is understood to be in the best interests of the child and as contributive to ensuring of the right of access.

3.1.2 The risk of harm and the challenge of evidence

As Hester¹¹⁹ argues, precisely in situations where domestic violence was reported, the access often provides the perpetrator with opportunities for further violence. Yet, this is where the question regarding the quantity and character of evidence needed to prove risk of harm arises.

As both Norris¹²⁰ and Lubin¹²¹ agree, domestic violence is one of the most difficult forms of violence to prove. Moreover, intimidation, coercion, threats of violence and other forms of psychological pressure are effectively impossible to document as there are no visible

¹¹⁹ Marianne Hester, "The Three Planet Model: Towards an Understanding of Contradictions in Approaches to Women and Children's Safety in Contexts of Domestic Violence," *British Journal of Social Work*, 41, no. 5 (2011): 837-853

¹²⁰ Catherine Norris, "Immigration and Abduction: The Relevance of U.S. Immigration Status to Defenses under the Hague Convention on International Child Abduction," *California Law Review*, 98, no. 1 (2010): 159-195, <http://www.californialawreview.org/assets/pdfs/98-1/Norris.pdf> (accessed June 2, 2013).

¹²¹ Barbara E. Lubin, "International Parental Child Abduction: Conceptualizing New Remedies through Application of the Hague Convention," *Washington University Global Studies Law Review*, 4, no. 2 (2005): 415-445, <http://digitalcommons.law.wustl.edu/globalstudies/vol4/iss2/8/> (accessed June 2, 2013).

bruises to serve as evidence. In terms of invoking Article 13 (1) *b*), all four Central Authorities admit that the issue of domestic violence or abuse appears frequently in cases of abducting mothers to justify their motives for abduction. As emphasized in the survey, “the taking parent has to meet the burden of proof”.¹²² In fact, providing sufficient evidence has been claimed to be crucial and, at the same time, the most challenging step in order to succeed in one’s appeal against the return order. In responses of the Central Authorities, gathering of extensive and expert evidence appears to be the main obstacle for the fleeing parents in successfully appealing against the return order.

In case no. *I CKN 745/98 Decision of the Supreme Court*,¹²³ the court ruled in a case of a Polish mother who abducted her child to Poland. The mother initially relocated with her husband to Canada where they lived together with the child. During family holiday in the home country, Poland, the mother retained the three year old child and expressed her wish to stay in the country. The father issued proceedings in Canada and the court in Ontario ordered return of the child. The District Court for the Capital City of Warsaw arrived with the same decision. The mother appealed invoking Article 13 (1) *b*) of the Hague Convention. Yet, her appeal was dismissed based on insufficient evidence of grave risk. The mother challenged the decision, among other points the failure of the Supreme Court to determine the risk if the child was returned to the place of habitual residence and inability of the Court to admit other pieces of evidence. The legal challenge was dismissed and return granted.

Similarly, in the case no. *6457/09 Shaw v. Hungary*,¹²⁴ the court ruled in case of a mother who abducted her child from France where she lived with her Irish husband. The parents later divorced, and the child stayed with the mother while the father was to have

¹²² Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, 2010, Permanent Bureau

¹²³ Decision of the Supreme Court, I CKN 745/98 (1998).

<http://www.incadat.com/index.cfm?act=search.detail&cid=700&lng=1&sl=2> (accessed June 2, 2013)

¹²⁴ *Shaw v. Hungary* no. 6457/09 (2011)

<http://www.incadat.com/index.cfm?act=search.detail&cid=1150&lng=1&sl=2> (accessed June 2, 2013)

access. However, later the mother accused the father of sexually abusing the child and informed the French authorities. Her allegations were not taken into account as the evidence was believed to be insufficient. After some time had passed, the mother removed the child to Hungary for the holidays with the father's consent. However, she later informed him that she would not return to France. The father filed an application under the Convention and Hungarian Court confirmed that retention was wrongful and ordered return of the child to France. The mother appealed invoking Article 13 (1) *b*), yet the evidence she provided was not considered sufficient. The mother appealed and kept opposing the return order, and later went into hiding while the father requested the Hungarian Court to enforce his access rights. The French court granted the father exclusive custody for which he sought recognition before national court in Hungary. The Hungarian Court did not recognize the exclusive custody the father had obtained in France. Eventually, the father appealed to ECHR claiming that Hungarian authorities did not ensure his access rights and failed to act adequately for the enforcement of the return order.

In both cases, the evidence proving risk of harm was found insufficient, and in both cases, the mothers appealed against dismissal of the first appeal claiming that the risk of harm existed. Drawing on Lubin¹²⁵, the extensive evidence such as police reports, social reports from the habitual residence of the child or medical documentation might be difficult to obtain, as it is in domestic cases where gender-based violence is reported. However, in cases of transnational marriages, if those fail or a harmful situation arises, the women who reside in the host counties might be more reluctant to trust the services in these countries. As Norris¹²⁶

¹²⁵ Barbara E. Lubin, "International Parental Child Abduction: Conceptualizing New Remedies through Application of the Hague Convention," *Washington University Global Studies Law Review*, 4, no. 2 (2005): 415-445, <http://digitalcommons.law.wustl.edu/globalstudies/vol4/iss2/8/> (accessed June 2, 2013).

¹²⁶ Catherine Norris, "Immigration and Abduction: The Relevance of U.S. Immigration Status to Defenses under the Hague Convention on International Child Abduction," *California Law Review*, 98, no. 1 (2010): 159-195, <http://www.californialawreview.org/assets/pdfs/98-1/Norris.pdf> (accessed June 2, 2013).

emphasizes, they might also be more obstructed to use them due to language, cultural or other barriers. Both home countries did not take the evidence provided into account.

On the other hand, interesting differences can be observed in the actions of the two national courts. While both, The District Court in Warsaw and the Hungarian Court, ruled that the removal was wrongful in cases of both mothers, the actions and enforcement of the return order differed. While the Hungarian Court was accused of not ensuring adequate enforcement of the return of the child the Polish District Court acted promptly and did not allow any extra space for further investigation of the mother's allegations. This difference may be explained using the information that the Central Authorities of both Poland and Hungary provided on behalf of the 2010 survey.¹²⁷ The position of Poland was rather strict, claiming (as well as understood in Polish judicature) that, "domestic violence in itself does not constitute a ground for refusing child's return to the state of his or her habitual residence if the authorities of that state are capable of providing security to the child".¹²⁸ In terms of Hungary, and as published in the Hungary section of International Divorce service, the country has been blamed for failing to comply with its obligation under the Hague Convention which is to promptly return children who are wrongfully taken to Hungary or retained in Hungary.¹²⁹ The national narrative was also stressed by the Hungarian Central Authority to be a strong and often present element in how the issue is shaped in the public and media.¹³⁰ And thus, while the appeal was eventually unsuccessful in both cases, the removal was wrongful and return was

¹²⁷ Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, 2010, Permanent Bureau, Poland, Hungary

¹²⁸ Ministry of Justice of the Republic of Poland, Division of European Law and International Cooperation – Division of International Law, Reply to the questionnaire concerning the practical operation of the 1980 and 1996 Conventions Poland, 2010, p. 3

¹²⁹ "International divorce." Accessed June 3, 2013. <http://www.international-divorce.com/ca-hungary.htm>.

¹³⁰ Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, 2010, Permanent Bureau, Hungary

ordered, the following actions (or lack of them) open space for a discussion of a more country specific responses.

Another Hungarian case might be understood as in line with the criticism articulated by the international community regarding compliance of the country with the Hague Convention. In a case no. 23.P.500023/98/5 *Mezei v. Bíró*,¹³¹ the Central District Court of Budapest ruled in a case of a Hungarian mother who abducted her children from Australia where she was living for some time after separation from her partner. During their visit in Hungary, the mother decided to remain in Hungary with the children. The father filled an application under the Convention, requesting return of the children to Australia. The Central Hungarian Court rejected the application and the father appealed. The mother appealed claiming that the father's behavior (domestic violence, alcoholism) represents a risk of harm if children are returned to the place of habitual residence. The expert psychologist' opinion confirming the risk of harm was initially accepted by the court. Father appealed and this appeal was eventually accepted and return of the children back to Australia ordered. The mother was advised to petition for custody in Australia. In addition, the evidence she provided was later found insufficient regardless of its initial acceptance. The justification for abduction by the mother who invoked Article 13 (1) *b*) was unsuccessful although originally supported by the Central Hungarian Court.

An interesting moment here is the initial refusal of the return order, as opposed to the previously assessed case when Hungary only failed to enforce the return. In *Mezei v. Bíró*, the Hungarian Court refused issuing the return order and the evidence proving risk of harm was accepted. After the father's appeal, the evidence was reassessed and claimed insufficient. The return order was enforced and one of the children, the daughter, was returned to Australia.

¹³¹ *Mezei v. Bíró* no. 500023/98/5 (1998)
<http://www.incadat.com/index.cfm?act=search.detail&cid=329&lng=1&sl=2> (accessed June 2, 2013)

The mother applied for the access to her daughter under the Convention. However, in a year from her application, the father voluntarily returned the daughter to Hungary.

On one hand, the refusal might be seen as a step towards a less narrow application of the Convention since the evidence of risk of harm was accepted. Yet, considering the initial concerns of the international community regarding Hungary's lack of compliance as largely connected to nationalist motives might eventually not contribute to shaping of a more sensitive approach on behalf of the primary carers. However, a more extensive examination of the connection of nationalism and the gaps in compliance with the Hague Convention is beyond the scope of the paper. In both cases, the return was eventually ordered which can be understood as the official standpoint. The mothers, in both cases the primary carers, were refused despite the reported violence, and largely left out of discussion in relation to the residence of the children.

In a case no. 440/2000 *DAOUD / DAOUD*¹³², involving a Czech mother and the Czech Republic as the requested state, the child objection (Article 13 (2)) was the type of evidence eventually accepted although no hierarchy officially exists between the different grounds for appeal. Only then the risk of harm (Article 13 (1)) as linked to the child's refusal of return was considered valid.

In this case, the Court ruled in a case of a Czech mother who removed her daughter to mother's home country, the Czech Republic, from Israel where the family was habitually resident. The father petitioned under the Convention for the child's return and the District court Rychnov nad Kniznou ordered the return of the child to Israel. The mother appealed invoking Article 13 (1) b) as well as child objection claiming the child possessed maturity to decide. Also, she challenged the return order insisting that the court did not take into consideration the evidence she provided (letters from the father, a report by a psychologist).

¹³² Daoud v. Daoud no. 440/2000 (2000)
<http://www.incadat.com/index.cfm?act=search.detail&cid=468&lng=1&sl=2> (accessed June 2, 2013)

The child objection was eventually confirmed by the Social Authority and it was further confirmed that if the child's views were not taken into consideration this would result in serious trauma of the child. The court still found the removal wrongful, yet admitted that the additional evidence should have been taken into consideration. The father's application is being reassessed anew.

In this case, the child's maturity served as an important factor to determine whether the return order is the best option. However, this objection is not applicable in cases of younger children and infants. Hence proving the risk of harm typically remains a challenge for the abducting mothers. In terms of the regional context, the Czech Central Authority confirmed that domestic violence is frequently alleged by abducting parents who consequently decide to invoke Article 13 (1) *b*).¹³³ Only in some cases there is enough evidence to prove it in a form of police reports, social reports from the habitual residence of the child or medical documentation.¹³⁴ And thus, when it comes to the issue of evidence, the situation seems to be rather complex. In case of *Mezei v. Bíró*, INCADAT does not provide additional information regarding the change in acceptance of evidence proving risk of harm, which the mother provided earlier. Yet, out of all¹³⁵ cases available in the database for the four countries invoking Article 13 (1) *b*), this was the only instance when the evidence was accepted and risk of harm confirmed, although later dismissed.

¹³³ Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, Czech Republic, 2010, Permanent Bureau

¹³⁴ *Ibid*

¹³⁵ Eight cases in total invoking Article 13 (1) *b*)

3.1.3 Incorporating the primary carers

Lubin¹³⁶ insists, that in cases of removal by the primary carer, it is likely that the harm the child is expected to experience may in fact be minor, as already discussed earlier. In that sense, separation from the primary carer may cause greater harm to the child than physical removal from the country of habitual residence. Also, the ties of the child to the place of habitual residence which the Convention is determined to restore and protect, may have different forms and vary in intensity. It is undoubtedly difficult to determine to what extent can the integration of the child in school or in peer groups and the positive aspects of that compete with presence of the primary carer. This also largely depends on the age and physical and mental wellbeing of the child. In her work, Lubin¹³⁷ challenges the narrowly defined concept of habitual residence and the seeming benefit of sustaining it regardless of the interfering elements. Additionally, in cases of young children, the ties to the neighborhood and peer groups are hardly more relevant and more important for healthy development of the child than presence and care of the mother.

In a cases no. 4824/06 and 15512/07 *Macready v. Czech Republic*,¹³⁸ the return of the child abducted by the mother was eventually refused due to recognized importance of the primary carer for the wellbeing of the child. Here, the court ruled in a case of mother who abducted her child from the United States of America where the family resided until their divorce. The mother was awarded custody. The father appealed under the Convention after he learned that the mother had left with the child to her home country, the Czech Republic. The Court ordered return of the child, to which the mother appealed, stressing that the child

¹³⁶ Barbara E. Lubin, "International Parental Child Abduction: Conceptualizing New Remedies through Application of the Hague Convention," *Washington University Global Studies Law Review*, 4, no. 2 (2005): 415-445, <http://digitalcommons.law.wustl.edu/globalstudies/vol4/iss2/8/> (accessed June 2, 2013), p. 434

¹³⁷ *Ibid*

¹³⁸ *Macready v. The Czech Republic* no. 4824/06, 15512/07 (2010) <http://www.incadat.com/index.cfm?act=search.detail&cid=1159&lng=1&sl=2> (accessed June 2, 2013)

suffered from autism, thus risk of harm existed and presence of the primary carer was crucial. The Regional Court in the Czech Republic confirmed the original ruling and although the removal was wrongful, the court admitted that ordering the return would cause the child mental disturbance which could further negatively impact his already fragile state.

Having divorced, the mother for various reasons favored to return to her home country where she could most likely reestablish her life in a familiar environment. Typically, in situations like this one, the mother only has two options, either remaining resident in the host country with the child, or leaving the country without the child. In this case, a more flexible approach of Czech courts could be observed. Presence of the primary carer appeared crucial for the best interests of the child. Yet, in *Macready v. Czech Republic*, it was the condition of the child which justified the necessity of mother's presence and it overruled the principle of return to the place of habitual residence. It might be argued that the same approach could be hard to expect in cases of healthy children.

In the last examined case no. 31515/04 *Serghides v. Poland*,¹³⁹ the ECHR ruled in a case of a mother who abducted her child from England, where she was living for two years after the divorce, with the child in her sole custody. She later removed the child to her home country, Poland and refused father's petition under the Convention. This petition was initially also refused by the Polish courts, and later returned for a retrial. Variety of evidence¹⁴⁰ was obtained and provided by the mother confirming that the father had no right of custody relating to the child. After retention of the child at the British embassy in Poland by the father, the return order was refused and the child admitted into care of the mother in Poland. The father's appeal was dismissed after a risk of psychological harm was proven if the child was returned to the place of habitual residence since their relationship suffered due to father's attempt for abduction.

¹³⁹ *Serghides v. Poland* no. 31515/04 (2010)

<http://www.incadat.com/index.cfm?act=search.detail&cid=1188&lng=1&sl=2> (accessed June 2, 2013)

¹⁴⁰ a welfare report, a psychological examination and testimonies from parents and witnesses

Although in this case, the mother was eventually relieved of returning the child to the place of habitual residence, it was the fact that even living with the child as a custodial parent for two years did not provide enough space to address the status of a primary carer. The Polish courts were reluctant with the father's petition and managed to collect extensive evidence to support their decision. Yet, the final ruling of ECHR was based on the risk of harm due to the deteriorated relationship of the child and the father. The mother's status as a caretaking and a sole custodial parent in England did not contribute to this ruling.

As Lubin¹⁴¹ highlights, promotion of access significantly shapes the approach and understanding of the best interests of the child. As such, the current access paradigm works almost exclusively in favor of the non-primary carer since the primary carer's choices regarding moving both within and outside the country have to take into consideration ensuring space for the access of the non-primary carer. As visible in the examined cases, the decisions that the primary carer is able to make are effectively limited by making sure that the place of residence is within reach of the non-primary carer so that contact with the child can be ensured. The access paradigm along with the narrow definition of the habitual residence, which does not recognize presence of the primary carer as crucial for the child's wellbeing, are then powerful instrument in limiting autonomy of the primary carer. This reflects in the limitations in decisions regarding the future place of habitual residence and applies regardless of history or character of the relationship. As observed in the analyzed cases, most national courts still proceed with issuing of the return order, without exploring the motives of the mother abductor and whether such return is truly in the best interests of the child.

¹⁴¹ Barbara E. Lubin, "International Parental Child Abduction: Conceptualizing New Remedies through Application of the Hague Convention," *Washington University Global Studies Law Review*, 4, no. 2 (2005): 415-445, <http://digitalcommons.law.wustl.edu/globalstudies/vol4/iss2/8/> (accessed June 2, 2013), p. 434

Conclusions

There is a consensus¹⁴² that the 1980 Convention succeeded in responding to the original context of the parental child abductions where the typical abductor profile was the non-custodial father abducting to gain more control over the life of the child. However, as discussed in chapter one, this is not the dominant paradigm anymore, and many argue that the Convention has failed to anticipate and capture complexity of the issue in terms of future maternal abductions. Moreover, as demonstrated in chapter two, the Convention in its current form largely disregarded the relationship of the parent with the child, and did not include it as an important factor in determining the best interests of the child. The absence of the primary carer in the original text is currently reflected in their further disadvantaging in cases of maternal abductions, limiting their options regarding life after separation as well as not providing sufficient response in cases of abductions due to domestic violence.

The role of the primary carer and the qualitatively different relationship with the child remain without a response in most cases, as shown in chapter three. Simultaneously, as also concluded, the Convention fails to reflect upon the often very different motives of abducting mothers today, who are left with a limited space for opposing return of the child. Such disregarding of the gender-specific context also reflects in a greater disadvantage on the side of the abducting primary carers.

In terms of the regional context, Poland, Hungary, Czech Republic and Slovakia have mainly demonstrated similarities in handling of the cases. The observed differences in practices might be due to domestic attitudes regarding abductions or other interfering factors that deserve further attention. However, in the region with growing incidence of parental abductions following the EU accession in 2004, and more importantly with a growing

¹⁴² Lubin (2005), Beaumont and McEleavy (1999), Bruch (1998/1999), Tuohey (2005), Norris (2010) and others

numbers of maternal abductions, the application of the Hague Convention has been mostly similar in terms of issuing the return order. The exceptions provided by the Convention for the abducting parent proved largely ineffective and there seems to be a perceived hierarchy among them in some national contexts. Therefore, the appeals of the abducting primary carers were almost unanimously refused and return of the child ordered despite the context. Although the majority of abductions were committed by primary carers, the original aims and definitions as in the Convention remained unchallenged in the public and scholarly discussion.

Thus, as a result of being disregarded in the original text, mothers as primary carers are being further disadvantaged by the Convention when making decisions regarding their future and in context of domestic violence. This missing primary carer necessarily translates into often unfavorable court rulings under the Convention. And although the Convention proved successful in the past and in number of cases to date still does prove effective, the statistics for mother abductors call for a more primary-carer inclusive approach where complexity of the issue would be articulated more adequately. Addressing the primary carer in the Convention might have the potential of doing more justice in case of both, the mothers and the children. It is after all the child's wellbeing that needs to be considered and which the Convention finds to be of paramount importance.

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Appendix 2

Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – full text

CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

(Concluded 25 October 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 organisations 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 States 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 organising 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 recognised 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 organising 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 fulfilment 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 organising 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 legalisation 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 authorisation 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 organising 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 authorised 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.