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Domestic Violence and Child Participation: Contemporary Challenge for the 1980 Hague Child Abduction Convention

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Domestic Violence and Child Participation: Contemporary Challenges for the 1980 Hague Child Abduction Convention

Abstract

This article addresses two contemporary challenges for the 1980 Hague Child Abduction Convention: (i) domestic violence and (ii) child participation. It also outlines three components of a global socio-legal policy and research initiative undertaken to address these issues and, where relevant, their intersection. The published literature on these topics, including the children's objections exception, is explored, as are the ways in which these challenges are addressed within some of the 101 Contracting States to the Convention and through the Guide to Good Practice on Article 13(1)(b) of the Convention. Regard is paid to the data provided by the statistical analysis of applications made under the Convention in 2015 by Lowe and Stephens, and the changes which will occur once the Recast of The European Brussels 11a Regulation comes into operation. The likely impact of the UK leaving the European Union, currently due to occur on 31 October 2019, for 1980 Hague Convention abduction proceedings is contemplated. Other current international initiatives are discussed, including the development of a child-friendly version of the Convention through The International Association of Child Law Researchers. Training is a key to changing attitudes and upskilling family justice professionals to ensure the Convention operates in a fully child-centric way. This will maintain and strengthen the Convention by keeping it 'fit for purpose'. (215 words)

Keywords: Domestic Violence, Child Participation, International Child Abduction Challenges

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Introduction

International child abduction is a global and growing phenomenon (Lowe and Stephens 2012, 2018a, 2018b). The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereafter the Convention) provides for co-operation between its 101 signatory States to ensure that a child abducted from their State of habitual residence in breach of rights of custody is returned there forthwith. Unlike most other family law matters, the focus is on the jurisdiction, not the child's welfare, unless one of the limited Convention exceptions to return applies. The Convention provides an internationally agreed mechanism for dealing with child abduction, yet its interpretation and implementation is a matter for each individual State Party since there is no supra-national body controlling its application.

This article discusses two challenges facing the application of the Convention in contemporary times: firstly, domestic violence and, secondly, child participation. It outlines three components of a socio-legal policy and research initiative that addressed these issues and, where relevant, their intersection through i) a 2017 international workshop held in London on domestic violence and welfare outcomes in the context of Convention proceedings; ii) a 2017-2018 cross-jurisdictional research project on children's objections to return under Article 13 of the 1980 Convention; and iii) a 2019 Round-table Meeting in Israel on the voice of the child in Convention proceedings.

Domestic Violence and the 1980 Convention

Domestic violence, and its treatment under the Convention, have long been concerns for commentators in this field (Bruch 2004, Greif and Hegar 1993, Hale 2017, Kaye 1999, Weiner 2000). A significant reason for this has been the change in the profile of abductors from non-custodial father abductors to primary and joint primary carer mother abductors (Lowe and Stephens 2012, 2018a, 2018b), some of whom abduct because they are escaping from domestic violence or abuse. The Convention does not contain any specific 'defence' or exception to the obligation to return the child relating to domestic violence. Weiner (2002, p. 278) notes that 'the Convention was

not drafted with this fact pattern in mind, and it often works unjustly in these cases.' Quillen (2014, p. 622) is also concerned that the tension between discouraging child abduction and protecting victims of domestic violence manifests in the 'unjust treatment of domestic-violence victims under the Hague Convention.' However, to afford better protection, a trend towards more favourable treatment of such victims has emerged whereby some Contracting States (for example, Switzerland and Japan) have included specific provisions relating to domestic violence in their enabling legislation (Quillen 2014).

In Switzerland an intolerable situation in Article 13 exists under the Swiss Federal Act on International Child Abduction and the Hague Conventions on the Protection of Children and Adults where a placement with the parent who filed the application is manifestly not in the child's best interests; the abducting parent is not, given all of the circumstances, in a position to take care of the child in the State where the child was habitually resident immediately before the abduction or this cannot reasonably be required from this parent; and placement in foster care is manifestly not in the child's best interest (Weiner 2008).

The Convention came into force in Japan on 1 April 2014 through their Act for Implementation of the Convention on the Civil Aspects of International Child Abduction. Section 28 (vi) states that:

> … in judging whether a grave risk of the child's return to the state of habitual residence would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation, the court shall consider all of the circumstances set out in s28(2), including (i) whether or not there is a risk that the child would be subject to the words and deeds, such as physical violence, which would cause physical or psychological harm(referred to as "violence, etc" in the following item) by the petitioner, in the state of habitual residence (ii) whether or not there is a risk that the respondent would be subject to violence, etc. by the petitioner in such a manner as to cause psychological harm to the child, if the respondent and the child entered into the state of habitual residence (iii) whether

> or not there are circumstances that make it difficult for the petitioner or the respondent to provide care for the child in the state of habitual residence.

Yamaguchi and Lindhorst (2016, p. 25) argue that Japan's broad definition of domestic violence in its implementing legislation takes greater account of the need to protect Japanese women and warn of the consequences for children of not taking this issue into account when Hague Convention petitions are filed when they state that children who are the supposed beneficiaries of the treaty may end up being victimised by the policy instead of helped by it.[i]

Similar concerns have prevented India from becoming a signatory to the 1980 Convention:

> It was thought that acceding to the Convention would impede protection of Indian women and children from difficult living situations and the vast majority of abductors have been mothers suffering from domestic violence in NRI [non-resident Indian] marriages. (Jolly 2017, p. 25)

Jolly (2017) recognises that "India's reluctance is the result of various factors" (p. 25), but attributes their major objections to a focus on "the rights of Indian women" instead of "looking at the issue from a child-centric perspective" (p. 26). This is problematic as it has long been recognised that children are significantly affected by the violence and abuse which occurs between their adult carers (Carlson, 2000; Edleson, 2011). Thus, concern for women victims of domestic violence and abuse is, in fact, also an expression of concern for the children of that relationship who may be either direct victims of the abuse or witnesses of it. Jolly (2017, p. 26) further argues that a failure to return a child to their habitual residence encourages child abduction and denies the right of the child to be in direct contact with both parents as provided in the United Nations Convention on the Rights of the Child (hereafter the UNCRC). That right, contained within Article 9 of the UNCRC, for a child not to be separated from their parents against their will, is not absolute as it provides for such separation that is necessary for the best interests of the child, and specifically states that this may be necessary in a case involving abuse or neglect of the child by the

parents. When it is recognised that abuse to the child may occur through violence between the parents, the child-centricity of a non-return of the child to the State of habitual residence in these circumstances is evident. It is, of course, entirely possible for a child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis even when they reside in different countries, and the right to do so in Article 9 is, in itself, subject to the child's best interests being served by such contact (Article 9.3). Furthermore, Article 19 of the UNCRC requires States Parties to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child. Therefore, in a case involving domestic violence, non-return of the abducted child and the consequent ongoing separation from one of their parents may be fully justified as being in the child's best interests within Article 9, and also be in furtherance of the requirement for States Parties to protect the child from physical or mental violence within Article 19.

Recognition that contact may not be in a child's interests where there has been domestic abuse to the parent (or the child) can be found in the English exception to the presumption of contact in s 1(2A) of the Children Act 1989 where, *unless the contrary is shown*, it is presumed that involvement of a parent in the life of the child will further the child's welfare (emphasis added). This provision has been the subject of a Practice Direction (Practice Direction 12J) which requires the court to have particular regard to any allegation or admission of harm by domestic abuse to the child or parent or any evidence indicating such harm or risk of harm when applying the presumption that parental involvement in a child's life will further the child's welfare (Para. 7).

It is at least questionable whether non-return of the child to the State of habitual residence encourages abduction or whether women who are victims of domestic violence will still try anything to protect themselves and their children, even if they fear they might ultimately be returned. Weiner (2000, p. 632) states that women concerned about preserving their lives are less concerned with the legal implications of the abduction than with their physical safety and if, by chance, women stay in an abusive relationship

because of the Convention, the primary goal of protecting children will be undermined.

It was hoped that recent consideration of the Civil Aspects of International Child Abduction Bill 2016 would herald the joining of India to the Convention. However, Jolly (2017) noted that neither the Convention, nor the Bill, dealt with situations where a parent is exposed to 'grave risk' and it is only by interpreting 'domestic violence' and other violence against a parent as exposing the child to 'grave risk' that the provisions could be utilised to protect women. Jolly (2017, p. 30) concluded that:

> The legislative and policy measure to protect women in abusive marital relationships involving NRI's need to be strengthened if India is to reap the real benefit of acceding to the Hague Convention.

However, the Bill was not accepted into law and, despite continued encouragement, it now seems that India is unlikely to become a party to the Convention because of its concerns about the treatment of domestic violence victims within it. (Strategic News International 2019).[ii]

The incorporation of a domestic violence 'defence' in the enabling laws of countries like Switzerland and Japan has created an uneven playing field for domestic violence victims and their abducted children within the Convention countries. Where a domestic violence 'defence' has not been enacted as part of the Convention, as is the more common approach, an abducting mother must seek to rely on Article 13(1)(b) of the Convention to resist the return of the child to the State of habitual residence based on the risk of harm to the child created by the violence perpetrated against her. Under this provision, a court in a requested State is not bound to order the return of the child if there is a grave risk that return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. However, this is a difficult threshold to satisfy as the drafters' intention was for the exceptions to return to be applied in a restrictive fashion so the Convention does not become a dead letter (Perez-Vera 1982). If the grave risk threshold is not satisfied, the child will be ordered to return to the State of habitual residence, and the mother will

have to decide whether to return with her child, and risk further violence to herself, or to accept that the child will return without her. These agonising choices are necessary because of the greater risk faced by domestic violence victims after separation than previously since 'the mere physical proximity of an abuser and his victim increases the likelihood of violence' (Weiner 2000, p. 626, see also Bruch 2004).

Some women report feeling disbelieved when they raise domestic violence in their efforts to resist their child being returned in abduction proceedings. Masterton (2019) interviewed ten abused mothers who fled with their children, but were subsequently ordered to return their children to an abusive situation by Australian and other courts. These women all felt their voices were not heard and that the courts did not believe their domestic violence experiences. Shetty and Edelson (2005, p. 119) also note that a staff member from the Abduction Unit of the Office of Children's Issues at the U.S. Department of State stated, in an interview, that when domestic violence is raised "it is often viewed as an unsubstantiated allegation." Yet domestic violence can be common in Hague Convention cases. In research by Lindhorst and Edelsen (2012) with 22 cases where return proceedings occurred for wrongful removal, all the women reported their situation as one of domestic violence. Shetty and Edelson (2005, p. 117) had also earlier found adult domestic violence to be a significant issue in parental abductions:

> It is the abducting mother, who is battered and fleeing across international borders for her safety and that of her children, for whom there is little or no assistance and whose motives are often doubted.

A possible reason for the unwillingness to believe allegations of domestic violence in the abduction context could be concern about weakening the Convention if domestic violence is used as a 'defence' against returning an abducted child to the State of habitual residence. However, King (2013, p. 310) cautions against favouring this policy over the perils of exposing children to domestic violence because of the severe impact this has on women and children who flee abuse.

The Sixth Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child

Abduction Convention and the 1996 Hague Child Protection Convention held in June 2011 and January 2012 addressed the issue of domestic and family violence in relation to the Article 13(1)(b) grave risk exception. Baroness Hale (2017, p. 11) identified the strong impetus for this Special Commission's consideration of these issues:

Without doing something, there was a very real risk that some countries would pull out of the Convention altogether. There was and remains a very real concern in some states that their primary carer nationals were being required to choose between returning with the child to a situation where they would face a real risk of violence or abuse or refusing to return so that the child would have to go alone to a new situation. In either case there was a real risk of harm to the child.

A reflection paper (HCCH Permanent Bureau 2011) written in response to the increased attention that domestic violence issues in the context of return proceedings were receiving in practice and through academic comment helped to inform the discussion. One of the 'difficult challenges' noted about the operation of the 1980 Convention was how to achieve a balance between the need for the required expeditious processes while necessarily avoiding an examination of the merits of the case, but still allowing proper consideration of a defence under Article 13(1)(b) (Sixth Special Commission 2011-2012, para 93). The Special Commission recommended that:

> The Council on General Affairs and Policy authorise the establishment of a Working Group composed of judges, Central Authorities and cross-disciplinary experts to develop a Guide to Good Practice on the interpretation and application of Article 13(1)(b), with a component to provide guidance specifically directed to judicial authorities, taking into account the Conclusions and Recommendations of past Special Commission meetings and Guides to Good Practice. (Sixth Special Commission 2011-2012, Recommendation No. 82).

The significant negative long-term effects of abduction identified in prior research (Freeman 2006, 2014, Grief 2000, 2009, Chiancone 2000, Gibbs *et al*. 2013, Van Hoorde 2017) means it is critical that the effectiveness of the Convention is not undermined. However, this is unlikely to be achieved

without constructively addressing the issue of domestic violence. The 2016 award of a University of Westminster Strategic Research Investment Fund Grant to the lead author enabled her to convene a specialist one-day *Experts' Meeting on Issues of Domestic / Family Violence and the Operation of the 1980 Hague Child Abduction Convention* (hereafter the Experts' Meeting) at The University of Westminster (London), in collaboration with The Hague Conference on Private International Law, on 12 June 2017 to address these issues directly (HCCH 2017a). Fifty-seven specialist abduction researchers, judges, legal practitioners, policy makers and NGO staff attended this high-level networking and information exchange event, either in an official or personal capacity, from the following 19 jurisdictions: England and Wales, Australia, Belgium, Brazil, Canada, Finland, France, Germany, India, Italy, Japan, New Zealand, Northern Ireland, Norway, Scotland, South Africa, Switzerland, The Netherlands and the USA. The presence of three participants from India was particularly significant because of the sensitive discussions then being held concerning the possibility of India joining the Convention.

In preparation for the Experts' Meeting, the authors, in co-operation with The Hague Permanent Bureau, developed and electronically distributed a questionnaire to all participating experts to provide information from each jurisdiction relevant to the thematic working sessions. Fifteen responses from 12 jurisdictions were received, together with supplementary documents from several experts (such as leading cases and published articles). This information was collated and circulated in advance to all the experts. Four key themes, which centred on the current tensions and challenges identified earlier in this article, were discussed at the Experts' Meeting, where the respective sessions were chaired by participants with particular expertise and/or experience with the issues under discussion:

1. **Retrospective views on the 1980 Convention and the issue of domestic violence and the evolution of national domestic violence regimes (1980 to 2017)** (c*haired by Professor Nicholas Bala, Queens University, Canada*): The experts acknowledged the range of conduct which might

amount to abuse and could, therefore, affect children as either direct abuse or that which results from being exposed to violence between their parents. In welcoming the signing by the European Union on 13 June 2017 of the Council of Europe Convention on preventing and combating violence against women and domestic violence, the experts recognised the global reach of these issues, and the ways in which they are being addressed around the world by awareness raising, training, and support programmes. The experts also emphasised the importance of considering the availability and efficacy of protective measures in the jurisdiction of the child's habitual residence to protect the child and the taking parent if the child's return is ordered.

2. **The evolution of Central Authority and judicial good practices related to the 1980 Convention and domestic / family violence** (*co-chaired by Lord Justice Moylan, Court of Appeal, London, and Joelle Schickel, Central Authority, Switzerland*):

Central Authority Practice: With (now) 101 parties to the Convention, the size and resourcing of Central Authorities can be a practical challenge within jurisdictions (Lowe and Stephens 2018b). Nonetheless, the experts concluded that Central Authorities must consider how they can best assist in situations involving domestic and family violence. The paucity of data about what happens for a child after the Convention case has concluded was said to hamper Central Authorities and judges, who would also find education and information to assist them in developing the requisite skills and practices of paramount importance. The experts also highlighted the need for co-operation between judges, central authorities, and authorities in a given country.

Judicial practice: The experts looked forward to the publication of the Guide to Good Practice on Article 13(1)(b) of the 1980 Convention which they agree will be of assistance at the global level. There is an increased awareness within the judiciary globally of the impact of domestic violence on children, and the importance of direct judicial communications in specific Convention cases was emphasised. The need to develop further means to assist courts in understanding and determining the protective measures available in the requesting State and their

effectiveness in responding to any grave risk that is established was underlined. The experts highlighted the importance of implementing legislation for Contracting States and how domestic violence can, by itself, establish the grave risk exception. In some States it is possible to establish an Article 13(1)(b) defence based on the subjective perception of risk.

3. **New Guide to Good Practice on Article 13(1)(b) and other mechanisms to strengthen international cooperation on this issue** (*chaired by Chief Justice Diana Bryant AO, Family Court of Australia, Member of the International Hague Network of Judges*): The meeting welcomed the report on the progress on the new Guide to Good Practice on Article 13(1)(b) which includes, but is not limited to, assertions of domestic and family violence raised under the grave risk exception. At the same time, the importance of mediation as a means of achieving conditions for return and a 'soft landing' for children was emphasised. The cross-border enforceability of mediated agreements and the development of a Navigational Tool on this topic under existing Hague Children's Conventions were also noted as issues and projects of interest. The experts underlined the potential of 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 (hereafter the 1996 Convention) for orders to be made enforceable under Article 11 in the context of the 'safe return' of a child. The need for effective means of obtaining and enforcing orders upon return was emphasised. Experts agreed upon the importance of Network Judges and the International Hague Network of Judges in this regard, e.g., confirming what orders can be made and their enforceability. While the new Guide to Good Practice on Article 13(1)(b) will be compatible with different legal systems internationally, specific States or jurisdictions may want to develop their own bench books to best address local specificities in law and practice.
4. **A potential new international instrument on protection orders** (*chaired by Anne-Marie Hutchinson QC (Hon), OBE, Dawson Cornwell & Co., Solicitors, London, and Chair of the Board of Trustees of reunite, The International Child Abduction Centre*): The effective

enforcement of orders generally, and the training of relevant actors (e.g., enforcement officers) on the same, was considered important. Potential in this area could be realised, in particular, through co-operation and liaison within judicial networks, among lawyers and Central Authorities. As 1980 Convention proceedings are restricted to the parties, usually the parents, and the protective measures that could be obtained under the 1996 Convention are related to the child concerned / the dispute concerning the child and not necessarily the child's carer, the experts recognised a practical need in the operation of the 1980 Convention for an international instrument addressing the recognition and enforcement of protection orders. This would assist in many situations where protection orders are required in respect of other actors and, in particular, extended family members. Any new instrument should likely be multi-layered with an option for 'full' protection orders that are transportable across international borders, as well as provision for urgent measures that are intended to be time-limited (e.g., in the context of return proceedings under the 1980 Convention) with required learning from operational experience with the 1996 Convention, including ensuring that recognition and enforcement of measures would be truly 'automatic.' In all cases, the due process rights of a respondent should be safeguarded, and an effective database or other registration system was needed for prompt access to, and rapid verification of, 'transportable' international orders so they could be accessed and verified swiftly.

The concluding session of the Experts' Meeting, co-chaired by Lady Justice Jill Black, as she then was, Head of International Family Justice, Court of Appeal, London, and Philippe Lortie, First Secretary, Hague Conference on Private International Law, focused on the challenge of striking the correct balance between resolving and properly investigating cases involving domestic and family violence (to the extent required by the grave risk exception under the Convention) whilst maintaining the expedition necessary to return abducted children without undue delay. Whilst the legitimate needs and expectations of the left-behind parent were recognised, the importance of ensuring the enforceability of mirror orders was emphasised. Using simpler language to convey the meaning of the mirror order more easily was

suggested as a way of enabling them to be better understood in other countries. The critical impact of immigration matters in the context of the operation of the 1980 Convention in cases involving domestic and family violence was also highlighted as immigration status is not infrequently used by abusive partners as a means of control. The experts welcomed and supported recommencement of the regular publication of The Judges' Newsletter on International Child Protection which has provided key information for the development of many Guides to Good Practice, Practical Handbooks, Guidelines and Principles. The experts noted the benefits of face-to-face meetings and proposed that events like the London Experts' Meeting be repeated in the future. The need for further (evidence-based) research to strengthen existing knowledge on international child abduction was also acknowledged. In particular, the experts wanted research to address the short-term and long-term outcomes for children (and relevant family members, including taking and left-behind parents), for example, in the context of return and non-return cases, when abductions occur against a background of domestic/family violence and/or other abuse; the impact and effectiveness of post-return protective mechanisms, measures, judicial and legal processes, support services, and/or arrangements; and the ascertaining of children's views in Hague proceedings.[iii] The report from the Experts' Meeting became Information Document No. 6 (HCCH 2017b) at the 2017 Seventh Special Commission.

Following the final session of the Experts' Meeting, Chief Justice Diana Bryant AO delivered a lecture at The University of Westminster as part of this project on 12 June 2017. Entitled *The Abduction Convention in a post-Brexit era: The law will survive the changes to the political landscape*, this lecture was attended by a diverse range of participants, including senior members of the judiciary, leading practitioners and academics in the abduction field within the United Kingdom, as well as international delegates from the Experts' Meeting. Chief Justice Bryant addressed the issue of domestic violence in the context of the grave risk defence in Article 13(1)(b) and noted the significant differences in values that could be anticipated between at least some of the then 97 contracting states where the issue of domestic violence is concerned. She also considered the Brussels 11a Recast[iv] and said that the message

contained in that instrument was how, not whether, the child should be heard (Bryant 2018).

The final part of this project involved a two-day research meeting at The University of Westminster in June 2017, hosted in collaboration with the International Association of Child Law Researchers (hereafter IACLaR).[v] The research meeting considered the key issues emerging from the Experts' Meeting and particularly focused on the strong call for research on abduction outcomes. Others have lamented the dearth of such research - for example, Shetty and Edelson (2005, p. 120) discuss 'the little research available on families where parental child abductions have occurred.' Future research must address the outcomes for children abducted against a background of violence or abuse so as to better understand any similarities or differences from what is known about the impact on children abducted in circumstances that do not include these familial dynamics (see Freeman 2014 – Baroness Hale's Foreword). Undertaking longitudinal cross-jurisdictional empirical research on the outcomes of international child abduction is methodologically, ethically and logistically challenging, and expensive to undertake, because of the need to recruit and track children across more than one country and, often, more than one continent. Assembling a robust and balanced sample of those abducted against a background of violence and/or abuse who can be followed over time is therefore a formidable exercise, but nevertheless one that IACLaR is continuing to pursue.

Outcomes for Objecting Children under the 1980 Convention

Turning now to child participation issues in the context of the 1980 Convention, the need for further evidence-based research on ascertaining children's views, which was recognised in the 2017 Experts' Meeting, has long been desired by those working on international child abduction issues (Beaumont *et al*. 2016). In part, this was driven by the child's objection exception in Article 13 of the Convention which states that:

> The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at

> which it is appropriate to take account of its views. In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Little is known about the use and impact of this exception on children ordered by the Court to either return, or not return, to their State of habitual residence. A small-scale, mixed-methods Demonstration Project, funded by the British Academy, was therefore undertaken in 2017-2018 by the authors in England & Wales and New Zealand (Taylor and Freeman 2018). Entitled *Outcomes for Objecting Children under the 1980 Hague Convention* (hereafter the Children's Objections project), the study ascertained the perspectives of family justice professionals, children who had objected to their return, and their parents regarding the children's objection exception, and the tensions and challenges inherent in its use, to better inform international law, policy and practice.

There is no minimum age at which the exception will apply; nor are there any guidelines for assessing the maturity of the child. It has been held that the child's objection, which forms the basis of the exception, must be more than a preference:

> The wording of the article is so phrased that I am satisfied that before the court can consider exercising discretion, there must be more than a mere preference expressed by the child. The word 'objects' imports a strength of feeling which goes beyond the usual ascertainment of the wishes of the child in a custody dispute. (*re R (A Minor: Abduction)* [1992] 1 FLR 105 per Bracewell J at 108).

Further, the child's objection must be to returning to the State of habitual residence; not to the left-behind parent, notwithstanding that the place and the person may be the same in the child's mind, particularly if the abducting parent refuses to return with the child. The complexity of this

distinction was clearly encapsulated by Lady Justice Butler Sloss in *re M (A Minor) (child Abduction*) [1994] 1 FLR 390 [1994] Fam Law 242:

> The problem arises when the mother decides not to return with the child. It would be artificial to dissociate the country from the carer in the latter case and to refuse to listen to the child on so technical a ground…such an approach would be incompatible with the recognition by the Contracting States signing the Convention that there are cases where the welfare of the child requires the court to listen to him. It would also fail to take into account Art 12 of the United Nations Convention on the Rights of the Child 1989. From the child's point of view the place and the person in those circumstances become the same.

This has particular pertinence given that the most recent statistical survey of abductions in 2015 revealed the majority of abducting parents continue to be mothers (Lowe and Stephens 2018a, 2018b). There is also no guidance in the Convention on how to establish that a child objects to return, or on the way in which children should be heard in such proceedings more generally. These crucial issues are left to the policy and practices of individual State parties and have inevitably resulted in considerable global diversity in how, when and by whom children's objections and views are heard.

Even if a child is found to object, and to be of an age and degree of maturity at which it is appropriate to take account of their views, the child may nevertheless still be returned to the State of habitual residence. The fulfilment of the legal criteria simply creates a discretion for the court to exercise in determining the matter. Article 12 of the UNCRC assures to the child capable of forming their own views the right to express those views freely in all matters affecting them, with due weight being given to those views in accordance with the age and maturity of the child concerned. It is questionable whether, and how far, the children's objections' exception in Article

13 of the 1980 Convention can be said to fulfil the requirement in Article 12 of the UNCRC relating to the child's right to participate in decisions concerning them (Schuz, 2013, p. 317). This is particularly the case for the many children who are unaware they can raise an objection to their return and have to rely on being informed about this, usually by the respondent parent at a time of great stress. Additionally, the differing approaches between the Contracting States to the 1980 Convention to hearing children mean that children will not always be heard in 1980 abduction proceedings when no objections to return are raised. Younger children are even less likely to be heard as the court may be of the view that any weight to be given to their views will not affect the outcome of the application due to their age. It is hard to argue that this truly reflects the obligations embodied for child participation within the UNCRC. With the 1980 Convention preceding the UNCRC by nearly a decade it is perhaps unsurprising there was less emphasis on child participation rights in the abduction context. However, Article 11(2) of the Brussels 11a Regulation (which takes its inspiration from Article 12 of the UNCRC) provides more contemporary guidance on how certain aspects of the 1980 Convention should be interpreted within the Member States of the European Union. The current recast of this Regulation, which will come into effect on 1 August 2022, moves even closer towards honouring the intent of the UNCRC[vi], as Article 21 contains the instruction that:

> Member States shall, in accordance with national law and procedure, provide the child who is capable of forming his or her own views with **a genuine and effective opportunity to express his or her views,** either directly, or through a representative or an appropriate body. … Where the court, in accordance with national law and procedure, gives a child an opportunity to express his or her views in accordance with this Article, the court shall give due weight to the views of the child in accordance with his or her age and maturity. (emphasis added)

The authors believe that children should have opportunities to express their views in family law proceedings generally, and within abduction proceedings whether or not an objection to return has been raised, and regardless of whether or not the jurisdiction involved is governed by a regulatory regime, like Brussels 11a, which specifically addresses the international obligations of State Parties to the UNCRC and other similar instruments. Children's rights should not be so haphazard in their application that those able to take advantage of them must rely on the serendipity of geography. As Baroness Hale stated in *re D* [2006] UKHL 51 (para 57):

> As any parent who has ever asked a child what he wants for tea knows, there is a large difference between taking account of a child's views and doing what he wants. Especially in Hague Convention cases, the relevance of the child's views to the issues in the case may be limited. But there is now a growing understanding of the importance of listening to the children involved in children's cases. It is the child, more than anyone else, who will have to live with what the court decides. Those who do listen to children understand that they often have a point of view which is quite distinct from that of the person looking after them. They are quite capable of being moral actors in their own right. Just as the adults may have to do what the court decides whether they like it or not, so may the child. But that is no more a reason for failing to hear what the child has to say than it is for refusing to hear the parents' views.

Baroness Hale did not limit her observations to cases under B11a, but said that the principle was of universal application and consistent with international obligations under the UNCRC. It applies in any case in which the court is being asked to apply Article 12 and direct the summary return of the child:

> … in effect in every Hague Convention case. It erects a presumption that the child will be heard unless this appears inappropriate. Hearing the child is .. not to be confused with giving effect to his views. (para 58).

The Children's Objections project[vii] involved the completion of i) a literature review summarising the key findings and specialist commentary on the child's objection exception in statistical analyses, research and professional publications internationally; ii) a caselaw analysis of reported court judgments examining use of the exception from its introduction in England and Wales in 1985 and in New Zealand from 1991; iii) an online global survey which attracted responses from 97 family justice professionals from 32 countries, including representatives from Central Authorities, The Hague Network of Judges, lawyers and NGOs; and iv) research interviews with a subset of family justice professionals and with 13 family members who had been involved in Convention proceedings where the exception had been raised. The family members comprised 10 parents (nine taking mothers; one left-behind father) and three abducted children (from two families) aged 19, 15, and 8 years at the time of their interview. To conclude the project, three cross-jurisdictional interdisciplinary Regional Workshops were held in 2018 in Auckland, Genoa and London with 137 representatives from 19 jurisdictions.

A wide divergence in the attitude of family justice professionals towards the children's objections exception was found ranging from those who said the exception was overused and abused, to others who thought it was appropriate and desirable to listen to the child's views when children's objections are raised in Convention proceedings. As the Convention is premised on the desire to protect children internationally from the harmful effects of their abduction, the latter professionals questioned whether sending an objecting child back against their wishes, on the basis of upholding the Convention, can truly be said to be protecting the child from harm. Concern was also expressed about children's awareness of the exception as families often did not know the child can have their own lawyer, or that their voice can be heard in the proceedings. The development of child-friendly information on how the process works was recommended, as was the availability of specialist advice and support for children to help them cope with the effects of their abduction and reunification if, and when, that occurs. A restrictive approach to separate representation was also said to often result in last-ditch

separate representation applications at the appellate or enforcement stage, which cause significant anxiety and stress for all involved. The authors believe that it may therefore be better to simply have a system where children are more readily separately represented in Convention proceedings.

The practices of Contacting States relating to the application of the children's objection exception were also found to vary considerably depending on domestic laws and procedures. These included independent experts/intermediaries being used between the child and court; separate legal representation of children; children joined as parties to the proceedings; and judicial interviews with children. A striking feature of the project's findings related to the 17 different types of specialists involved with the child/family to inform the legal process when a child's objections are raised – including psychologists, family consultants, counsellors, social workers, guardians ad litem, children's officers, child protection officials, youth department workers and child protection officials. While survey respondents recognised that social science reports could assist parties to understand, or hear, the views of their child from an independent specialist, and could help parents to reach agreement about appropriate arrangements for a child's return, they were concerned about variations in the quality of these reports in abduction cases. Survey participants wanted the person who speaks with the child to be specifically trained to assess a child's objections. The authors agree this is crucial and believe it could form part of a broader training programme which is also needed to assist family justice professionals to more effectively engage with, and listen to, children. As Beaumont *et al*. (2016, p. 32) stated:

> ... the focus should be on the provision of the necessary tools, environment and suitable training to allow the child's voice to be heard, where appropriate in relation to their maturity, by the correct people and with the minimum of harm to the child.

A skilled interviewer was also considered vital to engage with children who were lacking self-confidence, unassertive or had learning or other disabilities and therefore faced greater difficulty in convincing a Court they were sufficiently mature to raise a valid objection. Similar concerns were expressed in the EWELL project about children who were shy and not so persuasive in their speaking and behaviour (Van Hoorde 2017).

The survey found that, in some jurisdictions, judges receive no training on how to hear children. There were also uncertainties about the purpose of the judicial interview with an abducted child regarding whether it can provide evidential material for the subsequent hearing.

Despite the small-scale nature of the interviews with the 10 family members, the Children's Objections project nevertheless revealed some pertinent issues from those most directly affected by the Convention. The abducting mothers wanted greater account taken of children's views, and said the children must have their own lawyer and be made parties to the proceedings because parents tend to see abduction proceedings from their own perspective and have difficulty being objective. Like the survey respondents, the mothers were concerned about the way some specialist interviews were undertaken with children. They suggested having someone else present in the room when the psychologist/specialist spoke with the child, or for a transcript to be provided, to protect the child and ensure that what the child had said had been properly understood. The three children who were interviewed either wanted, or liked being able, to talk to the judge without interruption and to use their own voices rather than having someone else relay their objection, views and feelings. They said that professionals needed to understand that children have their own views and opinions and that it is not right that these be given less significance because they are being expressed by children. One child powerfully explained that courts need to understand these proceedings are "a defining moment in a child's life." It is, of course, difficult to draw any robust conclusions from such a small sample. However, the views these three children expressed are consistent with those of many other children

reported across numerous common law and civil law jurisdictions about wanting to participate more directly in family law proceedings regarding aspects of their post-separation care and contact, and in the context of abduction proceedings (Birnbaum, Bala and Cyr, 2011; Van Hoorde, 2017). The child's age may be significant in whether, and if so how much, they wish to be involved. In an Australian study, Cashmore and Parkinson (2017, p. 93) found that children under 12 were "more likely to have wanted more say compared with those over 12." This has particular resonance for 1980 Hague Convention proceedings where the average age of a child involved in a return application is 6.8 years, and the greatest proportion of abducted children are aged 3-7 years (Lowe and Stephens, 2018a, p. 9).

A round-table meeting, hosted by the lead author in Israel on 12 July 2019, on *The Voices of Children in Abduction Proceedings under the 1980 Convention* (Freeman *et al*. 2019) provided a further opportunity for the polarised views on child participation to be aired by family justice professionals involved in these cases. Funded by the University of Westminster Law School, this meeting was held at the Academic Center for Law and Science, Hod Hasharon, Tel-Aviv, with 20 invited key stakeholders which included members of the judiciary, lawyers, senior academics a psychologist, and a lawyer at the Israeli Central Authority. The authors gave a joint presentation on their British Academy funded research on *Children who object to return under the 1980 Convention* to the invited specialists which, together with other local presentations, set the context for the discussion chaired by Professor Ayelet Blecher Prigat, Dean of the Academic Center Law School. Israel is one of the few jurisdictions in the Middle East which is a party to the 1980 Convention and its lack of a uniform judicial approach on an aspect of how children are heard i.e., the weight to be attached to children's views once they have been ascertained[viii] was evident in the presentations and discussion where notably divergent viewpoints emerged about hearing children in abduction proceedings, and the weight to be attached to their views. This diversity reflected the contrasting views of those who regard the policy intent of the Convention as purely being to ensure the return

of abducted children to their State of habitual residence, while others emphasise the equal importance of the principle of giving due weight to children's views as expressed in the children's objection exception. Discussion highlighted the empirical and anecdotal evidence of harm caused to children by abduction, including following their return against their wishes or where protective measures were ineffective in cases of domestic violence. This underscored the importance of hearing children in decisions which have the potential to impact so significantly on their lives (Freeman 1998, 2014). However, the extent to which the returning court should look beyond return, and whether it is legitimate to consider what will happen to the child after return when deciding whether an exception is made out, were issues which did not command consensus. Notwithstanding the often opposing viewpoints and diversity of approaches evident amongst the participants, one issue which did attract general support was the need for further training for all family justice professionals. The evident tension around these issues in Israel is, of course, echoed more broadly in the Hague jurisprudence of other jurisdictions (Freeman *et al*. 2019).

Discussion and Conclusion

Domestic violence takes many forms and is not limited to the traditional view of physical assault by one person, usually a man, against another, usually a woman, although it clearly includes such conduct. It not only occurs in archetypically recognisable relationships where overt power dynamics can easily be observed, but can also encompass:

> … any type of controlling, bullying, threatening or violent behaviour between people in a relationship. It can seriously harm children and young people, and witnessing domestic abuse is child abuse. (NSPCC 2019)

The Convention 'is concerned with the protection of children in international relations' (Perez-Vera 1982, para 15). Behaviour that has the potential to harm children should therefore be addressed by Convention proceedings if this aspiration is to be achieved. Where there is no provision regarding

domestic violence in a jurisdiction's implementing legislation (as there is in Switzerland and Japan), then Article 13(1)(b) is the only relevant provision for dealing with this issue. However, its uncertain interpretation can leave an abducting mother who is escaping domestic violence, and her child, in a vulnerable position. This is untenable when the harm to children from domestic violence is so certain.[ix] The Experts' Meeting clearly demonstrated the concern of the international child abduction community regarding these issues and this is also reflected in the significant effort devoted, over several years, to the development of the Guide to Good Practice on Article 13(1)(b). The draft Guide has recently been submitted for approval to the Council on General Affairs and Policy of The Hague Conference on Private International Law (Celis, 2019). The Chairperson of the Working Group has acknowledged the complexities involved:

> The difficulty of the task and the inherent tensions between maintaining the integrity of the Convention and ensuring safe return of children to the state of habitual residence in the face of domestic violence, admits of no simple solutions. Some of the wording of what is still the draft Guide demonstrates the minefield of trying to give any "advice." (Bryant 2019, p. 1)

With 101 Contracting States, it is unlikely the 1980 Convention will be amended to address domestic violence (or child participation) issues. Calling for the implementing legislation of some new Contracting States to be followed, whereby domestic violence against the abductor provides a defence against return of the child, is not necessarily a solution as the uneven playing field thereby created, may be a cause of concern for others within the Convention community. Perhaps continued awareness-raising about the risk posed by domestic violence for its victims, including the children who witness it, and the dangers they face if returned together or separately, can provide a helpful incentive for a supportive interpretation of Article 13(1)(b) and the Convention in appropriate cases.

Harm to children and young people must also be prevented when it occurs through their marginalisation from decisions which fundamentally concern them and affect their lives. The

Children's Objections project, extended by the Israeli Round-table Meeting, highlighted the need for further discussion on, and closer incorporation of, children's rights' principles in the 1980 Convention framework (Hollingsworth and Stalford 2018). This is particularly relevant as the 30th anniversary of the UNCRC dawns, to which all Hague Convention signatories are parties other than the United States. If this does not happen, further harm to children is the likely outcome. Quigley and Cyr (2018, p. 502) describe how children 'want their input to be added to the decisional scale' by weighing in on their parents', or the court's, decisions because they know that these affect their futures. They say they feel hurt, frustrated and anxious about being left in the dark when they are not included in decision-making processes.

The deeply entrenched differences that exist between family justice professionals about hearing children in abduction cases, and the weight to be attached to their views, may reflect protective attitudes towards children on the one hand, and a determination to recognise and honour children's right to be heard and their evolving capacities, as set out in the UNCRC, on the other hand. They may also mirror abduction-preventative views of the Convention, rather than a children's rights-promoting perspective. While the Preamble of the Convention aspires to protect children from the harmful effects of international child abduction, the exceptions, including the children's objections exception, must be considered as part of this aspiration to avoid undermining the Convention. This aim is amplified in Article 21 of the B11a recast by providing for children to be given a genuine and effective opportunity to be heard and for due weight to be given to their views in accordance with their age and maturity. This will go some way towards enacting Smart's (2002, p. 309) perceptive observation that:

> [I]t is not simply a matter of allowing the child to speak; it is also a matter of being attentive to what it is that we hear the child say.

B11a applies only to the countries within the EU, of which there are currently 28. However, as this article is being written, this number may shortly reduce with the UK's scheduled departure from the EU on 31 October 2019. Should this occur, the UK may then be in the same position as other countries outside of the EU which are contracting States to the 1980 Convention where the Convention will apply to those abduction cases it has with other Convention States without the benefit of the provisions of B11a. There is currently no certainty about this, much to the disappointment and concern of family law practitioners[x] and commentators. Even though the UK courts may legislate and/or choose to apply terms similar or identical to B11a in incoming cases, the question of whether there will be reciprocal arrangements between the UK and the remaining EU States and, if so, what they will be remains unclear. The UK is likely to be treated as a third party State by some of the EU countries within which B11a will still apply, although others will treat the UK as an EU Member State in this context for a specified time upon departure. Be this as it may, there are many more contracting States that are not governed by B11a than those which are, and it would be a significant step forward if an interpretation which is sympathetic to the children's rights developments recognised in B11a was generally accepted and applied to the 1980 Convention scheme. This requires us to be willing to 'stand in children's shoes' so we can better understand the child's worldview (Smart 2002, p. 308), which will necessitate some attitudinal changes as it imports a broader understanding of children's rights into the Convention than the sometimes perfunctory application of the children's objections exception.

Smart (2002, p. 307) noted that 'the process of starting to treat children seriously poses many challenges to adults – as well as to legal systems.' Seventeen years later, efforts must be made to build sufficient consensus within the international family justice community for the shift in thinking and in the use of resources that is required.

Thus the need for training, identified in the Experts' Meeting, the Children's Objections project and the Israeli round-table meeting as important in tackling the contemporary challenges posed by

domestic violence and child participation for the 1980 Convention, moves to centre-stage. In relation to child participation, training should be available to all family justice professionals who have to form an opinion about the maturity of children and the genuineness of their views, or the weight to be given to those views. This would reorient practice to reflect current knowledge of child development and States Parties' obligations in respect of children's rights in the 21st century. The training could include information on contemporary child development research regarding the cognitive, physical, emotional and language abilities of children of different ages and vulnerabilities (Lawrence 2008, Smith 2002, 2013). It could also address the children's rights implications of hearing children and the weight to be given to their views within Convention cases. Approaching this from the standpoint of maintaining and strengthening, rather than undermining, the integrity of the Convention, would be important. Lowe and Stephens (2018b) argue against the contention that the Convention is no longer fit for purpose, and we support that view. However, the child's participation is not simply instrumental, but has an independent value (Schuz 2013). There must therefore be an effective opportunity for the child to express their views to professionals who understand the principles and mechanisms of the Convention and how these apply to them (Hollingsworth and Stalford 2018).

Children also need to be better informed about the 1980 Convention, how it works, and the opportunities for their participation within it. To this end, the authors have initiated, through IACLaR, the drafting and production in 2020 of a child-friendly summary of the 1980 Convention to assist children and families.

Training will also help to meet the significant existing global concern about domestic violence expressed by academic commentators, at the Experts' Meeting, and in the work undertaken on the Guide to Good Practice on Article 13(1)(b). It may assist in achieving broader acceptance of the

sympathetic interpretation of the Convention's grave risk defence that exists in some jurisdictions to address the dangers faced by domestic violence victims and their children in return proceedings.

While the inherent difficulties of undertaking research on the outcomes for abducted children, including those abducted against a background of domestic violence or abuse, are acknowledged, so too are the potential benefits to the international community of such research data being available. This would help strengthen the content and applicability of the training being asked for by family justice professionals, which is strategically important in achieving the required child-centric approach towards Convention cases and in addressing both of the pressing contemporary challenges to it identified in this article. Domestic violence and child participation issues require continued impetus[xi] if policy and practice in this area is to reflect global developments and the newer, but now well-accepted, thinking about children and their rights and the ways of preventing or ameliorating the known risks to their well-being.

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[i] Domestic violence remains a current concern in abduction cases in Japan where the first author, at the invitation of the Japanese Ministry of Foreign Affairs, delivered a public lecture on 10 June 2019 on her research at the Symposium Commemorating the Fifth Anniversary of Japan's Entry into the 1980 Hague Convention, at the Ito Research Center, Tokyo. https://www.mofa.go.jp/fp/hr_ha/page22e_000903.html Domestic violence campaigners continue to advocate for the protection of victims, usually women, while fathers who have been accused of domestic violence feel equally victimised by their treatment regarding this issue. https://www.washingtonpost.com/world/asia_pacific/parental-child-abduction-becomes-a-

diplomatic-embarrassment-for-japan-ahead-of-g-7/2019/08/21/1e51a7fa-bf34-11e9-aff2-3835caab97f6_story.html?noredirect=on

[ii] Domestic violence continues to raise significant concerns in India. The first author participated in a panel discussion on *Interparental Child Removal, Domestic Violence and The Voice of the Child* at The India International Center, New Delhi, on 7 November 2018, where 'issues arising out of domestic violence which were a major cause in concerns for India not signing the Hague Convention on child removal and its impact on the voice of the removed child' were examined by the audience of judges, lawyers, academics, and others involved in the field.

[iii] See also Conclusion and Resolution No. 81 adopted by the 7th Special Commission on the Operation of the 1980 Hague Convention, held in The Hague from 9-17 October 2017. This recognised the value of evidence-based research to strengthen existing knowledge of the effects of the wrongful removal or retention of children internationally and was the first time a Conclusion and Resolution of this type had been adopted by the Special Commission. https://assets.hcch.net/docs/edce6628-3a76-4be8-a092-437837a49bef.pdf

iv Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELLAR%3A524570fa-9c9a-11e9-9d01-01aa75ed71a1

[v] IACLaR was established by the authors in August 2016 as a research organisation of leading international child law researchers around the globe with a particular focus on, and specialism in, international child and family mobility and transition issues. It was granted observer status at the 7th Special Commission held in The Hague in October 2017.

vi Paragraph 39 states: 'The opportunity of the child to express his or her views freely in accordance with Article 24(1) of the Charter of Fundamental Rights of the European Union and in the light of Article 12 of the UN Convention on the Rights of the Child plays an important role in the application of this Regulation.'

[vii] The authors gratefully acknowledge Victoria Stephens, Maria Wright and Megan Gollop for their contributions to this project.

[viii] Thanks are expressed to Professor Schuz for providing information about the two approaches to interpreting this exception in Israel; one a wider child-centred approach and the other a narrower approach. The latter was adopted by the Supreme Court in the 2006 case RFamA 672/06 *Plonit v Ploni* 61(3) PD 247 and this remains the leading case on this issue.

[ix] Unicef (2006, p. 6) state that there is increased risk of children becoming victims of abuse themselves, and that there is significant risk of ever-increasing harm to the child's physical, emotional and social development.

[x] Thanks are expressed to James Netto, Dawson Cornwell, for the information provided on this issue.

[xi] Other current initiatives include *Minor's Right to Information in EU Civil Actions (MiRI) – Improving Children's Right to Information in Cross-Border Civil Cases*. This project is led by Universita Degli Studi de Genova Unige, Italy, together with Universitat de Valencia Uveg, Spain, Universiteit Utrecht UU Netherlands, SIA Biznesa Augstskola Turiba, Latvia, The Institute of Private International Law, Bulgaria, and the European Association for Family Law and Succession Law. It is aimed at improving the situation of children involved in civil cases having cross-border implications with particular reference to children's right to receive adequate information concerning those proceedings, in order to develop common best practices for the child-friendly application of EU law (thanks to Professor Wendy Schrama, Utrecht University, for this information). Additionally, INCLUDE (co-funded by the European Commission and co-ordinated by Missing Children Europe) will gather the views of young people in Cyprus and Hungary on how best to deal with international child abduction cases (thanks to Professor Thalia Kruger, University of Antwerp, for this information).