

THE ROLE OF CENTRAL AUTHORITIES IN THE APPLICATION OF THE 1980 HAGUE CONVENTION ON CHILD ABDUCTION: A CRITICAL ANALYSIS OF A GENUINE AREA OF PUBLIC INTERNATIONAL LAW

(1980 Tarihli Uluslararası Çocuk Kaçırma Sözleşmesi Uygulamasında Merkezi Makamların Rolü: Gerçek Bir Uluslararası Kamu Hukuku Uygulamasına Eleştirel Bir Bakış)

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ABSTRACT

There is a widespread consensus that the Hague Child Abduction Convention of 1980 constitutes a comprehensive attempt at the international protection of children. This article mainly intends to provide a roadmap for Central Authorities regarding the return requests within the meaning of the Hague Convention. It also touches on the emerging challenges faced by the Convention system while achieving a delicate balance between the competing or joint interests of the child as well as the left-behind and taking parents within the context of grave risk exception. In doing so, alongside with achievements made by Contracting States, this work will find a chance to make clear the overall handicap of the implementation mechanism. Lastly, it will be revealed that the translation of the Convention requirements into practice presupposes the full exercise of public power and the application of public international law norms, despite the Convention is a natural product of international private legal order.

Key Words: Lahey iade talebi, ciddi risk iddiası, uluslararası kamu hukuku.

ÖZ

1980 Tarihli Lahey Çocuk Kaçırma Sözleşmesi'nin, çocukların uluslararası korunması adına geniş kapsamlı bir girişim olduğu genel olarak kabul edilmektedir. Bu makalede, esas olarak, Merkezi Makamlar için

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Lahey Sözleşmesi kapsamında yapılan başvurulara dair bir yol haritasının temini amaçlanmıştır. Ciddi risk istisnası kapsamında çocuk, kaçırılan ve bırakılan ailenin çatışan ve ortak menfaatleri için hassas bir denge kurulurken, Sözleşme sisteminde karşılaşılan yeni sorunlara da ayrıca temas edilecektir. Bu sayede, Taraf Devletlerce kaydedilen gelişmelerin yanında, uygulama sisteminin yetersizliklerinin genel olarak ortaya çıkarılması da sağlanacaktır. Son olarak, Sözleşme, uluslararası özel hukuk sisteminin bir parçası olmasına rağmen; Sözleşme yükümlülüklerinin hayata geçirilmesinin kamu yetkisinin tam kullanımını ve uluslararası kamu hukuku normlarının uygulanmasını gerektirdiği gözler önüne serilecektir.

Anahtar Kelimeler: The Hague return request, alleged grave risk, international public law.

I. Introduction

Hassle-free international travel and the growth in multinational marriages resulted in the increase of the commitment of child abduction offence beyond borders after 1970s.² Since then, the advancement of children's rights and interests has lied at the heart of multilateral law mostly in connection with the proliferation of divorce issues. The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction³ represents a historic value in the protection of children at the international level.⁴ The Convention is designed for safeguarding children, as stressed in the Official Website of the Convention 'from the harmful effects of abduction and retention across international boundaries by providing a procedure to bring about their prompt return'.⁵ It is useful to point out that 93 Member States of the Convention currently acts together against such a serious crime.⁶

This article initially provides an insight into the active role of Central Authorities in fulfilling operational measures of the Convention. Chapter II, thus, is concerned to the mission of Central Authorities to meet obligations set out in particularly Article 7 of the Convention. It sheds light on the

2 Tai Vivatvaraphol, 'Back to Basics: Determining a Child's Habitual Residence in International Child Abduction Cases Under the Hague Convention', (2009) 77 *Fordham Law Review* 3325, at 3330.

3 Herein after referred to as "the Hague Convention".

4 See for instance, Carol S. Bruch, *The Hague Child Abduction Convention: Past Accomplishments, Future Challenges*, (1999) 1 *European Journal of Law Reform* 97, at 97.

5 Official Website of the Hague Conference on Private International Law, 'Welcome to the Child Abduction Section', http://www.hcch.net/index_en.php?act=conventions.status&cid=24, accessed 20 October 2014.

6 See Official Website of the Hague Conference on Private International Law for updated information concerning parties to the Convention, 'Status Table', http://www.hcch.net/index_en.php?act=conventions.status&cid=24#nonmem, accessed 3 November 2014.

question of which coercive efforts should be made to harmonize the case-law of national justice actors and practice of Central Authorities. In doing so, this study basically intends to review key operating principles and the underlying shortcomings of the Convention implementation system and to make basic recommendations.

Chapter III later addresses how to strike a necessary balance between the custody rights of left-behind and abducting parents in the field of grave risk claim. Finally, even though the Hague Convention mainly concerns the matters between private individuals, this work displays that the scope of the Convention may bring up threshold questions, mostly falling within the ambit of the public international law. Taking into account the changing nature of international law and the growth of international organizations,⁷ this part of the present work focuses on key aspects of the exercise of public power for the application of the Convention.

As for terminology, regardless of the fact that there is no universally agreed meaning of “international child abduction”, for the purpose of this article, this phrase means the “abduction by parents or by close family members”, namely, as argued by the doctrine, “international parental child abduction”.⁸ In emphasizing that ‘we are far removed from the offences associated with the terms “kidnapping”’, the Explanatory Report indicates that there is no inclusion of abduction with pure criminal objectives such as kidnapping.⁹ Thus, other child abduction crimes committed by ordinary criminals for different aims such as ransom are not covered in this article.¹⁰ As for the term of “abducting or taking parent”, it is understood to mean a parent having full responsibility for the wrongful removal or retention of a child in this study.

Additionally, the Convention is codified with a view to protecting the prompt return of children wrongfully removed to or retained and ensuring respect for rights of custody and access.¹¹ So, the Hague request

7 See e.g. Vaughan Lowe, *International Law* (Oxford University Press, New York 2007), at 11 and 13; Malcolm N. Shaw, *International Law* (Sixth Edition, Cambridge University Press, New York 2008), at 65.

8 See for the same perspective, ‘International Family Law-Habitual Residence, Changing Custody Rights, and Wrongful Retention and Removal Under the Hague Convention on Civil Aspects of International Child Abduction: *Redmond v. Redmond*, 724 F.3d 729 (7th Cir. 2013)’, (2014) 37 *Suffolk Transnational Law Review* 235, at 235.

9 Explanatory Report on the 1980 Hague Child Abduction Convention by Elisa Pérez-Vera, 1982, para. 53.

10 See for a helpful study on the commitment of child abduction offence including by other perpetrators Susan O’Brien, *Criminal Investigations: Child Abduction and Kidnapping* (Chealse House Publishers, United States 2008).

11 Article 1 declares two objects of the present Convention: a-securing the prompt return of children wrongfully removed to or retained in any Contracting State; b- ensuring that rights



presupposes an illegal displacement or retention of the child in question.¹² The preamble attaches particular focus on three core objectives: the protection of children internationally from the harmful effects of their wrongful removal or retention; the establishment of procedures to ensure their prompt return to the State of their habitual residence and securing the respect for the access rights. Since this work will entirely deal with the return process of children, the Hague access requests for access rights within the meaning of Article 21 go beyond this study. In that connection, it is also significant to underline that only post-abduction process falls within the scope of the present work.¹³

Resources prepared by Permanent Bureau on the basis of the understanding of Member States are the cornerstone of this work for achieving a useful guidance on the Hague applications. Academic literature will be reviewed so as to examine current deficiencies of the Convention. It results from the foregoing that the present study prefers analytical review and avoids descriptive methods.

II. The Duties of Central Authorities for Processing the Application for Return

This Chapter attempts to say that consecutive procedures need to be followed upon a return request. Indeed, any mistake on the ring of procedures may cause a potential setback for the whole stages. Moreover, it will be also referred to that a broad range of responsibilities are accorded to Central Authorities for the enforcement of the Convention.

It is vital at the outset to categorize the tasks of Central Authorities as twofold: implicit and explicit tasks. Firstly, Central Authorities have obligations that are not specified in the formal text of the Convention but can be deduced from the spirit of the Convention. First group of implicit missions may be summarized as awareness-raising campaigns and progressive implementation efforts. In relation to former mission, one needs to realize that the Convention return proceedings are far from straightforward. Accordingly, the development of education and training programmes is indispensable for increasing the awareness

of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

12 Alin-Gheorghe Gavrilescu, 'The Main Civil Aspects of the International Child Abduction', (2013) *Annals Constantin Brancusi U. Targu Jiu Juridical Series* 59, at 62.

13 See generally regarding preventive policies aiming at eradicating all conditions for the infant abduction, *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Part III- Preventive Measures* (Permanent Bureau of the Hague Conference on Private International Law, Jordan Publishing Limited, Great Britain 2005).

of competent national agencies including justice sector staff. The formulation of guidelines, manuals and checklists is a crucial ingredient for justice professionals.¹⁴ Regarding latter mission, it is suggested that one of the primary tasks of Central Authorities is to secure and facilitate the compliance with the Convention obligations.¹⁵ Review and where appropriate modifying and amending all legal framework and policies is a reliable tool to make progress. The Permanent Bureau underlines the significance of progressive implementation while making clear as follows:

Implementation should be seen as a continuing process of development and improvement and Contracting States should continue to consider ways in which to improve the functioning of the Convention, if appropriate, through modification or amendment of existing implementation measures.¹⁶

When it comes to explicit functions, there are also the assignments of Central Authorities that are clearly enunciated in the Convention. In that connection, a few key articles should be identified. In the matter of Articles 7(c) and 10 of the Convention, they lay certain responsibilities upon Central Authorities to take all appropriate actions for the voluntary return or for an amicable resolution. In that connection, this study seeks to illustrate the best ways of achieving these goals.

After registering and acknowledging the receipt of application, the requested Central Authority is in need of checking whether the documents for return demand meet Convention requirements.¹⁷ What is noticeable is that the rejection of a Hague return petition strictly depends on certain qualifications. Two clusters of refusal indicators may be considered at this juncture. First of all, one needs to be aware that the appeal for return may be directly rejected as it does not come within the ambit of the Convention at the beginning. The requested Central Authority is bound to monitor whether the requirements of the Convention are fulfilled or that the application is otherwise is well-founded according to Article 27. Supporting adequate documentation is particularly needed at this point. Otherwise, the Central Authority is granted a competence to dismiss the

14 *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Part IV- Enforcement* (Permanent Bureau of the Hague Conference on Private International Law, Jordan Publishing Limited, Hague 2010), at 39.

15 *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Part II- Implementing Measures* (Permanent Bureau of the Hague Conference on Private International Law, Jordan Publishing Limited, Hague 2003), at 11.

16 *Ibid.*, at x.

17 *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Part I- Central Authority Practice* (Permanent Bureau of the Hague Conference on Private International Law, Jordan Publishing Limited, Hague 2003), at 44.



Hague application at this juncture.¹⁸

As to the second cluster, we should duly keep in mind that every return request is subjected to compliance with additional specified necessities or undertakings. It is critical for Central Authorities to scrutinize whether the fundamental necessities are satisfied or not under Articles 3 and 4. This may be summarized as follows:

- the applicant had custody rights that were infringed by the alleged removal or retention,
- the applicant essentially was exercising his/her custody rights at time of removal or retention,
- the applicant was habitually resident in a Member State at the time of the removal or retention
- the child has not been yet 16.

Where prerequisites are met or undertakings are completely fulfilled, the process moves forward with pre-trial procedures. It is imperative to confirm for the requested Central Authority that the child has been within its own jurisdiction. Locating the child is one of the first responsibilities to be discharged. Article 7 (a) involves the discovery of the whereabouts of the abducted child who has been wrongfully removed or retained. At this stage, Central Authorities mostly prefer to search, through including judicial authorities such as the office of public prosecutors, whether the child involved lives in the address described in the application form. The requested Central Authority forwards the application along with its annexes to the local authority with the purpose of finding the location of the child at this time.¹⁹ Aside from domestic agencies, INTERPOL, in close cooperation with international organizations, may help to promptly locate children.²⁰

If child lives in the place described in the application petition, the relevant judicial body should carry out preventive actions for the further potential harm pursuant to Article 7 (b). It is considerable to understand that the locating of the child's place does not necessarily involve informing the requesting parents of current location. As a matter of fact, the

¹⁸ Ibid., at 26.

¹⁹ *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Part II- Implementing Measures* (Permanent Bureau of the Hague Conference on Private International Law, Jordan Publishing Limited, Hague 2003), at 25.

²⁰ INTERPOL may offer technical and operational assistance to national actors in finding child at the international level: Report of the Third Special Commission meeting to review the operation of the Hague Convention on the Civil Aspects of International Child Abduction (17-21 March 1997), para. 28.

confidentiality is a recognized principle here. Another preventive method is to preclude the removal of the child at issue outside his/her current location until the finalization of the case. The provision of an order for the placement of the child in a temporary custody is a complementary and provisional strategy.²¹

As a next step, the abducting parent is invited to hammer out a compromise. The Special Commission of Hague Conference attaches great emphasis to the amicable resolution of the issues while further recognizing and welcoming the important role of Central Authorities through the use of mediation.²² It should not be forgotten, however, that there is no internationally reaffirmed type of mediation.²³

In the case of the disagreement on the issue, the local authority may be demanded to launch the return proceedings. If the taking parents do not want to do reach an agreement, judicial or administrative procedures are initiated or facilitated with the aim to obtain the return of the child.²⁴

One of the most important features of the Convention system, the requested Central Authority generally becomes party on behalf of the petitioner before the court while acting as the petitioner; representing the petitioner parent or acting in capacity of *amicus curiae*.²⁵ In fact, that is the main dilemma of the Convention machinery because on many occasions, requested Central Authorities participate in such cases as main representative of requesting families. Moreover, by and large the Central Authority concerned defends foreigners against its own citizens. The mentality behind this idea has been enshrined in the Convention, as suggested by Lindhorst and Edleson that the citizenship of the abductor, left-behind parents and abducted children cannot be taken into account pending the Hague cases.²⁶

Another critical side of the institution of the court proceedings, the requested Central Authority is bound to help judicial affairs officials

21 *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Part II- Implementing Measures* (Permanent Bureau of the Hague Conference on Private International Law, Jordan Publishing Limited, Hague 2003), at 32.

22 See for instance Conclusions and Recommendations of the Sixth Special Commission on the practical operation of the 1980 and 1996 Hague Conventions (1-10 June 2011), para. 14.

23 Sarah Vigers, *Mediating International Child Abduction Cases: The Hague Convention* (Hart Publishing, Oregon 2011), at 34 and 35.

24 See Article 7 (f).

25 *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Part II- Implementing Measures* (Permanent Bureau of the Hague Conference on Private International Law, Jordan Publishing Limited, Hague 2003), at 26.

26 Taryn Lindhorst and Jeffrey L. Edleson, *Battered Women, Their Children, and International Law: The Unintended Consequences of the Hague Child Abduction Convention* (Northeastern University Press, Boston 2012), at 7.



appropriately through the proper explanations regarding the return case management, the Hague Convention and its implementing measures, applicable national legislations and regulations, the collection and evaluation of evidences. It has been already proven that the provision of the magistrates with full information about the nature of a Hague return system is very critical. What is more, at the time of the court proceedings, it is obligatory, under Article 7(g) of the Convention, to enhance the provision of legal aid and advice including the participation of legal counsel and advisers. Such engagements are the keystone of having an access to the court proceeding timely and effectively.

In addition to the aforementioned elements, national justice components must be reminded by Central Authorities that judges should not decide on the merits of rights of custody until the Hague return application is completed under Article 16. On the other hand, it is essential to pointing out that the decision on the return of the child involved does not imply a decision on the merits of the rights of custody.²⁷

Throughout all these procedures, Central Authorities are obligated to keep each other informed of all developments under Article 7 (i). It is crucial to keep updated all parties of the agenda of the proceedings. It implies that urgent responses as well as rapid communication and fast reporting engagements are needed at every stage.²⁸ The provision of follow-up information for such as acknowledgement of receipts of any letter or document, recommendations on further necessary paperwork or the notification of dates for court and legal proceedings is an imperative duty.²⁹ Information sharing commitment covers further engagements including notification of the applicant's right of appeal, its time frames, deadlines and all respective conditions.³⁰

Convention machinery involves the implementation of speedy and prompt procedures for interests of the children. This conclusion may be drawn from the wording of Article 1 underlining the need for "prompt return of children". Article 2 also reaffirms the requirement for using the most expeditious procedures possible with the aim to pursue the objectives of the Convention. Central Authorities, in the light of Article 7 principles,

²⁷ Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction (18-21 January 1993), Conclusion 7.

²⁸ *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Part I- Central Authority Practice* (Permanent Bureau of the Hague Conference on Private International Law, Jordan Publishing Limited, Hague 2003), at 16 and 17.

²⁹ *Ibid.*, at 37 and 38.

³⁰ *Ibid.*, at 55.

are necessitated to enhance the most expeditious proceedings available. This undertaking is more broadly and expressly formulated in Article 11 declaring that the judicial or administrative authorities of Member States shall act expeditiously in return proceedings. Furthermore, second paragraph of Article sets very short time frame. In this regard, where a requested judicial or administrative agency does not made a decision within six weeks from the initiation of the proceedings, the requesting Central Authority is entitled to demand the reason for the delay.³¹

It is arguable, that such short time may not be deemed as sufficient for completing all return procedures on time. In this regard, as indicated by Contracting States, some follow-up procedures such as appeal proceedings are not included by this kind of timing.³² But, a prompt decision making system needs to be established for every level of justice chains including first instance and appeal processes.³³ On the basis of such assumptions, it becomes clear that justice members must give top priority to the return cases. It is also indispensable for Central Authorities to encourage speediness or expeditiousness of return cases without any delay.

There is a further burden on Central Authorities, pursuant to Article 7 (i), to undertake targeted measures for the elimination of all obstacles to the application of the Convention. It is obligatory for Contracting States to take revolutionary steps as may be as necessary and appropriate and in accordance with their obligations.

It is of course obvious that return applications may end with the actual and voluntary return of the child as well as judicial return and the withdrawal of the return suit. The applicant and taking parents must be accorded a competence to make an appeal for the non-return or return decisions. It should be, however, stressed that a judicial return order cannot be implemented until the finalization of the said decision through appeal stages. This gives rise to delays.

31 Second paragraph the article in question reads as follows:

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.

32 Report of the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Practical Implementation 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 (30 October-9 November 2006), para. 173.

33 *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Part II- Implementing Measures* (Permanent Bureau of the Hague Conference on Private International Law, Jordan Publishing Limited, Hague 2003), at 36.



Plus, securing safe return depends on the helpful efforts of the Central Authorities according to Article 7 (h) which orders the provision of vital arrangements for the safe return. It is paramount that finalized judicial return orders be enforced promptly and effectively. It requires a wide range of coercive steps.³⁴ Working alongside institutions such as police forces, Central Authorities have a major task to organize the enforcement step by step.³⁵ On the other side, it must be borne in mind that once a return order is made, it must be enforced voluntarily. Nonetheless, what is quite striking is that several left-behind parents have to lodge an application before the European Court of Human Rights at the stage of enforcement of return orders. The European Court of Human Rights strictly interprets the undertakings for the return order while permanently stresses that the failure of fostering all targeted and urgent return steps infringes the applicant parents' right to respect for their family life, as safeguarded by Article 8 of the European Convention. The inactivity³⁶ particularly in the absence of convincing explanations³⁷ may be deemed as being incompatible with the Convention commitments. However, in fact, such issues may be easily handled where national agencies make sufficient and timely efforts to enforce the return order notwithstanding the elapsed time of 8 months.³⁸

III. Grave Risk Doctrine

In this Chapter, the involvement of States Parties to return cases in which grave risk exception is raised will be assessed. The first point to be clarified here is that the concerned child's best interests may require non-return of him/her even in spite of the completion of all return phases. Abducting parents are granted, among others,³⁹ to conduct a robust defense pursuant to Article 13 (1) b. They may maintain that the child is likely exposed to a grave risk of physical or psychological harm or any intolerable situation

34 See primary preferable return efforts made by Contracting States during enforcement procedures, *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Part IV- Enforcement* (Permanent Bureau of the Hague Conference on Private International Law, Jordan Publishing Limited, Hague 2010), at 5.

35 *Ibid.*, at 3 and 4.

36 See among others, *H.N. v. Poland* (App. 77710/01), Judgment of the European Court of Human Rights on 13 September 2005, Hudoc, para. 80.

37 See e.g. *Karadžić v. Croatia* (App. 35030/04), Judgment of the European Court of Human Rights on 15 December 2005 (2005) 44 EHRR 896, para. 59.

38 *Couderc v. Czech Republic* (Requête no: 54429/00), Judgment of the European Court of Human Rights on 30 January 2001, INCADAT Site HC/E/859.

39 See for a useful summary for other defense claims of abductor parents, Brian Quillen, 'The New Face of International Child Abduction: Domestic-Violence Victims and Their Treatment under the Hague Convention on the Civil Aspects of International Child Abduction', (2014) 49 *Texas International Law Journal* 621, at 624.

upon his/her possible return to the country of habitual residence.⁴⁰ The core difficulty of this article is that there is no specified definition of “grave risk of physical or psychological harm or any intolerable situation”.

However, the most common examples in which the abducting parents may advance grave risk claim against requesting States may be categorized as follows: the child may be psychically or mentally ill, he/she may be making threats of self-harm, he/she may be at risk of the exposure of the child⁴¹ or the mother⁴² to domestic violence in the country of the child’s habitual residence, there may be a risk of physical, sexual and emotional abuse of the child.⁴³ Additionally, it is widely accepted that the term “intolerable situation” refers to ‘those situations where the return of a child would not necessarily create a grave risk, but where it would still be inappropriate to order of the return’.⁴⁴

It is expressly seen that the pure cultural defense approach may be misused by the requesting parties as a justification for the commitment of in particular the child abusive conducts.⁴⁵ Therefore, all allegations regarding the dominant risk factors, enumerated above, need to be thoroughly and seriously scrutinized. As an example, in a Belgian leading case, the father’s claim that the mother is mentally ill was refused on the grounds of insufficient evidence.⁴⁶

On the other hand, an additional considerable point about Article 13 (1) b is that this is not a general principle; but an exceptional rule. Further, it is fully confirmed that misusing such articles may undermine the Convention. The requested Central Authority may rely upon an event of grave risk but only provided that it is strictly interpreted.⁴⁷ What this

40 Article 13 (1) b regulates that ‘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 ... 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’.

41 See for the type and crippling impacts of domestic violence against children associated with abduction, Lindhorst and Edleson, Footnote n: 25 above, at 101-121.

42 There is growing evidence that the child is subjected to physical or sexual violence in a house where the mother is exposed to the same violent conducts: Quillen, n: 38 above, at 633.

43 Rhona Schuz, *The Hague Child Abduction Convention: A Critical Analysis* (Bloomsbury Publishing Series, 2014), at 277.

44 Report of the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Practical Implementation 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 (30 October-9 November 2006), para. 166.

45 R. Lee Strasburger, ‘The Best Interests of the Child?: The Cultural Defense as Justification Child Abuse’, (2013) 25 *Pace International Law Review* 161, at 207.

46 *Civ Liège (réf) 14 mars 2002, Ministère public cl A*, [INCADAT cite: HC/E/BE 706].

47 See among others, Eran Sthoeger, ‘International Child Abduction and Children’s Rights: Two



necessarily highlights is that domestic agencies involved are committed to offering all justifiable arguments for the non-return as well. Indeed, within the context of evidence collection and submission, where faced any above-mentioned critical conditions, of course, the judicial or administrative authority is under an obligation to present conclusive evidence within the meaning of Article 13 (1) b in each case. In the lack of the provision of such proof, the alleged harm cannot be proven. In connection with any grave risk concern, Article 7 (d) recognizes the importance of the provision of information relating to the social background of the child. Hence, the requesting State may provide such proof by means of social background and expert reports, or namely as indicated by the Special Commission, social welfare reports.⁴⁸

In practice, as observed by the Special Commission, '13 (1) b is given a very narrow interpretation and that therefore few defenses based upon this argument are successful'.⁴⁹ As a great illustration of this, in the *Wolfe v. Wolfe* case, the alleged claim of mother that the father's sexual practices would cause a grave risk to the child involved was dismissed by the New Zealand court as being unfounded.⁵⁰ However, greater focus should be given by Central Authorities where the taking parent has raised exceptions under Article 13(1) b of domestic violence. In terms of serious allegations of inappropriate behavior or sexual abuse, factual basis may, in many times, be regarded as amounting to a kind of severe risk. In a leading case, the American Court of Appeals, after having determined sexual abuse of the abducted child, disapproved the requesting father's argument that the Sweden courts would take preventive measures for further harm upon return of the child.⁵¹

It is undeniable that most conflict-affected states encounter various security and capacity problems.⁵² Accordingly, the return appeals from conflict-affected States may be rejected on the basis that it would expose the child to a grave physical risk of harm upon return to the habitual resident.⁵³

Means to the Same End', (2011) 32 *Michigan Journal of International Law* 511, at 514.

48 Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction (18-21 January 1993), Question 22.

49 Ibid.

50 *Wolfe v. Wolfe* [1993] NZFLR 277, [INCADAT cite: HC/E/NZ 303].

51 *Danaipour v. McLarey*, 386 F.3d 289 (1st Cir. 2004), [INCADAT cite: HC/E/USf 597]

52 See concerning a summary of the most daunting challenges in conflict or post-conflict states: Kutlay TELLİ, 'Rebuilding Peace through the Empowerment of Justice in Conflict-Affected States', (2014) 7 *Ankara Bar Review* 39, at 45-49.

53 See, inter alia, *Janine Claire Genish-Grant and Director-General Department of Community Services* [2002] FamCA 346 [INCADAT cite: HC/E/AU 458]. See also a leading United Kingdom judicial decision for an opposite idea regarding the impact of security situations of the same

There are severe discussions on the tricky question of what kind of respond should be given where an abducting parent who is primary carer do not want to or cannot accompany the concerned child returning to the State of habitual residence. In the case of *N.P. v. A.B.P.*, the Canadian Court of Appeal refused the return demand of the father. The Court in question reasoned that the applicant father is a women buyer and seller, as a consequence; the actual return may lead him to the psychological harm in the absence of his mother and the mother has serious concerns about her safety if she accompanies the child.⁵⁴

It must be proposed that the existence of great harm risk necessitates further efforts. The Central Authority is required to work in full cooperation with all stakeholders including welfare or child agencies for implementing protective initiatives such as the provision of care or shelter placement. A further measure for the requested central authority is to play a central role in, at least, the referral the situation to all concerned public and private authorities.

Finally, where general rule regarding processing the return of child under Article 13 (1) b is not applied on the account of grave risk, all information should be available to the left-behind parent based on a court decision. Left-behind parents should be entitled with contacting their children in such critical situations.

IV. The Gaps of the Convention as an Area of Public International Law

It is beyond doubt that the Convention on the Civil Aspects of International Child Abduction is a significant part of the Hague Conference on Private International Law.⁵⁵ The Hague Conference, as an intergovernmental body, represents a considerable advance on the promotion of international private legal order.⁵⁶ It necessarily follows that the Hague return procedures are naturally qualified as a typical element of private law. It has become a commonplace to assert that private international legal framework is essentially advanced for resolving problems between individuals beyond national borders.⁵⁷ On

country (Israel) on the abducted child, *Re S. (A Child) (Abduction: Grave Risk of Harm)* [2002] EWCA Civ 908, [2002] 3 FCR 43, [INCADAT cite: HC/E/UKe 469].

54 *N.P. v. A.B.P.*, [1999] R.D.F. 38 (Que. C.A.), [INCADAT cite: HC/E/CA 764].

55 Note that the overarching goal of the Hague Conference on Private International Law, which is a model of inter-governmental organization, is to advance divergent legal frameworks and understandings in the fight against global problems: See Official Website of the Hague Conference on Private International Law, 'Overview', http://www.hcch.net/index_en.php?act=text.display&tid=26, accessed 31 October 2014.

56 See, inter alia, Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press, New York, 2007), at 165.

57 Hüseyin Pazarıcı, *International Law* (Eight Edition, Turhan Publication Bookstore, Ankara



the other side, it is far from difficult to allege that public law norms are not applicable in the field of child abduction cases. This Chapter examines the best examples of such, not surprisingly, common application.

It is noticeable at the outset that some of national actors are likely to dismiss the return application in favor of the child. It is clear from a Croatia case that this may be done even in the lack of any reasonable grounds.⁵⁸ As a further example, return decision was given for many children through the effort of Turkish Central Authority or local judicial agencies, but very limited children returned to Turkey over the years.⁵⁹ What is more, as already discussed, delays in the enforcement of return orders or even the non-enforcement of return orders remain widespread and alarming.⁶⁰ The basic reason is that the whole community together with family members might be heavily interested in the critical Hague cases. The pressure arising from the public or the media, at least, hampers the immediate enforcement of return orders.⁶¹

Moreover, all the aforementioned procedures are solely adopted by governmental institutions pending the Hague Convention proceedings. Central Authorities, in their capacity as governmental agencies, lie at the very core of improving the legal and institutional frameworks in such a way as to ensure the full enforcement of the Convention. Indeed, Central Authorities, as observed by the Special Commission, are mandated to enhance the entire operation of the Convention.⁶² It is arguable from the above-mentioned examples that a broad margin of discretion is accorded to the Central Authorities. For instance, it is consistently reported that

2009, in Turkish), at 9 and 10.

58 In the case of *Karadric & Croatia*, domestic agencies did not enforce the return order of the concerned child who must have been returned from Croatia to Germany: Peter Beaton, 'the Enforcement of Return Order and the Role of Judges and Other Factors in the Light of the case-law of the European Court of Human Rights' in Mustafa Sabit (ed.), *Seminar on the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (Seminar Series: 2, Ministry of Justice of Turkish Republic, 12-13 June 2013, Ankara, in Turkish), 96-103, at 97.

59 See for instance Oğuz Sadık Aydos, 'An Analysis of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* in Mustafa Sabit (ed.), *Seminar on the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (Seminar Series: 2, Ministry of Justice of Turkish Republic, 12-13 June 2013, Ankara, in Turkish), 104-109, at 108.

60 *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Part II- Implementing Measures* (Permanent Bureau of the Hague Conference on Private International Law, Jordan Publishing Limited, Hague 2003), at 37.

61 *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Part IV- Enforcement* (Permanent Bureau of the Hague Conference on Private International Law, Jordan Publishing Limited, Hague 2010), at xxi.

62 Overall Conclusions of the Special Commission of October 1989 on the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, para 14.

reluctant requested Central Authorities directly decline to help or at least do not enhance requirements for even locating the concerned child.⁶³ It is now hardly even questioned that national public bodies use or even sometimes misuse their own powers within the context of Convention procedures.

Further, as underscored above, grave risk argument may be offered in very limited circumstances. Nonetheless, the most complicated problem is that increasing inclination of national courts towards implementing the principle of the best interest of the child on the basis of Article 13(1) b leads to incompliance of domestic case-law with the Hague regime because of non-return decisions.⁶⁴ Mostly, judicial authorities seem to prefer the protection of the best interests of particularly the citizens within their own jurisdiction. Historical experience has already revealed that the margin of discretion of the requested State becomes wider and heavier in spite of the absence of any “grave risk”. It necessarily implies that an enormous governmental power through the exercise of diplomatic law and public law by national agencies may be used.⁶⁵ As a matter of fact, since national actors seek to guarantee their own citizen’s rights at this juncture, the nature of private law turns into an entire exercise of public law.

It should not be forgotten that the lack of enforceability poses an underlying challenge to the success of the Convention. The basic deficiency of the Convention is that there is no affirmed comprehensive review mechanism or as analyzed by Silberman no “supranational body”,⁶⁶ intended to monitor compliance with the relevant obligations defined in the Hague Convention. Indeed, the most fragile side of the Convention is that there is no recognized sanction to requirements set forth in its text and no monitoring procedures improved for it. It leads to a huge gap because specific benchmarks and standards are not be able to be developed, adopted and enforced by any international supervising body. The stance of Contracting States fully depends on their will or reluctance to adhere to

63 *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Part I- Central Authority Practice* (Permanent Bureau of the Hague Conference on Private International Law, Jordan Publishing Limited, Hague 2003), at 37 and 38.

64 Christina Piemonte, ‘International Child Abduction and Courts’ Evolving Considerations in Evaluating the Hague Convention’s Defenses to Return’, 22 *Tulane Journal of International and Comparative Law* 191, 2013, at 211 and 212.

65 Estin rightly suggests that domestic authorities exercises their consular competences based on bilateral foreign relations for child abduction cases: Ann Laquer Estin, ‘Transjurisdictional Child Welfare: Local Governments and International Law’, (2013) 22 *Transnational Law&Contemporary Problems* 695, at 622.

66 Linda Silberman, ‘The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues’, (2001) 33 *International Law and Politics* 221, at 245.



the Convention principles. Any authoritative or unified meaning has not been produced for leading phrases including habitual residence, custody rights, and grave risk harm as a result of distinct understandings.⁶⁷

Under those circumstances, as entirely acknowledged by the Hague resources, the provision of coherent understanding and interpretation of the Convention has been a matter of concern due to divergent perspectives of Member States.⁶⁸ The failure in the uniformity and predictability has a crippling impact on the position of applicants, respondents and thereby the operation of the Convention.⁶⁹ It is also hard to disagree with the idea that the efficacy of the Convention machinery totally depends on the cooperation and collaboration of the States Parties.⁷⁰ What is worse, national domestic justice sectors are not found successful in the consistency of their own Hague case-law.⁷¹ The significance of strategic and technical guidance and support of the Permanent Bureau regarding the right and unified operation of return process is undeniable;⁷² albeit is not solely capable of fulfilling such gap.

In the light of these considerations, two far-reaching recommendations will be reflected at this stage for tackling such challenging issues. First of all, there is a duty on Contracting States to develop a fully-fledged review mechanism for better pursuit of goals of the Convention. An international body may be able to provide an effective and full-scale supervision. What is more, the principle of margin of appreciation will be properly restricted in this way and the decisions and actions of Central Authorities would be subjected to the final determination of an international institution.⁷³

67 Silberman, n: 66 above, at 246.

68 See e.g. *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Part II- Implementing Measures* (Permanent Bureau of the Hague Conference on Private International Law, Jordan Publishing Limited, Hague 2003), at 44.

69 See for a useful summary for other defense claims of abductor parents, Quillen, n: 38 above, at 637.

70 See for instance Peter Beaton, 'Cooperation and Communication Beyond Borders Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction' in Mustafa Sabit (ed.), *Seminar on the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (Seminar Series: 2, Ministry of Justice of Turkish Republic, 12-13 June 2013, Ankara, in Turkish), 23-31, at 30.

71 Merle H. Weiner, 'Navigating the Road Between Uniformity and Progress: The Need for Purpose Analysis of the Hague Convention on the Civil Aspects of International Child Abduction', (2002) 33 *Columbia Human Rights Law Review* 275, at 289 and 291.

72 See e.g. David P. Stewart, (2009) 30 *University of Pennsylvania Journal of International Law* 1121, at 1124.

73 See Margearet P. Karns and Karen A. Mingst, who indicates that the effectiveness of international conventions must be entailed from not only identification but also resolution of global problems point of view: *International Organisations: The Politics and Processes of Global Governance* (Lynne Rienner Publishers, London 2004), at 517.

In addition to that or aside from that, as a second proposal, the Permanent Bureau, at least, must be given a competence to test the overall standing of the Countries from the aspect of the commitments contained in the Convention. It would be easy for the Permanent Bureau to make such research through reporting engagements containing the current performance of States Parties about Convention commitments. In this manner, the practice of relevant States would be made public and open to criticism. What is really essential is that the comments of the Bureau should be included in such a document. On the basis of periodic reports, the Bureau may be tasked with regularly offering general recommendations and more importantly specific suggestions to concerned States for better consistency. Such choice would absolutely necessitate rebuilding existing institutional and legislative framework of the Bureau itself.

V. Conclusion

The Hague Convention is drafted for the universal battle against the parental abduction of children. It is worth reiterating that Central Authorities have a continuous and primary responsibility for controlling the compliance of the application of and improving the functioning of the Convention. In that connection, Chapter II was devoted to offering a step-by-step guide to the entire legal and administrative stages while handling a request for return. In this Chapter, Member States were provided with a logical opportunity of evaluating and modifying, if necessary, their own procedures for a speedier disposal of applications and fast-track court procedures.

We concentrated on the circumstances amounting to a grave risk where the return of children involved would expose them to physical or psychological harm or otherwise place them in an intolerable situation. It is striking, as discussed in Chapter III that the notion of grave risk has been open to exploitation. Hence, it is required that the non-return on the basis of such condition be subjected to very limited circumstances.

Finally, this article strongly suggests that the existing Convention machinery must be empowered through the foundation of a supervisory international organization or/and the strengthening the Permanent Bureau. Not surprisingly; such arrangement would mark a vital influence on the deterrence of international child abductions. What is more, this progressive change would play a vital role in balancing, where necessary, wide margin of discretion and public power granted to the Contracting States in the Hague return files.



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