IN-DEPTH ANALYSIS
Requested by the JURI committee

THE CHILD PERSPECTIVE IN THE CONTEXT OF THE 1980 HAGUE CONVENTION
Abstract
This in-depth analysis, commissioned by the Policy Department for Citizens’ Rights and Constitutional Affairs at the request of the Committee on Legal Affairs in the context of the Workshop to mark the 40th Anniversary of the Hague Convention on the Civil Aspects of International Child Abduction, examines the way in which subject children feature within Convention proceedings. It considers the aims of the Convention, and the lack of supranational control of its application. It draws on empirical research relating to the effects and consequences of child abduction to discuss the opportunities for children and young people to participate within Convention proceedings, and highlights the international obligations for such participation within the United Nations Convention on the Rights of the Child, The Charter of Fundamental Rights of the European Union, and other regional instruments. Different jurisdictional approaches are explained, and the role of culture in this context is probed. The impact of COVID-19 on abducted children is also explored.
CONTENTS

LIST OF BOXES 3

EXECUTIVE SUMMARY 4

1. INTRODUCTION 6

2. EFFECTS AND CONSEQUENCES OF CHILD ABDUCTION 9
   The Long-Term Effects Project 10

3. CHILD PARTICIPATION AND THE CONVENTION 12
   3.1. DISTINCT APPROACHES TO CHILD PARTICIPATION 15
   3.2. CULTURE AND CHILD PARTICIPATION 16
   3.3. THE IMPACT OF COVID-19 ON CONVENTION PROCEEDINGS AND CHILD PARTICIPATION 17

4. CONCLUDING COMMENT 18

LIST OF BOXES

Box 1: The Long-Term Effects Sample 10
EXECUTIVE SUMMARY

Before the introduction of the 1980 Hague Convention, the outcome for abducted children would depend entirely on the law in the country to which the child had been taken, or in which he or she had been retained. This provided an incentive to those considering abducting their children to seek out a jurisdiction where they believed they would be most favourably treated. There were various attempts at the international level to address this issue through localised bilateral agreements but they lacked uniformity and widespread reach. This led in time to the drafting of the 1980 Hague Convention which is widely recognised as an extremely successful instrument.

The inspiration behind the 1980 Hague Convention is set out boldly in its Preamble which proclaims the paramount importance of children’s interests in matters relating to their custody, as well as both the desire to protect children from the harmful effects of their wrongful removal or retention, and to establish procedures to ensure their prompt return to the State of habitual residence (as well as to secure protection for rights of access). The combined provisions of the Convention, together with the summary return mechanism in Article 12(1), require an abducted child under the age of 16 to be returned forthwith where less than one year has passed since the wrongful removal or retention unless one of the limited exceptions to return under the Convention is established. Those exceptions are contained within Articles 12(2), 13 and 20, and there are opportunities for children’s involvement in the far-reaching decisions which are taken in those proceedings. However, the way in which the relevant provisions of the Convention are interpreted and applied within the now-101 Contracting States will determine both the extent to which children’s rights are recognised and upheld under the Convention, as well as the success of the Convention in its aim of protecting children from the harmful effects of child abduction which have been documented in empirical research. It appears that there is often a lack of awareness by children and young people, and their families, about these opportunities to participate, and how to ensure that their rights are recognised and protected. Although there are competing views within the family justice profession on this issue, it is the right of children to be provided with meaningful opportunities to participate, and the prevention of harm sought by the Convention must surely include that which emanates through the marginalisation of children from critical decisions affecting their lives. With closer integration of children’s rights’ principles to the Convention’s application, it is possible to ensure that this desirable and attainable aim is fulfilled.

At the same time, greater awareness is required of the potential role of culture in the willingness and ability of children and young people to participate in these proceedings. Traditional values regarding obedience and respect toward elders, and a strong sense of hierarchical societal structures, may contribute to a disinclination to become involved in parental disputes, especially in a public forum.

The impact of COVID-19 on subject children in abduction proceedings must also be recognised. The international nature of such cases creates its own difficulties during these times when the aim of the Convention is the return of the abducted child across international borders. This may not currently be allowed which would mean that the child had to spend an undesirable period of time after the decision waiting for return to be actioned. Alternatively, it may involve periods of quarantine for the returning child, a situation which could be further exacerbated by the possible separation from the abducting parent who may be a primary or joint primary carer of the child, and may choose not to return with the child or be unable to do so. The emotional effect of a return ordered in these circumstances may be very difficult for the child to manage. Additionally, the now routine remote conduct of return hearings creates extra challenges for subject children where there may be a lack of alternative child-care arrangements, or space within the home, when the abducting parent is involved in the proceedings, and therefore privacy for subject children during COVID-19 times may be compromised. This may also
create tensions for subject children in their decision about participating in the hearing, and the extent to which they are willing and able to do so.

All in all, children should have opportunities to express their views 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 and the upcoming Recast, which specifically address the rights of children to be heard within a specific jurisdictional area. 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. If we are to protect children from the harmful effects of child abduction, it is critical to afford the opportunity to be heard to children who wish to participate when the decisions taken about them in abduction proceedings have the potential to impact so significantly on their lives. There is a perceived need for further discussion on, and closer incorporation of, children's rights' principles in the 1980 Convention framework. If this does not happen, further harm to children is the likely outcome.

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1. INTRODUCTION

International child abduction is a global and growing phenomenon. The Hague Child Abduction Convention of 25 October 1980 (hereafter the Convention) provides for co-operation between its 101 signatory States to ensure that a child removed or retained from their state of habitual residence in breach of rights of custody is returned 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, which aims to protect children internationally from the harmful effects of their wrongful removal or retention, 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.

One of the limited exceptions to return under the Convention is found in Article 13(2) which provides that the judicial or administrative authority in the requested State which is hearing the application for return of the abducted child may refuse to order that return 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. The discretionary nature of this provision means that, even its terms are met, the court may still decide to exercise its discretion in favour of returning the child.

Considerable global concern has existed for some time among family justice professionals about returning mature children who have been wrongfully removed or retained who have expressed objections to their return under Article 13 of the Convention. There is also now broader concern about participation of children generally in the proceedings for returning children under the Convention.

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5 Preamble to the Convention, see fn 3 above


7 Although the Convention does not specifically refer to this provision as Article 13(2) and, in fact, it simply forms a part of Article 13, it is often referred to as Article 13(2) to distinguish it from the earlier part of the Article which relates to the ability not to return a child for reasons other than the child's objections, and will be referred to in this way within this Briefing. Article 13(2) states: 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.

8 Article 18 states: “The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.”

9 See Greene, A.M. 'Seen And Not Heard?: Children’s Objections Under The Hague Convention on International Child Abduction', 13 U. Miami Int'l & Comp. L. Rev. 105 (2005) Available at: https://repository.law.miami.edu/umiclr/vol13/iss1/4 last accessed 8.10.20. Indeed, this was a concern of the drafters of the Convention – see Explanatory Report by Elisa Perez-Vera (Hereafter the Perez-Vera Report) para 30: “the fact must be acknowledged that it would be very difficult to accept that a child of, for example, fifteen years of age, should be returned against its will”, https://www.hcch.net/en/publications-and-studies/details4/?pid=2779 last accessed 8.10.20

Fenton-Glynn describes the distinction between participation and self-determination and stresses the inability of the State to restrict the child’s right to be listened to on the grounds of the weight which will be given to their views. This issue must be observed in the context of the right of children under Article 12 of the United Nations Convention on the Rights of the Child (hereafter UNCRC) to express their views freely in all matters affecting them, their views being given due weight in accordance with their age and degree of maturity, and to be given the opportunity to be heard in any judicial or administrative proceedings affecting them. Similarly, Article 24 of the Charter of Fundamental Rights of the European Union: The Rights of the child, assures children the right to such protection and care as is necessary for their well-being, and to express their views freely which shall be taken into consideration on matters which concern them in accordance with their age and maturity. The Brussels 11 Revised Regulation (Brussels 11a), which is binding on all Member States of the European Union (hereafter EU) except Denmark, also provides for a child to be heard during proceedings unless this appears inappropriate having regard to his or her age or degree of maturity. This provision was interpreted by Baroness Hale as applying not only when a defence under Article 13 has been raised, but also in any case in which the court is being asked to apply Article 12 of the Convention and direct the summary return of the child – in effect, in every Hague Convention case. She explained that it erects a presumption that the child will be heard unless this appears inappropriate. A Recast of Brussels 11a, which contains a dedicated chapter on international child abduction, will come into operation on 1 August 2022 and moves even closer towards honouring the intent of the UNCRC and Article 24 of the EU Charter of Fundamental Rights as its 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.

he or she objects (original emphasis) to return, Article 13(2) overlooks the child’s right to participate in proceedings affecting him or her. This has implications beyond the content of the views themselves, and goes to the very heart of the child’s personhood before the law.

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11 Ibid, 133
12 Convention on the Rights of the Child (Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with article 49) https://www.ohchr.org/en/professionalinterest/pages/crc.aspx Also note General Comment No. 12 on Art 12, 2009, para 35: After the child has decided to be heard, he or she will have to decide how to be heard: “either directly, or through a representative or appropriate body”. The Committee recommends that, wherever possible, the child must be given the opportunity to be directly heard in any proceedings. https://www.refworld.org/docid/4ae562c52.html
15 Article 11(2) Brussels 11a above
16 Re D [2006] UKHL 51, para 58
18 Chapter 111 Recast
The reach of the Recast Article 21 is extended by Article 26 of the Recast to specifically include return proceedings under the Convention. This is certainly an important development as it introduces the obligation to give the child a genuine and effective opportunity to express their views. It should be noted, however, that the modalities of how the child should be heard are left to national law and procedure, and the attempt by the European Parliament to set minimum standards was not taken up. Additionally, the right under the Recast of the child to be heard does not constitute an absolute obligation, but rather ‘must be assessed taking into account the best interests of the child, for example, in cases involving agreements between the parties.’ This may mean that the child is not heard where the adult parties are in agreement, notwithstanding the impact that the decision may have on the child’s life, and this has serious potential implications for a shy child, or one lacking confidence, or one operating under strong cultural traditions regarding obedience to elders.

Issues arise where there are inherent tensions between the Convention, the UNCRC, and other regional instruments which protect children’s rights. There are significant differences in approach to these matters within the State parties to the Convention, and thus to the recognition and safeguarding of children’s rights in this context. With the thirtieth anniversary of the UNCRC having been celebrated in November 2019, and the fortieth anniversary of the Convention occurring in October 2020, it is indeed timely to consider the practical application of the right of the child to participate enshrined within those international instruments in the context of proceedings under the Convention. This is especially so given the effects and consequences of child abduction which are experienced by the children involved in these cases which can continue throughout their lives, impacting on all aspects of their wellbeing and interpersonal relationships. When the outcomes can be so crucial to their futures, their participation in the decision-making processes which determine this event in their lives may be viewed as both fundamental and critical, and is often regarded like that by the children themselves.

19 Recital 39 Recast
20 See Missing Children Europe, ‘The Brussels 11a recast: Being heard is not enough’, https://missingchildreneurope.eu/News&press/Post/1212/The-Brussels-IIa-recast-Being-heard-is-not-enough for a critique regarding the additional requirements of hearing a child which include the need for specific training for the role. See also Blackburn, H. ‘The Advent of Brussels 11 bis Recast’, https://www.iflg.uk.com/printpdf/1215
21 Recital 39 Recast
2. EFFECTS AND CONSEQUENCES OF CHILD ABDUCTION

Research, including my own, has considered the effects of abduction from several different perspectives, including on the left-behind parent, the abducting parent, the wider family, and the children themselves. Children often reported that their return after an abduction can be as upsetting and stressful as the original abduction, and children were found to have been adversely affected in different ways notwithstanding their ages and stages of development. In order to investigate the long-term effects of abduction, and whether these adverse effects continue into adult life, I undertook a small-scale qualitative study to find out about the lived experiences of those who had been through an abduction many years earlier. This ascertained whether, and how, the participants felt that the abduction had affected their lives, and if those effects had continued long-term. Identifying long-term effects clearly requires the recruitment of adults whose abductions had taken place a considerable amount of time earlier. Abductions in my sample occurred between 10 years and over 50 years before the study which, of course, meant that many of these abductions occurred before the implementation of the Convention. It is certainly possible that this may have affected the outcomes for these children, and also that the outcomes may have been different at earlier points in time than that at which the study was undertaken. The periods of time away before reunification, if it occurred, were substantial. For the majority (68.76 per cent) of those reunited, this did not occur until more than 5 years after the abduction, and more than one third of the reunifications (34.37 per cent) occurred after 10 years.

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24 Effects, 2006, 55

The Long-Term Effects Project

Box 1: The Long-Term Effects Sample

Thirty four adults participated in the study – 33 had been previously abducted as children, and one was the non-abducted sibling of an abducted child participating in the research. The sample of 34 interviews related to thirty separate incidents of abduction. Each participant was interviewed by me as Principal Investigator (PI) during the period 2011–2012 and was then provided with an opportunity to update me by email in July 2014. The sample was recruited primarily in the USA and UK, although initial discussions with potential participants who did not eventually participate took place in other countries including South Africa and Spain.

The sample was acquired through personal and professional contacts working in the field, word of mouth, media publicity, and via the assistance of Take Root, an organisation for previously abducted children, funded by the U.S. Department of Justice and located in Washington State, USA.

The research participants spoke of their difficulties as adults in maintaining intimate relationships, and detailed the constant sense of insecurity they continued to feel. They described blocking things out as a technique for dealing with issues in their lives, self-harming, being numb for much of their childhood, and ‘just surviving’. Sadly, many spoke of their mental health problems including being suicidally depressed, and making serious suicide attempts during their youth. They spoke of always feeling “not connected” to anyone, and explained that abduction undermined their ability to attach, and to trust. They talked of their anger, in particular about the misunderstanding that exists about abduction which they said is seen as a non-issue. They emphasised that abduction needs to be taken more seriously as it has long-term implications. One research participant hauntingly reported being defined by his abduction, and not simply affected by it. He set out how it had shaped everything in his life, and pleaded for parents thinking about abducting their children to know what it can do to them. The participants stressed that abduction is not a victimless crime, and it is not just a domestic dispute. Commonly, they chronicled how support for the abducted child stops as soon as the child is found but, for the child, ‘it never stops’. Reunification, if it happens, is often not the happy ending which it is assumed it will be. The research participants recounted how their reunification was often the start of a new set of problems which they did not understand or know how to handle. They explained that people do not understand the situation: the left-behind family need the returning child to be happy but it is hard to feel that when the only support system that child has known during the abduction has been removed, and the child is returned to a family structure which is different from the one they left behind when they were abducted. The left-behind parent may have a new partner, and there may be new half and/or step-siblings. Notwithstanding that these physical changes may not have not happened in a specific case, the emotional changes created by the abduction are nonetheless present.
for the parties involved, even if they are not yet fully understood. These changes are extremely difficult to navigate, especially when the child realises that she is expected to be happy to be home, and just feels unhappy on the inside but without understanding why. The research participants recounted how they did not know what was wrong with them.

A high proportion (73.53 per cent) of the previously abducted children in this sample reported suffering very significant effects from their abduction in terms of their mental health. This percentage increased further (to 91.17 per cent) when taking into account those reporting less significant, but still discernible, effects. Such effects were evident even where the abduction occurred at a very young age where it might be thought that, as the child had not yet had a chance to form a strong and enduring relationship with the left-behind parent, the effects might be expected to be correspondingly less severe. A very low percentage (8.82 per cent) in this sample reported no real effects, and these were either related to very short periods of abduction or to abductions where the interviewee supported the abduction or intention to abduct by the primary carer. The primary or non-primary carer status of the abductor did not tend to alter the effects experienced by the abducted child. Those who reported very significant effects talked about the ongoing nature of those effects in their current adult lives, often very many years after the abduction.

These findings tend, therefore, to support those from earlier studies about the enduring negative effects of abduction which are emphasised in this project by the direct reporting of the abducted children, as adults, many years after the event. The report makes recommendations in support of the need to protect children from the harmful effects of abduction relating both to the prevention of abduction, and support and after-care for when it has occurred. Whilst it is accepted that some abductions undoubtedly occur against a background of violence or abuse which raise different issues and priorities for protecting children, the seriously negative consequences of many abductions mean that preventable abductions must be avoided. This is a societal problem, and not simply an individual family issue. These events are doubtless ripples on the oceans between those currently living in different countries who have been affected by an abduction event, but in learning more of the long-term effects of abduction, we see their inherent potential to also ripple through the generations and affect the society we will become, not just that which we now are. We ignore these issues at our peril.

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26 One interviewed left-behind parent described to me the psychological barrier which had been created between her and her now-returned children because they knew that they had survived this period of separation and life without each other, and had lost their faith in their reciprocal need. Effects, 2006, 25

27 See Effects and Consequences 1998 for a summary of the negative effects of abduction found by various researchers. However, more recently, Van Hoorde, K. (2017) Ensuring the wellbeing of children in judicial cooperation in cases of international child abduction. Hereafter Ewell report. Available from: https://missingchildreneurope.eu/Portals/1/Docs/Compiled_research_report_final.pdf found at 42 that most children (80.1%) showed ‘normal’ behaviour after an international parental abduction, 7.1% were qualified as ‘borderline’, and 12.8% were qualified as ‘problematic’. It is worth noting that the authors state that ‘the average time that elapsed since the abduction was six years and one quarter’. Clearly, the long-term effects of the abduction may change over time.

28 See Preamble of the Convention

3. CHILD PARTICIPATION AND THE CONVENTION

The primary provision of the Convention which addresses child participation is Article 13. This relates to the ability of judicial or administrative authorities not to return a child if they find that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take accounts of its views. However, the Convention does not set a minimum age for the application of the child’s objections exception, nor does it contain guidance on how to establish whether children object to return, for assessing their maturity, or the way in which they should be 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, nonetheless, still be returned against their expressed objections as the satisfaction of these criteria simply creates a discretion for the tribunal which it must then exercise in determining the question of whether to return the child. The possibility of undue influence on the child by the abducting parent is often argued by those who are unhappy about too much weight being placed on the child’s objections to return. There are different views taken on this issue, the first being a wide approach which says that a child’s views should not be taken into account if found to be shaped by undue influence; the second is a narrow approach which accepts there is influence on the child, but only advocates excluding the child’s objections if the influence is higher than the normal level.

The debates regarding Article 13(2) were among the most divisive of the XIVth Session of the Hague Conference on Private International Law which adopted the Convention. Indeed the arguments which divided the delegates in 1980, while they may have evolved and been refined, persist to the present day. However, it is important in this regard to note the shift which has occurred since the Convention was drafted in recognition of the rights of children generally and their right to be heard in particular. This has led to discussion about whether the Convention remains fit for purpose. It is the author’s view that, in spite of the critical societal changes which have occurred since its inception, and other challenges which the Convention faces, it is still fit for purpose. The Convention is capable of

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30 Article 13(2) see above

31 The objection must be to returning to the country of habitual residence and not to returning to the left-behind parent, a very difficult distinction in practice as from the child’s point of view the place and the person in those circumstances become the same, per Butler Sloss L.J. in re M (Minori) (Child Abduction) (1994). Similarly, the objection must not amount to mere wishes and feelings.


33 The minutes of the discussion of the fourteenth session of the Hague Conference on Private International Law concerning the Convention on the Civil Aspects of International Child Abduction are contained within the Actes et documents de la Quatorzieme session, 6 au 25 octobre 1980 Tome 111 Enleverment d'enfants Child abduction https://assets.hcch.net/docs/05998e0c-af56-4977-839a-e7db3f0ea6a9.pdf


37 Freeman, M. In the Best Interests of Internationally Abducted Children? Plural, Singular, Neither or Both, Intl Fam. L. 2002, at 77. Lowe, N. Some Moot Points on the 1980 Hague Abduction Convention (2015) 46 VUWLR 683, 704 discussing detailed recommendations which would require changes to be made to the Convention: “This has been resisted by previous Special Commissions to review its operation, but it is suggested that at the next Special commission, which is likely to take place within the next two years, the time has come to abandon such reticence”.

12 PE659.819
encompassing the current state of knowledge and understanding of child development and rights, but must do so as the child’s participation is not simply instrumental, but also has an independent value. In the absence of systematic empirical evidence on the use of this exception within the now 101 State Parties to the 1980 Convention, the author (together with co-Investigator, Associate Professor Nicola Taylor, University of Otago, New Zealand), funded by a research grant from the British Academy, undertook a cross-jurisdictional and interdisciplinary project in England & Wales and New Zealand from March 2017 to March 2018. This mixed-methods project investigated on a global basis the tensions and challenges inherent in the use of the child’s objections exception to return, and included an international literature review, case law analyses in New Zealand and England & Wales, a global online survey, interviews with family justice professionals and family members (parents and abducted children/young people), and specialist interdisciplinary Workshops in Auckland, Genoa and London attended by 133 experts from 19 jurisdictions. Global diversity was evident in the interpretation / implementation of the children’s objection exception, and how best to hear a child in the context of Hague Convention proceedings.

The research project survey was completed by 97 family justice professionals from 32 countries. In addition, we completed 8 interviews with professionals, as well as 10 interviews with parents (9 taking mothers, 1 left-behind father), and 3 abducted children from two families aged 19, 15, and 8 at the time of interview.

One of the most striking findings of the project concerned the range of 17 specialists involved with the child/family to inform the legal process when a child’s objections were raised. These ranged from a child protection official, to social worker, lawyer or psychologist. The most important issue for those charged with hearing the child is the training provided for the role which may vary within the range of expertise of those undertaking it. The survey respondents found that the quality of the social science assessments varied greatly, and that specific training would be valuable in this context. 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 when it is part of the relevant jurisdictional process for the child to be interviewed by the judge 43.

The views of the professionals involved were equally diverse. A minority believed that the child’s objections ‘defence’ is overused and abused, and is just part of the trend to give the child a voice. They considered that this was untenable, and puts the child in a difficult position. However, others stated that returning a child against his wishes, on the basis of upholding the Convention, is not protecting the child from harm.

Other concerns expressed in the survey about hearing children included those in relation to children who may lack self-confidence. It was thought that unless children are very confident and have an assertive personality they will not usually be listened to 44. Concern was also expressed that when assessing maturity, judges and other professionals hearing the child should take into account personality differences between children as children who are shy, not self-confident or not as persuasive in their speaking and behaviour should be provided with equal opportunities to express their views in their own way, and have their views taken into account.

The adult interviewees were supportive of greater account being taken of children’s views as their own experiences were that parents approach their cases from their own, rather than the children’s, perspectives because it is so hard for parents to be objective in these circumstances. The child interviews were, as always, instructive as the children welcomed the opportunity to speak to the judge without interruption, and to use their own voice to do so rather than having someone relaying what they said 45. They emphasised that they viewed having the opportunity to be involved as a good thing, and felt that it was not right to give less significance to the views and opinions of a child just because they are children. They highlighted that the decision made in an abduction case is ‘a defining moment in a child’s life’ 46. 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 47. Children’s wish to be involved may also be affected by their age. One study 48 found that children under 12 were ‘more likely to have wanted more say compared with those over 12.’ This has particular resonance for Convention proceedings where the average age

43 For England & Wales, see Guidelines for Judges Meeting Children who are Subject to Family Proceedings (2010) 2 FLR 1872 paragraph 5: “It cannot be stressed too often that the child’s meeting with the judge is not for the purpose of gathering evidence. That is the responsibility of the Cafcass officer. The purpose is to enable the child to gain some understanding of what is going on, and to be reassured that the judge has understood him/her.” MacDonald, Mr. Justice A. ‘Hearing the Children’s Objections. Some Perspectives from a judge hearing cases in England and Wales’, Judges’ Newsletter, 47 addressed the question of what a judge can do with the information gathered during the course of such a meeting. He stated at 48: “It may be said that the injunction against using a meeting with the child as a means of gathering evidence contained in the Guidelines for Judges Meeting Children who are subject to Family Proceedings is far easier to articulate in theory than it is to apply in practice”. He concluded that the continuing lack of clarity in this area is certainly something that needs to be addressed for children involved in the proceedings.

44 See Ewell report, 132 about shy children who were not so persuasive in their speaking and behaviour facing more difficulty in convincing the Court that they are sufficiently mature.

45 See Ewell report, 76 which found that most children responded positively to the possibility of being heard.

46 See Freeman & Taylor, Contemporary Challenges, 167


### 3.1. DISTINCT APPROACHES TO CHILD PARTICIPATION

This is an issue where different jurisdictions take different approaches to the way in which the Convention is interpreted and applied. A round-table meeting with 20 invited specialists was held at the Academic Center for Law and Science, Hod Hasharon, Israel, on 12 July 2019, on The Voice of the Child in International Child Abduction Proceedings under the 1980 Hague Convention (hereafter round-table meeting). The author presented the findings from her recent international project, funded by the British Academy, on the use of the 1980 Hague Convention’s child objections exception in 32 countries. Professor Rhona Schuz set out the Israeli approach to the voice of the child in 1980 Hague Convention proceedings and reviewed relevant case law developments in the Israeli courts. These showed that whilst children whose views might be relevant are usually heard by the judge in Hague cases, there are significant differences of opinion about the weight which should be given to these views. The differences of approach identified within the Israeli case law reflect inherent tensions between the 1980 Hague Convention and the UNCRC and are mirrored in divergent approaches in other jurisdictions.\footnote{Freeman, M., Taylor, N., and Schuz, R., 2019. The voice of the child in international child abduction proceedings under the 1980 Hague Convention. London: University of Westminster. Retrieved from: \url{https://westminsterresearch.westminster.ac.uk/item/qx8q8/the-voice-of-the-child-in-international-child-abduction-proceedings-under-the-1980-hague-convention}} One of the participants in the London workshop\footnote{See above} described the very different approach adopted in the Netherlands\footnote{Olland, A. The voice of the child in 1980 Hague return procedures in the Netherlands, The Judges’ Newsletter, 54} under which the children involved are interviewed by a specialised children’s psychologist whose written report is read to the parents at the start of the parental mediation session. If the mediation does not succeed, children over six years of age will be invited for an interview with one of the judges. If an appeal takes place, children over the age of six years will again be invited for interview with one of the judges. In recognition of the stress that children experience in these interviews, and the difficulty that this causes for the child to ‘express his or her views freely’ as envisaged in Article 12 of the UNCRC, the child requires support for their participation from a neutral person focused on the child, who “listens to him/her and provides information to him/her from a neutral perspective”.\footnote{Ibid, 54} For these reasons, a guardian ad litem is appointed for every child over the age of 3 years involved in a Convention case. This is a clear, and perhaps rare, example of recognition and facilitation of children’s right to participate. There are no doubt practical and cost implications which may militate against its widespread adoption within the Contracting States to the Convention, but it stands nonetheless as a noteworthy attempt ‘to meet the needs and rights of the child’.\footnote{Ibid, 55}
3.2. CULTURE AND CHILD PARTICIPATION

It is important to acknowledge any potential variations in the willingness and ability of children to participate in proceedings which affect them that might derive from the cultural traditions relating to the status of parental authority which are associated with their personal identities. Dixon et al. found that ‘African American and Latina girls showed significantly more respect for parental authority than did European American girls’. The authors highlight the traditional values for Latino families which typically include ‘a deep sense of family loyalty’ and state that ‘a well-educated, well-raised child is generally considered to be ‘calm, obedient, and respectful towards adults’’. They cite the study by Fuligni which asked adolescents of different cultural backgrounds whether they thought they should argue with their parents when they disagree. The study found that non-European teenagers (Mexican and Filipino) were the least willing to openly contradict their parents, and emphasised that Latino adolescents did not think it appropriate to argue with their parents. This is despite of the similar levels of conflict which all the study subjects reported as existing with their parents. Smetana and Gaines state that the value placed on harmony, communalism, obedience and respect towards elders, together with their strongly hierarchical structure, suggest that conflict may be muted in African American, as compared to European American, families.

Another study found that Indian immigrant families ‘attempt to maintain traditional family values such as a major emphasis on the extended family and the obedience of elders [–] and the discouragement of autonomy in the young’. Jambunathan et al discuss the high value placed by Asian Indian parents on academic achievement and family interdependence while discouraging autonomy and emphasising respect and obedience of elders. Farver et al state that Asian Indian families tend to use guilt, shame, and moral obligation to control their adolescents’ behaviour. They explain that, contrary to the Western notion that shame threatens children’s self-esteem, in the Asian Indian context shame induction is common practice in children’s socialisation. It is not difficult to envisage the reluctance which some children and young people might feel about becoming embroiled in testing, emotional arguments between their parents against such a background of cultural expectation. Nor is it hard to see the impact that this may have on their willingness or ability to participate in the decision-making process governing that conflict.

56 Ibid, p 1
57 Ibid, p 2
59 Dixon et al above, p 2
61 Ibid, 1447
Although the above observations focus on immigrant populations in the United States, there is no reason to assume that the findings are not more broadly generalisable. EU Member States have significant sized immigrant populations making it important to appreciate the participation challenges which may occur for the children of those families as they address the tensions created by their societal behavioural expectations following immigration into different cultural settings. In terms of abduction proceedings under the Convention, this conflict may limit the opportunities for participation for such children and young people in the decision-making processes.

3.3. THE IMPACT OF COVID-19 ON CONVENTION PROCEEDINGS AND CHILD PARTICIPATION

The ongoing global pandemic has raised considerable challenges in the determination of international child abduction cases. These cases necessarily relate to different international jurisdictions and thus, by definition, involve travel for those children who are to be returned following a decision by the relevant authority in the requested State. However, such travel may not be currently permitted under the laws of the countries involved and, even where it is, arguments about the relative COVID-safety for the returning child and parent of the relevant countries may be made under article 13(1)(b). In these difficult times, Convention cases may take far longer to reach determination, with the resultant interruption of contact, and relationship, between the child and the left-behind parent and family. Additionally, cases are now routinely being heard remotely which raises further challenges for everyone involved, especially children. In England & Wales, guidance was issued on 26 March 2020 to make the necessary provision for such processes including for Cafcass to interview children remotely to ascertain their wishes and feelings. Within the now-101 State parties to the Convention, it is likely that the processes for child participation during this unprecedented period, and thus the experiences of the children involved, will differ widely.

65 In 2018 there were an estimated 2.4 million immigrants to the EU-27 from non-EU-27 countries. Migration and migrant population statistics, Data extracted in May 2020. https://ec.europa.eu/eurostat/statistics-explained/pdfscache/1275.pdf
66 Thomas. A., Buxton, A. Child Abduction: is risk of contracting COVID-19 an Art 13(b) defence to Child Abduction? https://www.iflg.uk.com/printpdf/1254 See Guide to Good Practice on Article 13(1)(b) in which paragraph 62 states that in cases involving assertions associated with the child’s health, the grave risk analysis must focus on the availability of treatment in the State of habitual residence, and not on a comparison between the relative quality of care in each State.
69 Children and Family Court Advisory and Support Service. Cafcass represents children in family court cases in England, advising the courts about the child’s best interests in the specific case. Cafcass is sponsored by the Ministry of Justice and is a non-departmental public body. It is independent of the courts. https://www.cafcass.gov.uk/about-cafcass/
70 The Hague Conference on Private International Law has produced a toolkit for the 1980 Child Abduction Convention in Times of Covid-19 which is not intended to affect the interpretation of the Convention in individual cases, and specifically states that its content is subject to the relevant domestic law and procedures of each Contracting Party. https://assets.hcch.net/docs/2ae3e82-8524-4450-8c9a-97b250b00749.pdf
4. CONCLUDING COMMENT

The author believes that children should have opportunities to express their views 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 and the upcoming Recast, which specifically address the rights of children to be heard within a specific jurisdictional area. 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. If we are to protect children from the harmful effects of child abduction, it is critical to afford the opportunity to be heard to children who wish to participate when the decisions taken about them in abduction proceedings have the potential to impact so significantly on their lives. There is a perceived need for further discussion on, and closer incorporation of, children’s rights’ principles in the 1980 Convention framework. If this does not happen, further harm to children is the likely outcome.

The Convention contains opportunities for children’s involvement in the far-reaching decisions which are taken in Convention proceedings, but it is the way in which these provisions are interpreted and applied which will determine both the extent to which children’s rights are recognised and upheld under the Convention, as well as the success of the Convention in protecting children from the harmful effects of child abduction. It appears that there is often a lack of awareness by children and young people, and their families, about these opportunities to participate, and how to ensure that their rights are recognised and protected. It is clear that there are competing views within the family justice profession on this issue. However, it is the right of children to be provided with meaningful opportunities to participate and the prevention of harm sought by the Convention must surely include that which emanates through the marginalisation of children from critical decisions affecting their lives. There needs to be closer incorporation of children’s rights’ principles within the Convention framework to ensure that this noble and attainable aim is fulfilled.


73 Contemporary Challenges, 168


75 “...[M]any children 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”, Freeman and Taylor, Contemporary Challenges, 164. The authors state that children 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 initiated, through IACL (The International Association of Child Law Researchers) the drafting and production of a child-friendly summary of the 1980 Convention to assist children and families. Contemporary Challenges, 170. COVID-19 has caused some delays to this plan, but it is hoped that it can be resumed in the near future.


77 Contemporary Challenges, 168

This in-depth analysis, commissioned by the Policy Department for Citizens’ Rights and Constitutional Affairs at the request of the Committee on Legal Affairs in the context of the Workshop to mark the 40th Anniversary of the Hague Convention on the Civil Aspects of International Child Abduction, examines the way in which subject children feature within Convention proceedings. It considers the aims of the Convention, and the lack of supranational control of its application. It draws on empirical research relating to the effects and consequences of child abduction to discuss the opportunities for children and young people to participate within Convention proceedings, and highlights the international obligations for such participation within the United Nations Convention on the Rights of the Child, The Charter of Fundamental Rights of the European Union, and other regional instruments. Different jurisdictional approaches are explained, and the role of culture in this context is probed. The impact of COVID-19 on abducted children is also explored.