

R. Schuz, The Hague Child Abduction Convention: A Critical Analysis

Hans van Loon

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R. Schuz, *The Hague Child Abduction Convention: A Critical Analysis*

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Hans van Loon¹

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This book, in the words of the author, ‘provides a wide-ranging in-depth analysis of the [Hague Child] Abduction Convention and the way in which it has been applied...’ Not a word too much is said here, for this monograph is truly unique in the breadth of its overview of the Convention, the treaty’s operation and evolving context, and the depth of its investigation of the way in which the Convention has been interpreted and applied by courts around the world. The analysis offered by Rhona Schuz is based not only on intrinsic criteria derived from the Convention itself, but also on extrinsic parameters, in particular the development of the rights and interests of children; it draws on statistical, sociological and psychological research, and is obviously the fruit of many years of intense study and reflection. Her analysis leads to clear conclusions and her intense familiarity with the subject and her sound judgment also allow her to make important, valuable recommendations for the interpretation and application of the Convention, helpfully summarized in its final chapter.

Part I—Overview—starts with a discussion of the origin and structure of the Convention; its relationship with national civil and criminal legislation and with other supra/international instruments, including the Brussels IIa Regulation, the 1996 Hague International Child Protection Convention (the 1996 Convention), the European Convention on Human Rights (ECHR), and the UN Convention on the Rights of the Child (CRC); data on, and actors involved in, its practical operation; the way it operates in practice; sociological—profile, motivations and the gender of

Former Secretary General of the Hague Conference on Private International Law; Member of the *Institut de droit international*.

✉ Hans van Loon
hans.vanloon@ppl.nl

¹ The Hague, The Netherlands

the taking parent—and psychological—causes and impact—aspects of child abduction; and the relationship between abduction and relocation.

The overview offers far more than a descriptive introductory background. For example, regarding the relationship between the 1980 Convention and the ECHR, Schuz makes detailed critical comments both on the recent case law of the European Court of Human Rights and on the length of the Strasbourg Court's proceedings. With regard to the former, the fact that the Grand Chamber in its judgment in *X v. Latvia*, delivered on 26 November 2013, after the book's publication, has corrected its contested reasoning in *Neulinger and Shuruk v. Switzerland* brings some relief, although doubts remain concerning the—varying—extent to which the Court reviews domestic courts' decisions. And the Court has yet to address the length of time issue regarding its own proceedings in these highly urgent cases, which is in stark contrast to the fast-track (PPU) proceedings made available by the Court of Justice of the European Union (CJEU).

By way of an example of the thoroughness of her evaluation, Schuz's analysis of the Convention process does not stop at a detailed discussion of the enforcement of return orders but also considers the aftermath of the return of children. A research conclusion which gives rise to great concern is that undertakings given by the left-behind parent are often not respected after the child's return. Here, she argues, the protective measures offered by the 1996 Convention will be helpful (the support given by the 1996 Convention to the application of the Child Abduction Convention in this and other situations (e.g. organizing effective child-parent contact) is a recurrent theme of the book).

The discussion on the sociological (socio-legal) aspects of child abduction in chapter 3(I) is crucial for a proper understanding of the context in which the Convention currently operates. When the Convention was drafted, the leading idea was that the abductor was the non-custodial parent who did not have the primary care of the child and, therefore, a return would restore the child to the primary carer. Today, however, partly because of the success of the Convention in preventing and combating this type of child abduction, most abductors are mothers who are primary carers, often moving back to their original home country, often claiming domestic violence against her and/or the child. Moreover, as a result of developments in many legal systems granting joint custody to both parents, the non-primary carer now often has the right to co-determine the child's place of residence. As a consequence, this parent may use the Convention not so much to obtain the permanent return of, but contact with, the child. This changed profile of the abductor, and of the left-behind parent, has led to claims voiced by mothers of gender bias against women, and by fathers of discrimination against men. Schuz rightly emphasizes that both these claims should be considered in the context of protecting the child, who is the real victim of the abduction.

The subchapter (3.II) on research on psychological aspects assists in identifying factors relevant to ascertaining whether the grave risk of harm exception (Article 13 (1) b) is established, or, if return is ordered, what protective measures should be taken to minimize that harm. There are many such factors, and there is no easy rule of thumb. Schuz warns against any blind acceptance of the parental alienation syndrome (PAS) theory that holds that any refusal of the child to have contact with,

or even to return to, the left-behind parent should be ignored because the child will be brainwashed by the abducting parent. This is an oversimplification which, in fact, renders the views of the child redundant (and contradicts Article 13 (2)).

Relocation—the lawful removal of children from their habitual residence—is beyond the scope of the Child Abduction Convention. There is, however, an obvious interrelationship with abduction to the extent that the avoidance or resolution of relocation disputes will diminish the risk of the unlawful removal of children. In chapter 4, Schuz presents the different approaches to relocation law in various legal systems, empirical evidence, scholarly analysis, and international harmonization initiatives including the 2010 Washington Declaration adopted at the initiative of the Hague Conference (to which the Child Relocation Recommendation CM/Rec(2015)4 adopted by the Council of Europe on 11 February 2015 can now be added). Since research shows that courts, in an effort to balance the parties' interests, sometimes tend to include in their decisions unrealistic contact schedules—just as they may impose unrealistic conditions when they order the return of children in abduction cases—she urges courts to carefully test such contact schemes before accepting or imposing them.

The key chapter (6) in *Part II—Parameters for Analysis*—relates to the impact on the Child Abduction Convention of the CRC, which postdates the Convention by 9 years. The Abduction Convention's return mechanism upholds the rights of the left-behind parent, and does not in so many words refer to the rights of the child. Schuz reminds us, though, that the explanatory Report by Elisa Perez-Vera (par 24) stresses 'the general principle ... that children must no longer be regarded as parents' property, but must be recognized as individuals with their own rights and needs'. The CRC has given additional weight to the child as an autonomous person, and to the child's right to be heard in all proceedings concerning him/her. This may create tension with the Abduction Convention's primary aim to protect the child's welfare and its policy of immediate return in cases where the child objects to being returned. Schuz revisits this dilemma in a later chapter (12). The recognition of children's rights (as opposed to mere interests) also impacts on the right to contact. Too often this is seen as a right of the adult and not (also) as a child's right, as the CRC provides (Articles 7, 9 and 10 (2)). Obviously, this reinforces the need to hear the views of the child in contact proceedings.

It is characteristic of the author's balanced approach that her discussion of a child's rights—clearly a leitmotiv of her book—is followed by an analysis of the rights of parents. Both in Europe (under the ECHR) and in the United States of America (under the US Constitution) these rights have not eclipsed, but are protected as fundamental rights that must now be balanced with those of the child, which remain a (not 'the' as the Dutch translation mistakenly says) primary consideration (parallel analysis).

Part III—Conditions for Application of Mandatory Return Mechanism—and *Part IV—Defences to Mandatory Return*—provide a full analysis of the core provisions of the Convention. Part III begins with the concepts of wrongful removal and retention, and their interrelationship, and the question of where to draw the line between the concepts of custody rights and access rights within the Convention. The author resists the view that the return of a child, who has been removed by the

primary carer in breach of a *ne exeat* right [as in the US Supreme Court case *Abbott v. Abbott* (2010)] should be a reason not to treat the removal as wrongful. The better approach, she argues, is to invoke the Article 13 (1) b grave risk defence, and in determining whether it applies, the nature of the relationship between the child and the left-behind parent should be relevant. She goes a step further where she argues that '[I]n order to make the Convention consistent with the doctrine of children's rights, it is necessary to change the "trigger" which activates the obligation to order return. Instead of focusing on breach of parental rights, the focus should be on the violation of the child's right to regular contact with both parents and his right to stability in the emotional and social aspects of his life' (pp. 166–167). This would eliminate the need to prove a breach of custody rights, and extend the protection of the Convention even to pure contact rights. It is not obvious, however, how this proposal would work in practice. In any event, Schuz seems to admit that this would require a recast of the Convention, hence—given the current framework—her recommendations to interpret the concept of custody widely and to be mindful of the child's right to continued contact with both parents when determining, in accordance with Article 3 of the Convention, whether the removal or retention was wrongful under the law of the state of the child's habitual residence.

Habitual residence, the connecting factor that, first of all, determines the applicability of the Convention, has given rise to extensive litigation. Schuz gives an extensive overview of the different approaches to this concept (chapter 8). Contrary to what the drafters of the Convention had in mind—a factual approach based on the 'centre of gravity' of the child's life—certain courts in the UK and the US have ruled that parental intention (either to settle in a new jurisdiction or to abandon a previous habitual residence) is the critical factor to determine the child's habitual residence. The author proposes what she calls a combined or hybrid factual approach which would seem to be, in essence, a fact-based test, in which, however, parental intention may be one of the factors to take into account, not only in cases of the abduction of very young children but also by viewing the objective facts 'through the prism of parental intention, as understood by the child'. She approves of the case law of the CJEU in respect of the concept of habitual residence in the Brussels IIa Convention [but might be puzzled by the Court's recent decision in *C v. M* (9 October 2014, C-376/14 PPU) in which parental intent, interpreted, moreover, in light of the litigation history, seems to be overly emphasized].

Following an examination of the provisions of Articles 12 (2)—return in the case of the child's settlement in the new environment—and 13 (1) a—consent and acquiescence—the book turns to the 'grave risk of harm exception' of Article 13 (1) b. She concludes that 'only too often courts have failed to provide adequate protection for children and ... their zealotry to determine the long term interests of children has also led them to ignore their immediate interests'. No doubt Rhona Schuz is right when she stresses that not only not returning abducted children, but also returning children in situations where this will cause them real harm, is inconsistent with the purpose of the Convention. She proposes a two-pronged approach. Firstly, protective provisional measures—undertakings, mirror orders, liaison between Central Authorities and judicial cooperation—need to be developed, universally adopted, and made effective, recognizing that there will remain

cases in which there are no measures which will adequately protect the child. Secondly, the meaning of the 'grave risk' exception should be further clarified, and Schuz supports the establishment of the Working Group of the Hague Conference to establish a Good Practice Guide relating to Article 13 (1) b.

Chapter 12 provides a detailed analysis of the interpretation and application of Article 13 (2) of the Convention concerning the child's objections to return. While this provision has been framed as a defence for the abducting parent, it is evolving towards a child's defence, under the influence of the CRC (Article 12 (2), on the child's right to be heard in proceedings affecting him or her), at least outside the USA which is not a Party to the CRC. The chapter warns against stereotyping views on how children should participate in proceedings according to their age and maturity, and urges courts to respect the independence of the child's views, and to assess the effect of any influences on the child's views rather than ignoring the views completely because of influencing by a parent. *Part V—The voice of the child—*develops this theme further, noting that the child's views may also be relevant in determining the child's habitual residence, whether the child is settled for the purpose of Article 12 (2) and whether the grave risk defence applies. Rejecting the argument that the summary nature of return proceedings, and their limited purpose make it sufficient for the child to be heard by the court which decides on the merits, Schuz highlights the importance of hearing the child's voice in return proceedings, and makes a strong case for judges hearing children directly (chapter 14). She also advocates the separate representation of the child, e.g., in the case of Article 12 (2), where the child objects to return, or where there is evidence that the return is likely to expose the child to harm (chapter 15).

The intermediate chapter 13 concerning Article 20 (return may be refused if not permitted by the fundamental principles of the state of refuge relating to the protection of human rights and fundamental freedoms) includes an interesting discussion of cultural pluralism. Does the fact that a mother who has abducted a child to a Western country faces discrimination on the grounds of gender in the country of origin justify the non-return of the child to that country? Not automatically, otherwise the Convention could not work in the relations with such countries. Rather, Schuz argues, the criterion should be whether the return in such a situation would cause harm to the child as a result of the breach of the abductor's human rights under Article 13 (1) b. Article 20 remains a last resort, in accordance with the drafters' intention.

*Part VI—Related Proceedings and Processes—*deals with mediation (chapter 16), highlighting its importance and the need for standard setting regarding the training of mediators and the quality of mediations, hearing the voice of the child, and the cross-border enforceability of the agreement; compensating the left-behind parent (chapter 17)—the fact that a full chapter is devoted to this question contrasts somewhat with the few remarks that the book makes on the adverse effects of the legal aid reservation made possible by Article 26, which may have a dramatic effect on the position of the abducting parent in proceedings in States Parties having made this reservation; and enforcing rights of access (chapter 18)—a weak point of the Convention, and another reason why it is so important that States Parties to the Convention also join the 1996 Convention, which reinforces rights of access.

Part VII—The Way ahead—, succinctly summarizes the developments which in the author's view have affected the interpretation and application of the Convention since its adoption: the recognition of children as subjects of rights and the impact of the CRC, and the prominence of abduction by primary carers. Absent the prospect—in the near future—of amending the Convention to adapt it better to these developments, she supports the work done by the Permanent Bureau of the Hague Conference encouraging national implementing legislation and improving Central Authority practice. She concludes the book by proposing a hierarchy of objectives, with protecting children as the primary focus of the Convention while avoiding conducting a full-blown best interest analysis; a number of clear Recommendations for the Convention's interpretation and application; and Recommendations concerning other aspects such as the vital need to ensure the expeditious handling of abduction cases in all stages of the Convention's operation.

Although Rhona Schuz frequently takes a stance—always 'with respect'—against judicial decisions or doctrine, she eschews extreme and unrealistic positions, and rather seeks to find a 'via media'. Readers may not always find clear-cut solutions for issues they may have, but they will be encouraged to look at the many different aspects of the issue at hand. Consistently, the book examines its main themes from the perspective of the internal coherence of the Convention, consistency with the drafters' intention, promotion of the Convention's objectives, compatibility with the summary nature of its proceedings, with the rights and interests of children, with the rights of parents, with private international law principles and certainty versus flexibility. In this sense, the book offers a toolbox, an argumentation methodology, of great value.

Consultation of the book is greatly facilitated by tables of cases, national and international legislation, and an excellent, detailed index. It has been edited with great care. It is a book that no one seriously interested in international child abduction can ignore and is a must for lawyers, whether they are practitioners, judges, scholars or students. Given its broad coverage, interdisciplinary methodology, and clarity, it will also be valuable for non-lawyers, be they policy makers, Central Authority staff, social workers, or psychologists involved in child abduction cases.