Thirty Years of the Hague Abduction Convention: A Children's Rights' Perspective

Rhona Schuz
Sha'arei Mishpat Law School, Israel

I. Introduction

This paper analyses the Hague Convention on the Civil Aspects of International Child Abduction 1980 ("the Abduction Convention") and the way in which it has been implemented in the light of the doctrine of children's rights, of which Michael Freeman has been perhaps the most influential advocate over the past four decades. Back in the 1970s, Michael refused an invitation to participate in the drafting of the Convention because he saw it as anti-children and anti-women.¹ Now 30 years since the Convention came into force (in December 1983), it might well be asked whether Michael's stance was justified.

On the one hand, as will be seen below, the Abduction Convention's automatic return mechanism and the way in which its provisions have been interpreted and applied over the years can be seen as incompatible with children's rights ideology in a number of ways. It is of particular note that one of the main criticisms of the operation of the Convention has been that insufficient account is taken of domestic violence perpetrated by the left-behind parent against the abductor (Bruch, 2004; Kaye, 1999; Weiner, 2000; Hoegger, 2003; Brown Williams, 2011). Michael's pioneering work on domestic violence (1979) was published a year before the signing of the Convention; but at that time the scope of the phenomenon, the relationship between domestic violence and child abduction and the extent of the adverse effect on children of being exposed to domestic violence (Edelson and Lindhorst, 2010) were not yet documented.²

On the other hand, since the beginning of the current century, when I first addressed the issue of the rights of abducted children (2002), courts and policy-makers have become more aware of the need to ensure that children's rights are protected in Abduction Convention cases and have taken some steps in this direction. In particu-

¹ Personal communication to author from Michael Freeman.
² Although Michael himself does seems to have understood the connection, id.
lar, in a number of decisions over the last few years, some of them very recent (see IIC2 below), the UK Supreme Court has adopted a more child-centric approach.

Thus, it is appropriate in a volume marking Michael Freeman's amazing academic career and achievements to analyse these developments and consider how we might better protect children's rights within the existing framework of the Abduction Convention. This issue has become more critical now that the proposal to negotiate a protocol to the Abduction Convention has been dropped from the agenda of the Hague Conference on Private International Law.3

In this paper, I will concentrate on three aspects of children's rights: (1) the child as a subject and not an object; (2) the child's right to participate and (3) the obligation to treat the child's best interests as a primary consideration. In relation to each of these aspects, I will first illustrate the various ways in which the Convention and the manner in which it has been applied over the years in a number of leading jurisdictions are inconsistent with children's rights ideology and then go on to consider steps which have already been taken and those which might be taken in the future to resolve these inconsistencies.

A number of preliminary clarifications should be made. Firstly, whilst the United Nations Convention on the Rights of the Child (the 'CRC') provides a relatively comprehensive list of the rights which children are recognized as holding, it should not be seen as the final word on children's rights (Freeman, 2002: 98) and so this paper is not restricted to discussing compatibility between the Abduction Convention and the CRC, but rather takes a broader approach to the concept of children's rights. Accordingly, even though the US has not ratified the CRC, US Abduction Convention case-law can legitimately be used to demonstrate consistency or inconsistency with the ideology of children's rights.4 Similarly, the examination here is not limited to the question of whether the outcome of cases violates children's rights, but includes consideration of whether the legal discourse in Abduction Convention cases is consistent with the language of children's rights.5

Secondly, this essay is not attempting to provide a comprehensive analysis of how the Convention has been applied in all, or even most, of the 92 Contracting States, which is an impossible feat. Rather, the paper aims to demonstrate that in applying the Convention, there exists a real risk of violation of children's rights and inconsistency with children's rights ideology, and to explain how this risk has already been and can be further reduced. Examples are brought from the case-law of a number of jurisdictions, including the US and the UK, the two States which receive the most applications under the Convention (Lowe, 2011: 34).

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4 For the view that because of its widespread acceptance, the CRC has become part of customary international law and so may be used in US courts, see Elrod (2010-2011: 672).

5 For the relevance of the language of rights, see e.g. Freeman (1997: 17).